

STATE OF WISCONSIN

CIRCUIT COURT

WAUKESHA COUNTY

MICHAEL J. GABLEMAN, IN HIS OFFICIAL CAPACITY AS SPECIAL
COUNSEL TO THE WISCONSIN ASSEMBLY, EX REL. WISCONSIN STATE
ASSEMBLY,

Petitioner

v.

Case No. 2021GF605

SATYA RHODES-CONWAY, PERSONALLY, AND IN HER OFFICIAL
CAPACITY AS MAYOR OF MADISON, WISCONSIN,

FILED

Respondent

NOV 29 2021

CIRCUIT COURT
WAUKESHA, COUNTY, WI

PETITION FOR A WRIT OF ATTACHMENT OF THE PERSON

PLEASE TAKE NOTICE that Petitioner Michael J. Gableman, in his official capacity as Special Counsel to, and on behalf, of the Wisconsin State Assembly, moves this Court, pursuant to Wisconsin Statutes § 13.31 and Wisconsin Statutes § 885.12, to issue a writ of attachment to Satya Rhodes-Conway to comply with the duly issued legislative subpoena *duces tecum* of October 22, 2021.

Whereas, the subpoena (Exhibit A, attached) was lawfully issued and set a time and place certain, October 22, 2021 in Waukesha County, for delivery of certain documents and for testimony by Satya Rhodes-Conway.

Whereas, that time and place certain was unilaterally continued by the Special Counsel during a period of negotiations with the City attorney, to November 15, 2021 at 9:00am in Waukesha County.

Whereas, Satya Rhodes-Conway did fail to appear on November 15, 2021 without justification.

Now, therefore, Petitioner respectfully requests that the Waukesha County Circuit Court issue a writ of attachment on the person of Satya Rhodes-Conway and order

the Waukesha County Sheriff to execute such commitment until Satya Rhodes-Conway has fulfilled her legal duties in responding to said subpoena.

DULY SWORN AND
RESPECTFULLY SUBMITTED,

Signature:

[Handwritten Signature]
Michael Gableman, WI Bar No.: 1024325

SPECIAL COUNSEL to the WISCONSIN STATE
ASSEMBLY

P.O. Box 510766

New Berlin, WI 53151

T: (262) 2020-8722

E: coms@wispecialcounsel.org

NOTARY STATEMENT:

State of Wisconsin

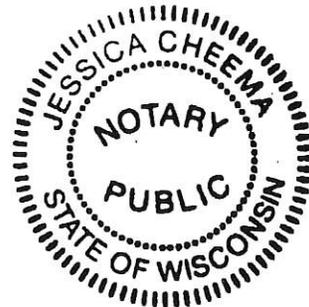
County of Waukesha

This document was sworn before me on November 29th, 2021 by Michael J. Gableman.

Signature of Notary *[Handwritten Signature]*

Title Notary

My commission expires on 7/9/22



FILED

NOV 29 2021

**CIRCUIT COURT
WAUKESHA, COUNTY, WI**

EXHIBIT A

AFFIDAVIT OF SERVICE

State of Wisconsin

County of Waukesha

Case Number: _____ Court Date: 10/22/2021 9:00 am

Re: **November 2020 General Election**

For:
Office of the Wisconsin Special Counsel
PO Box 510766
New Berlin, WI 53151

Received by GREGG INVESTIGATIONS, INC. to be served on **Satya Rhodes-Conway Mayor, City of Madison, 210 Martin Luther King Jr. Blvd., Madison, WI 53703.**

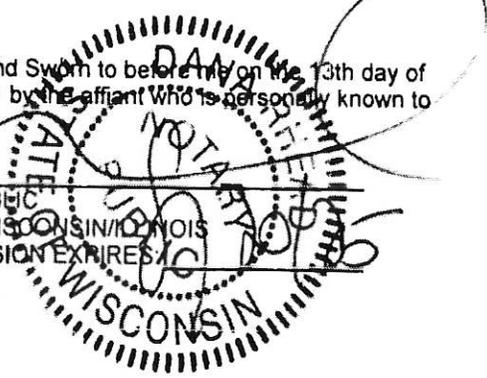
I, Gregory Kowal, being duly sworn, depose and say that on the **6th day of October, 2021 at 1:10 pm, I:**

BUSINESS: served by delivering a true copy of the **Subpoena Duces Tecum, Schedule A, Schedule B, Exhibit A, 2021 Assembly Resolution 15, Witness Fee Voucher** with the date and hour of service endorsed thereon by me, to: **Eric Christianson as Certified Municipal Clerk**, a person employed therein and authorized to accept service for **Satya Rhodes-Conway** at the address of: **210 Martin Luther King Jr. Blvd., Madison, WI 53703**, the within named person's usual place of Work, in compliance with State Statutes.

I certify that I am an adult over the age of 18, I am a resident of the State of Wisconsin, and I have no interest in the above action. I also certify that at the time of said service, I endorsed upon the copy so served, the date upon which the same was served, the time, place, manner of service and upon whom service was made and signed my name thereto.

Subscribed and Sworn to before me on the 13th day of October, 2021 by the affiant who is personally known to me.

NOTARY PUBLIC
STATE OF WISCONSIN/ILLINOIS
MY COMMISSION EXPIRES





Gregory Kowal
Process Server

GREGG INVESTIGATIONS, INC.
500 E. Milwaukee St., Lower
P O Box 1270
Janesville, WI 53547-1270
(608) 755-1976

Our Job Serial Number: GWK-2021007127
Service Fee: \$65.00

SCHEDULE A

GENERAL INSTRUCTIONS

1. These Instructions incorporate the Definitions attached to the subpoena. Please read them carefully before reading this document.
2. In complying with this subpoena, you are required to produce all responsive Documents that are in your possession, custody, or control. You shall also produce Documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as Documents that you have placed in the temporary possession, custody, or control of any third party. Subpoenaed Documents shall not be destroyed, modified, removed, transferred, or otherwise made inaccessible to the Special Counsel.
3. All Documents produced in response to this subpoena shall be sequentially and uniquely Bates-stamped.
4. In the event that any entity, organization, or person identified in this subpoena has been, or is also known by any other name than that herein identified, the subpoena shall be read also to include that alternative identification.
5. It shall not be a basis for refusal to produce Documents that any other person or entity also possesses non-identical or identical copies of the same Documents.
6. If a date or other descriptive detail set forth in this subpoena referring to a Document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the subpoena, you are required to produce all Documents that would be responsive as if the date or other descriptive detail were correct.
7. Documents produced in response to this subpoena shall be produced as they were kept in the normal course of business together with copies of file labels, dividers, or identifying markers with which they were associated when the subpoena was served.
8. If you withhold any Document pursuant to a claimed right protected by the state or federal constitution, or pursuant to a claim of non-disclosure privileges including, but not limited to, the deliberative-process privilege, the attorney-client privilege, attorney work product protections, any purported privileges, protections, or exemptions from disclosure under Wis. Stat. § 19.35 or the Freedom of Information Act, then you must comply with the following procedure:
 1. You may only withhold that portion of a Document over which you assert a claim of privilege, protection, or exemption. Accordingly, you may only withhold a Document in its entirety if you maintain that the entire Document is privileged or protected. Otherwise you must produce the Document in redacted form.
 2. In the event that you withhold a Document—in whole or in part—on the basis of a privilege, protection, or exemption, you must provide a privilege log containing the following information concerning each discrete claim of privilege, protection, or exemption:
 - the privilege, protection, or exemption asserted;
 - the type of Document;
 - the date, author, and addressee;

- the relationship of the author and addressee to each other; and
 - a general description of the nature of the Document that, without revealing information itself privileged or protected, will enable the Office of the Special Counsel to assess your claim of privilege, protection, or exemption.
3. In the event a Document or a portion thereof is withheld under multiple discrete claims of privilege, protection, or exemption, each claim of privilege, protection, or exemption must be separately logged.
 4. In the event portions of a Document are withheld on discrete claims of privilege, protection, or exemption, each separate claim of privilege, protection, or exemption within that Document must be separately logged.
 5. You must produce the privilege log contemporaneously with the withholding of any Document in whole or in part on the basis of a privilege, protection, or exemption.
 6. You must certify that your privilege log contains only those assertions of privilege, protection, or exemption as are consistent with these Instructions and are warranted by existing law or by a non-frivolous argument for extending, modifying, or reversing existing law, or for establishing new law.
 7. Failure to strictly comply with these provisions constitutes waiver of any asserted privilege, protection, or exemption.
9. Neither the Office of the Special Counsel nor the Committee recognizes any purported contractual privileges, such as non-disclosure agreements, as a basis for withholding the production of a Document. Any such assertion shall be of no legal force or effect, and shall not provide a justification for such withholding or refusal, unless and only to the extent that the Special Counsel has consented to recognize the assertion as valid.
 10. This subpoena is continuing in nature and applies to any newly-discovered information. Any Document not produced because it has not been located or discovered by the return date shall be produced immediately upon subsequent location or discovery.
 11. If you discover any portion of your response is incorrect in a material respect you must immediately and contemporaneously submit to the Office of the Special Counsel, in writing, an explanation setting forth: (1) how you became aware of the defect in the response; (2) how the defect came about (or how you believe it to have come about); and (3) a detailed description of the steps you took to remedy the defect.
 12. A cover letter shall be included with each production and include the following:
 - a. The Bates-numbering range of the Documents produced, including any Bates-prefixes or -suffixes;
 - b. If the subpoena is directed to an entity as opposed to an individual, a list of custodians for the produced Documents, identifying the Bates range associated with each custodian;
 - c. A statement that a diligent search has been completed of all Documents in your possession, custody, or control that reasonably could contain responsive material;
 - d. A statement that the search complies with good forensic practices;

- e. A statement that Documents responsive to this subpoena have not been destroyed, modified, removed, transferred, or otherwise made inaccessible to the Office of the Special Counsel since the date of receiving the subpoena or in anticipation of receiving the subpoena;
 - f. A statement that all Documents located during the search that are responsive have been produced to the Office of the Special Counsel or withheld in whole or in part on the basis of an assertion of a claim of privilege or protection in compliance with these Instructions; and
 - g. Your signature, attesting that everything stated in the cover letter is true and correct and that you made the statements under penalty of perjury.
13. You must identify any Documents that you believe contain confidential or proprietary information. However, the fact that a Document contains confidential or proprietary information is not a justification for not producing the Document, or redacting any part of it.
 14. Electronically-stored Documents must be produced to the Office of the Special Counsel in accordance with the attached Electronic Production Instructions in order to be considered to be in compliance with the subpoena. Failure to produce Documents in accordance with the attached Electronic Production Instructions, may, in an exercise of the Special Counsel's discretion, be deemed an act of contumacy.
 15. If properties or permissions are modified for any Documents produced electronically, receipt of such Documents will not be considered full compliance with the subpoena.

ELECTRONIC PRODUCTION INSTRUCTIONS

The production of electronically-stored Documents shall be prepared according to, and strictly adhere to, the following standards:

16. Documents shall be produced in their native format with all meta-data intact.
17. Documents produced shall be organized, identified, and indexed electronically.
18. Only alphanumeric characters and the underscore ("_") character are permitted in file and folder names. Special characters are not permitted.
19. Production media and produced Documents shall not be encrypted, contain any password protections, or have any limitations that restrict access and use.
20. Documents shall be produced to the Office of the Special Counsel on one or more memory sticks, thumb drives, or USB hard drives. Production media shall be labeled with the following information: production date, name of the subpoena recipient, Bates range.
21. All Documents shall be Bates-stamped sequentially and should not duplicate any Bates-numbering used in producing physical documents.

Schedule B

DEFINITIONS

22. "All," "any," and "each" shall each be construed as encompassing any and all. The singular includes the plural number, and vice versa. The masculine includes the feminine and neuter genders.
23. "And" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this subpoena any information that might otherwise be construed to be outside its scope.
24. "Ballot" means a ballot related to the Election, including mail-in ballots, early in-person ballots, provisional ballots, and physical ballots cast in person the day of the election.
25. "Committee" means the committee named in the subpoena.
26. "Communication" means each manner or means of disclosure or exchange of information (in the form of facts, ideas, inquiries, or otherwise), regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in an in-person meeting, by telephone, facsimile, e-mail (desktop or mobile device), text message, MMS or SMS message, regular mail, telexes, releases, intra-company messaging channels, or otherwise.
27. "Communication with," "communications from," and "communications between" means any communication involving two or more people or entities, regardless of whether other persons were involved in the communication, and includes, but is not limited to, communications where one party is cc'd or bcc'd, both parties are cc'd or bcc'd, or some combination thereof.
28. "CTCL" means the Center for Tech and Civic Life.
29. "Documents" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (emails), text messages, instant messages, MMS or SMS messages, contracts, cables, telexes, notations of any type of conversation, telephone call, voicemail, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electronic records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
30. "Election" means the November 3, 2020, Wisconsin General Election for, inter alia, President of the United States.

31. "Employee" means a current or former: officer, director, shareholder, partner, member, consultant, senior manager, manager, senior associate, permanent employee, staff employee, attorney, agent (whether de jure, de facto, or apparent, without limitation), advisor, representative, attorney (in law or in fact), lobbyist (registered or unregistered), borrowed employee, casual employee, consultant, contractor, de facto employee, independent contractor, joint adventurer, loaned employee, part-time employee, provisional employee, or subcontractor.
32. When referring to a person, "to identify" means to give, to the extent known: (1) the person's full name; (2) present or last known address; and (3) when referring to a natural person, additionally: (a) the present or last known place of employment; (b) the natural person's complete title at the place of employment; and (c) the individual's business address. When referring to documents, "to identify" means to give, to the extent known the: (1) type of document; (2) general subject matter; (3) date of the document; and (4) author, addressee, and recipient.
33. "Forensic Image" means a bit-by-bit, sector-by-sector direct copy of a physical storage device, including all files, folders and unallocated, free and slack space. Forensic images include not only all the files visible to the operating system but also deleted files and pieces of files left in the slack and free space.
34. "Indicating" with respect to any given subject means anything showing, evidencing, pointing out or pointing to, directing attention to, making known, stating, or expressing that subject of any sort, form, or level of formality or informality, whatsoever, without limitation.
35. "Party" refers to any person involved or contemplating involvement in any act, affair, contract, transaction, judicial proceeding, administrative proceeding, or legislative proceeding.
36. "Person" is defined as any natural person or any legal entity, including, without limitation, any business or governmental entity or association, and all subsidiaries, divisions, partnerships, properties, affiliates, branches, groups, special purpose entities, joint ventures, predecessors, successors, or any other entity in which they have or had a controlling interest, and any employee, and any other units thereof.
37. "Pertaining to," "referring," "relating," or "concerning" with respect to any given subject means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with, or is in any manner whatsoever pertinent to that subject.
38. "Possession, custody or control" means (a) documents that are in your possession, custody, or control, whether held by you or your employees; (b) documents that you have a legal right to obtain, that you have a right to copy, or to which you have access; and (c) documents that have been placed in the possession, custody, or control of any third party.
39. "Processes" means any processes, procedures, methodologies, materials, practices, techniques, systems, or other like activity, of any sort, form, or level of formality or informality, whatsoever, without limitation.
40. "You" or "Your" shall mean (in the case of an entity) the entity named in the subpoena, as well as its officers, directors, subsidiaries, divisions, predecessor and successor companies, affiliates, parents, any partnership or joint venture to which it may be a party. If the person named in the entity is either an individual or an entity, "you" and "your" also means your employees, agents, representatives, consultants, accountants and attorneys, including anyone who served in any such capacity at any time during the relevant time period specified herein.

EXHIBIT A

TO SUBPOENA DUCES TECUM

These document requests are limited to the time period from January 1, 2020 to current:

1. All documents pertaining to election administration related to interactions, communication with, or comments regarding the Office of the Clerk of the City of Madison.
2. All documents and communications between the Office of the Mayor of the City of Madison with the Center for Tech and Civic Life ("CTCL"). This includes, but is not limited to, documents and communications with Tiana Epps-Johnson and Whitney May.
3. All documents and communications between the Office of the Mayor of the City of Madison and the Wisconsin Elections Commission ("WEC") and its officials or employees regarding or in any way related to the election.
4. All documents and communications between the Office of the Mayor of the City of Madison and officials or employees of the Cities of Green Bay, Kenosha, Racine and Milwaukee and/or any other employee, representative agent or other person affiliated with these cities, regarding or in any way related to the election.
5. All documents and communications between the Office of the Mayor of the City of Madison and employees of any group, organization, person or entity, including but not limited to CTCL, and/or any other employee, representative agent or other person affiliated with them, regarding or in any way related to the election.
6. All documents or communications between the Office of the Mayor of the City of Madison and CTCL and/or its employees Tiana Epps-Johnson and Whitney May, The National Vote At Home Institute and/or its employee Michael Spitzer-Rubenstein, The Elections Group and/or its employee Ryan Chew, Ideas42, Power to the Polls and/or Fair Elections Center, Mikva Challenge, US Digital Response, Center for Civic Design, Center for Election and Innovation Research ("CEIR"), Center for Secure and Modern Elections ("CSME") and/or its employee Eric Ming, The Brennan Center for Justice, HVS Productions, Facebook, Modern Selections and/or any other employee, representative agent or other person affiliated with the above named entities, regarding or in any way related to the election.

Subpoena of Parties

Coms <Coms@wispecialcounsel.org>

Thu 10/21/2021 11:32 AM

To: MHaas@cityofmadison.com <MHaas@cityofmadison.com>

Dear Mr. Haas,

We have been trying to work with you in order to schedule the deposition of the person most knowledgeable as described in the Wisconsin State Assembly's subpoena of October 4, 2021 as well as to coordinate your client's compliance with the Assembly's subpoena duces tecum of that same date.

This office is currently reviewing the documents produced by the City of Madison last Friday, October 15.

In order to provide our office more time to review materials produced last week, as well as to give both parties additional time to reach an understanding of the scope and nature of the topics to be addressed in the deposition, we are continuing the return date from Friday, October 22, 2021 to Monday, November 15, 2021 at 9:30 a.m.

Thank you,

Mike Gableman

Office of the Special Counsel

Tel. (262) 202-8722

FILED

NOV 29 2021

**CIRCUIT COURT
WAUKESHA, COUNTY, WI**

EXHIBIT B



State of Wisconsin
2021 - 2022 LEGISLATURE

LRB-2247/1
MPG:skw

2021 ASSEMBLY RESOLUTION 15

March 17, 2021 - Introduced by Representatives SANFELIPPO, BRANDTJEN, MURPHY, ROZAR, THIESFELDT and TUSLER. Referred to Committee on Rules.

1 **Relating to:** directing the Assembly Committee on Campaigns and Elections to
2 investigate the administration of elections in Wisconsin.

3 Whereas, the ability of American citizens to exercise their right to vote is
4 foundational to our representative democracy; and

5 Whereas, the legitimacy of the American form of government depends on the
6 citizens' widespread confidence in the fairness of elections and acceptance of election
7 results; and

8 Whereas, preserving the integrity of the electoral process is one of our
9 government's most important responsibilities; and

10 Whereas, the administration of elections in Wisconsin is governed by an
11 extensive set of duly enacted laws; and

12 Whereas, however, election laws are not self-enforcing but rely on the good
13 faith efforts of election officials to dutifully carry out those laws as written in order
14 to ensure fair elections; and

2021 - 2022 Legislature

- 2 -

LRB-2247/1
MPG:skw

1 Whereas, the integrity of our electoral process has been jeopardized by election
2 officials who, either through willful disregard or reckless neglect, have failed to
3 adhere to our election laws by, at various times, ignoring, violating, and encouraging
4 noncompliance with bright-line rules established by the statutes and regulations
5 governing the administration of elections in Wisconsin; and

6 Whereas, it is the duty of the Wisconsin Legislature to make laws and to
7 exercise its oversight and investigative authority to determine the extent to which
8 elections in Wisconsin have been conducted in compliance with the law; now,
9 therefore, be it

10 ***Resolved by the assembly, That*** the Wisconsin Assembly hereby directs the
11 Assembly Committee on Campaigns and Elections to investigate the administration
12 of elections in Wisconsin, focusing in particular on elections conducted after January
13 1, 2019.

14

(END)



ROBIN J. VOS

SPEAKER OF THE WISCONSIN STATE ASSEMBLY

TO: Members of the Committee on Assembly Organization
FROM: Speaker Robin Vos, Chair
DATE: May 28, 2021
SUBJECT: Ballot 21-03 ~ Authorization to Obtain Legal Counsel and Employ Investigators

[MOTION] *It is moved that the Committee on Assembly Organization authorizes the Speaker of the Assembly to hire legal counsel and employ investigators to assist the Assembly Committee on Campaigns and Elections in investigating the administration of elections in Wisconsin. Speaker Vos, on behalf of the Assembly, shall approve all financial costs and contractual arrangements for hiring legal counsel and investigators.*

I am recommending adoption of this motion. Please review and indicate your approval by circling "aye" or "no", signing your name, and inserting the date. Thank you.

[If this ballot is not returned to the Speaker's office by Friday, May 28, 2021 at 3:00 p.m., you will be designated as not voting.]

Speaker Robin Vos

AYE NO

COORDINATING ATTORNEY INDEPENDENT CONTRACTOR AGREEMENT

This Independent Contractor Agreement (Agreement) is entered into this 25th day of June 2021 by and between The Wisconsin Assembly (Assembly) and Consultare LLC, by and through its President, Michael J. Gableman, an independent contractor (Contractor), in consideration of the mutual promises made herein, as follows:

Term of Agreement

This Agreement will become effective on July 1, 2021, and will continue in effect until October 31, 2021, unless altered or extended by mutual agreement of Assembly and the Contractor.

Services to be Rendered by Contractor

Contractor agrees to:

- Coordinate the day to day Investigatory work relating to potential irregularities and/or illegalities connected to the 2020 November election in Wisconsin.
- Analyze and delegate to the investigators leads/allegations from whatever source derived, including- but not limited to- those that have been submitted to the Assembly Committee on Campaigns and Elections, raised in the media, provided to members of the Legislature before or during the investigation, or generated through the course of this investigation;
- Receive investigative reports from investigators and keep a weekly report of investigative findings.
- Routinely consult with investigators to help direct them in the nature and manner of their investigatory work.
- Compile all investigator reports and weekly attorney reports into a final report related to the election investigation, to be submitted to the Speaker of the Assembly, and;
- Keep all information/findings related to the services rendered under this agreement confidential, except when working with Integrity Investigators and such designee(s) of the Assembly whom the Speaker shall from time to time identify in writing to the Consultant for such purposes. At present, the Speaker hereby designates Attorney Steve Fawcett as the Assembly's point of contact with the Contractor. The identity of the Assembly point of contact with whom the Contractor may share such information may be modified from time to time in writing by the Speaker. The requirement for confidentiality set forth in this paragraph extends to any and all employees or agents of the Contractor.

Method of Performing Services

Contractor will determine the method, details, and means of performing the above-described services.

Compensation

In consideration for the services to be performed by Contractor, the Assembly agrees to pay Contractor the sum of Eleven Thousand dollars (\$11,000), on a monthly basis, the first such payment due on July 15, 2021, and payment continuing on and through the 15th day of each subsequent month subject to this Agreement (August, September, and October 2021) until the "Term of Agreement" recited herein has ended.

Equipment, Supplies and Related Expenses

Contractor will supply all equipment and supplies required to perform the services under this Agreement. Contractor will also be responsible for all related expenses, including but not limited to mileage or hotel stays, required to perform the services under this Agreement.

Workers Compensation

Contractor agrees to hold harmless and indemnify the Assembly for any and all claims arising out of any injury, disability, or death of the Contractor and Contractor's employees or agents. The Contractor also agrees to provide workers' compensation insurance for Contractor's employees and agents where necessary.

Insurance

Contractor agrees to hold the Assembly free and harmless from any and all claims arising from any negligent act or omission by the Contractor or Contractor's employees or agents during the performance of any duties under this Agreement. The Contractor should consider maintaining a policy of insurance to cover any negligent acts committed by the Contractor or Contractor's employees or agents during the performance of any duties under this Agreement.

Obligations of the Assembly

The Assembly agrees to meet the terms of all reasonable requests of Contractor necessary to the performance of Contractor's duties under this Agreement.

Assignment

Neither this Agreement nor any duties or obligations under this Agreement may be assigned by the Assembly or Contractor without the prior written consent of the Assembly and Contractor.

Termination of Agreement

Neither party may terminate this Agreement at any time prior to the "Term of Agreement" recited herein absent good cause, except at the sixty (60) day mark either party may terminate the last two months of the contract, by written notice, should either party desire to terminate the contract. If no such termination occurs by the sixty (60) day mark, the contract shall be fulfilled in full by both parties unless terminated for good cause.

Notices

Any notices to be given hereunder by either party to the other may be made either by personal delivery or by mail. Mailed notices shall be addressed to the parties at the following addresses:

Contractor:

Consultare LLC
c/o Michael J. Gableman, President
P.O. Box 510145
New Berlin, WI 53151

Assembly:

Speaker Robin Vos
c/o Steve Fawcett
PO BOX 8953
Madison WI 53708

Dispute Resolution

In the event the parties disagree to the terms or execution of the contract, the parties agree to notify the other party as soon as possible to said conflict and work in good faith to find a resolution. In the event that no resolution can be found, the parties agree that any conflict arising out of this contractual agreement is within the sole jurisdiction of the Circuit or Court for Waukesha County, which is the jurisdiction for the home County of residence of the Contractor.

Entire Agreement

This Agreement supersedes any and all other agreements, either oral or in writing, between the parties hereto with respect to the performance of services by Contractor and the Assembly, and contains all the covenants and agreements between the parties with respect to the rendering of such services in any manner whatsoever. Each party to this Agreement acknowledges that no representations, inducements, promises, or agreements, orally or otherwise, have been made by any party, or anyone acting on behalf of any party, which are not embodied herein, and that no other agreement, statement, or promise not contained in this Agreement shall be valid or binding. Any modification of this Agreement will be effective only if it is in writing and signed by the other party.

Partial Invalidity

If any provision of this Agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remaining provisions shall nevertheless continue in full force without being impaired or invalidated in any way.

Governing Law

This Agreement shall be governed by and construed in accordance with the laws of the State of Wisconsin.

Assembly, by: [Signature] Date: 6-24-2021

Contractor, by: [Signature] Date: June 26, 2021

FIRST AMENDMENT TO AGREEMENT

THIS FIRST AMENDMENT TO AGREEMENT (this "First Amendment") is made and entered into as of August 20, 2021, by and among THE WISCONSIN STATE ASSEMBLY (the "Assembly"), and CONSULTARE LLC, a Wisconsin limited liability company, by and through its President, Michael J. Gableman ("Gableman"), and together with the Assembly, the "Parties" and each a "Party").

RECITALS

- A. The Parties entered into that certain Independent Contractor Agreement effective July 1, 2021 (the "IC Agreement").
- B. The Parties desire to amend the IC Agreement to (1) approve and provide additional resources, including the budget attached hereto as Exhibit A, in order for Gableman to perform the Services required under the IC Agreement and (2) to confirm that Gableman shall act as the Custodian of Records with regard to the investigation that is subject of the IC Agreement.
- C. Capitalized terms used and not defined herein shall have the meaning given the same in the IC Agreement.

AMENDMENT

NOW, THEREFORE, in consideration of the foregoing recitals, the mutual covenants and agreements contained herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the IC Agreement is amended and/or supplemented as follows:

1. Incorporation of Recitals. The recitals set forth in the section entitled "Recitals" above are hereby incorporated into this First Amendment as if set forth in full herein.
2. Budget. The Assembly hereby approves and incorporates the Budget attached hereto as Exhibit A, which funds shall be made available by the Assembly to Gableman for reimbursement of costs and expenses for the purposes identified in the Budget.
3. Office of The Special Counsel. There shall be, and is hereby established, The Office of The Special Counsel (the "Office") for the investigation that is the subject of the IC Agreement and Michael J. Gableman, as Special Counsel, shall control such Office, which Office shall be the Custodian of Records with regard to the records related to the investigation that is the subject of the IC Agreement.
4. Miscellaneous. In the event of any conflict between the terms and provisions of this First Amendment and the IC Agreement, the terms and provisions of this First Amendment shall control. If any provision of this First Amendment or the application thereof shall, for any reason and to any extent, be invalid or unenforceable, neither the remainder of this First Amendment nor the application of the provision to other persons, entities or circumstances shall be affected thereby, but instead shall be enforced to the maximum extent permitted by law. This First Amendment may be executed in multiple counterpart signature pages, all of which taken together shall be construed as one and the same document. Facsimile and electronic (i.e., ".pdf") signatures of this First Amendment shall be treated as original signatures to this First Amendment and shall be binding on the Parties.

[signature page follows]

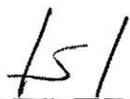
IN WITNESS WHEREOF, the Parties hereby enter into this First Amendment as of the date first written above.

THE WISCONSIN STATE ASSEMBLY

By: 

Robin J. Vos, Speaker

CONSULTARE LLC

By: 

Michael J. Gableman, President

EXHIBIT A

BUDGET

[to be attached]

Ex. A to First Amendment

Wisconsin 2020 Election Special
Counsel Budget

WEC	Private Admin of Elections	Voting Machines	Total *
Special Counsel	18,334.00	18,334.00	55,000.00
Administrative Assistant	5,333.00	5,333.00	16,000.00
Investigator #1	8,334.00	8,334.00	25,000.00
Investigator #2	8,334.00	8,334.00	25,000.00
Investigator #3	25,000.00		25,000.00
Investigator #4			25,000.00
Investigator #5	8,334.00	8,334.00	25,000.00
Rent			10,000.00
Office Equipment			2,000.00
Communications			15,000.00
Data Analysis Contractor		325,000.00	325,000.00
Outside Legal Counsel			50,000.00
Travel (reimb. @ federal rate)			25,000.00
Court Reporting			50,000.00
Service of Process/Filing			3,000.00
TOTAL			676,000.00

*5 months (09/01/21-12/31/21)
+Investigators paid per month, plus reasonable expenses including reimbursement for mileage, lodging and food

INDEMNIFICATION AGREEMENT

THIS MASTER INDEMNIFICATION AGREEMENT (this "Agreement") is made and entered into as of _____, 2021, by and among **THE WISCONSIN STATE ASSEMBLY** (the "Assembly"), and **CONSULTARE LLC**, a Wisconsin limited liability company, by and through its President, Michael J. Gableman in his individual capacity (collectively, "Gableman", and together with the Assembly, the "Parties" and each a "Party") and shall constitute a binding contract for indemnification of Gableman by the Assembly with respect to the liabilities of Gableman described herein.

RECITALS

A. Gableman has agreed with the Assembly to act as the Coordinating Attorney or Special Counsel with respect to the Assembly's inquiry and investigation of potential irregularities and/or illegalities connected to the 2020 November election in Wisconsin (the "Inquiry"), pursuant to that certain Independent Contractor Agreement attached hereto as Exhibit A (the "IC Agreement").

B. The nature and subject of the Inquiry and Gableman's position as the Coordinating Attorney or Special Counsel under the IC Agreement may subject Gableman to legal challenges, suits and/or other obligations or liabilities.

C. Gableman requires that the Assembly indemnify and hold Gableman harmless for any such legal challenges, suits and/or other obligations or liabilities in accordance with and upon the terms of this Agreement.

D. The Parties wish and intend by this Agreement to provide for the indemnification of Gableman for all legal challenges, suits and/or other obligations or liabilities arising out of or in any way related to the Inquiry and/or the IC Agreement.

E. The Assembly is aware of Gableman's reliance on this Agreement and the indemnification provided herein in acting as the Coordinating Attorney or Special Counsel and engaging in the Inquiry.

AGREEMENTS

NOW, THEREFORE, in consideration of the foregoing recitals, the mutual covenants and agreements contained herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

1. **Incorporation of Recitals.** The recitals set forth in the section entitled "Recitals" above are hereby incorporated into the Agreement section of this Agreement as if set forth in full herein, and the Parties hereby acknowledge and agree that each such recital is true and correct.

2. **Agreement.** This Agreement and its terms shall govern, to wit: any and all claims, losses, costs, expenses (including, without limitation, reasonable expenses of investigation and reasonable attorneys' fees and expenses in connection with any action, suit or proceeding),

liabilities and damages (including, without limitation, special, consequential and other similar damages) ("**Costs**"), that the Gableman Indemnified Parties (defined below) shall incur, suffer or become subject to, that arise out of, result from, or relate to the IC Agreement and/or the Inquiry, other than Costs resulting from recklessness or willful misconduct of any Gableman Indemnified Party(ies).

3. **Indemnification of Gableman by the Assembly**

(a) **Indemnification.** The Assembly shall indemnify and defend Gableman, and their respective members, directors, employees and investigators (the "**Gableman Indemnified Parties**" and each a "**Gableman Indemnified Party**") against, and shall hold each of them harmless from, any and all Costs that any Gableman Indemnified Party may incur, suffer or become subject to, that arise out of, result from, or relate to any of the matters identified herein, including without limitation Gableman's involvement as Coordinating Attorney or Special Counsel for the Inquiry pursuant to the IC Agreement, unless caused by the willful misconduct of a Gableman Indemnified Party. The Assembly acknowledges and agrees that the indemnification and hold harmless obligations set forth herein shall apply notwithstanding anything in the IC Agreement, or any other agreements between Gableman and the Assembly.

(b) **Procedures for Claims.**

(i) The Gableman Indemnified Parties agree to give prompt notice to the Assembly of the assertion of any claim, or the commencement of any suit, action or proceeding in respect of which indemnity may be sought under Section 3 (each a "**Action**" and, collectively, the "**Actions**"). The failure by any Gableman Indemnified Party so to notify the Assembly in accordance with this Section 3(b)(i) shall not relieve the Assembly from any liability that it may have to the Gableman Indemnified Party with respect to any Action pursuant to this Section 3, except to the extent the failure to notify shall actually prejudice the Assembly.

(ii) The Assembly shall allow Gableman to select legal counsel of its choice, that the Assembly shall engage to contest and defend any Action and the Assembly shall conduct the defense of the Action actively and diligently.

4. **Waiver of Breach.** The failure or delay of a Party at any time to require performance by any other Party of any provision of this Agreement, even if known, shall not affect the right of such Party to require performance of that provision or to exercise any right, power, or remedy hereunder, and any waiver by any Party of any breach or any provision of this Agreement shall not be construed as a waiver of any continuing or succeeding breach of such provision, a waiver of the provision itself, or a waiver of any right, power, or remedy under this Agreement. No notice to or demand on any Party in any case shall, of itself, entitle such Party to other or further notice or demand in similar or other circumstances.

5. **Termination**. This Agreement shall terminate upon the mutual written agreement of the Parties hereto.

6. **No Assignment**. No Party to this Agreement may assign its rights or delegate obligations under this Agreement without the prior written consent of the other Party hereto.

7. **Invalidity**. If any provision, clause or part of this Agreement or its application under certain circumstances, is held invalid, the remainder of the Agreement, or the applications of each provision, clause or part under other circumstances, shall not be affected.

8. **Amendments**. Amendments to this Agreement must be in writing and signed by each of the Parties hereto.

9. **Governing Law**. This Agreement shall be governed by and interpreted in accordance with the internal laws of the State of Wisconsin.

10. **Binding Effect**. Each of the Parties hereto, their successors and assigns, their respective heirs, personal representatives, pledgees or trustees, are bound by this Agreement and shall execute any instruments and perform acts, or refrain from performing the acts that may be necessary or proper to carry out the intent and purpose of this Agreement.

11. **Effective Date and Counterparts**. This Agreement shall take effect upon execution by all Parties. This Agreement may be executed and delivered in counterparts via facsimile, e-mail transmission or original, and each such duly executed counterpart shall be of the same validity, force and effect of the original.

[signature page follows]

Wisconsin Legislative Council



Anne Sappenfield
Director

TO: REPRESENTATIVE MARK SPREITZER
FROM: Peggy Hurley, Staff Attorney, and Brian Larson, Senior Staff Attorney
RE: Legislative Subpoena Authority and Special Counsel
DATE: October 6, 2021

You asked this office to review copies of subpoenas issued to elections officials in the Cities of Green Bay and Milwaukee and to determine whether the subpoenas comply with the requirements of s. 13.31, Stats. State law specifically states that a legislative subpoena may compel a person to appear before, or to provide documents to, a legislative committee. However, other statutes and case law support the conclusion that a duly authorized representative of a committee may serve as agent for the committee. Therefore, issuance of the subpoenas appears to be valid, and carrying out and enforcing the subpoenas must protect the due process and First Amendment rights of the individuals subpoenaed.

BACKGROUND

2021 Assembly Resolution 15 was passed by the Assembly earlier this year and directs the Assembly Committee on Campaigns and Elections to investigate the administration of elections in Wisconsin, focusing in particular on elections conducted after January 1, 2019. Pursuant to this resolution, the Committee on Assembly Organization adopted separate ballots on May 28 and August 27, 2021, to authorize the Speaker of the Assembly to hire legal counsel and to designate that individual as special counsel to oversee an Office of Special Counsel.

The August 27, 2021, ballot provides that the Special Counsel shall direct an elections integrity investigation, assist the Assembly Committee on Campaigns and Elections, and hire investigators and other staff.

On September 28, 2021, the Speaker and the Chief Clerk of the Assembly executed subpoenas, on behalf of the Assembly Committee on Campaigns and Elections, to require certain officials to appear before the Special Council on October 15, 2021. The subpoenas were signed and served in accordance with the statutes.

LEGISLATIVE SUBPOENA AUTHORITY

Sections 13.31 to 13.36, Stats., establish the procedures for compelling a witness to appear before a legislative committee and produce documents and records before the committee. The statutes set forth specific provisions relating to service of process, summary process to take custody of a witness, consequences for refusal to testify, immunity for testimony procured by subpoena, and witness fees for testifying before a legislative committee.

- 2 -

The legislative subpoena statute, s. 13.31, Stats., states:

The attendance of witnesses before any committee of the legislature, or of either house thereof, appointed to investigate any subject matter, may be procured by subpoenas signed by the presiding officer and chief clerk of the senate or assembly. Such subpoenas shall state when and where, and before whom, the witness is required to appear, and may require such attendance forthwith or on a future day named and the production of books, records, documents and papers therein to be designated, and may also require any officer of any corporation or limited liability company, or other person having the custody of the keys, books, records, documents or papers of any such business entity, to produce the same before such committee. Such subpoenas may be served by any person and shall be returned to the chief clerk of the house which issued the same as subpoenas from the circuit court are served and returned. (Emphasis added.)

This statute and case law¹ establish that a witness may be compelled to appear before a legislative committee charged with investigatory authority.

DISCUSSION

Validity of Subpoena

A plain language reading of the phrase “before any committee of the legislature, or of either house thereof, appointed to investigate any subject matter” in s. 13.31, Stats., appears to contemplate that a witness may be compelled to appear and to produce documents before a legislative committee, so long as that committee is appointed to investigate the subject matter to which the subpoena pertains. The Office of Special Counsel is not a legislative committee, although it has been charged with assisting the Assembly Committee on Campaigns and Elections.

Some of the duties of the chair established in ss. 13.32 (1) and 13.34, Stats., also indicate that current statutes anticipate that a witness would appear before a legislative committee. Specifically, the chair of the committee may file with the presiding officer a certificate stating that the summoned person failed to appear or refused to answer questions or provide requested documents. Additionally, s. 13.36, Stats., directs that the chair of the committee before which a witness appeared may document the witness’ appearance in order to authorize the payment of witness fees.

If a court considers the statutes directly and specifically relating to legislative subpoenas and applies a plain language analysis, these statutes appear to compel a witness to appear, and produce documents for, a legislative committee and not a separate entity. However, a court may refrain from questioning whether an authorized investigation should be carried out in a specific manner by an independent branch.² When considering the Legislature’s authority to carry out its duties, the Wisconsin Supreme Court has consistently held that unless an action interferes with a constitutional provision or right, it

¹ See *Goldman v. Olson*, 286 F. Supp. 35 (W.D. Wis. 1968).

² The Wisconsin Supreme Court has held that the Legislature has all “authority ... appropriate to achieve the ends” of its express law-making authority. *Wisconsin Carry, Inc. v. City of Madison*, 2017 WI 19 ¶ 54 n.38; *Johnston v. City of Sheboygan*, 30 Wis.2d 179, 186 (1966) (quoting *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (“Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”)).

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will not interfere with the Legislature on matters of legislative procedure or purely legislative matters. [*Ozanne v. Fitzgerald*, 2011 WI 43 (2011); *La Follette v. Stitt*, 114 Wis. 2d 358 (1983).] In addition, a court may find that it is not entirely clear what it means for a witness to appear “before” a committee for purposes of this provision and that a plain language analysis is insufficient.

There are several facts that indicate an appearance before the Special Counsel might be interpreted as an appearance before the committee. First, a legislative committee may utilize outside experts to perform work on its behalf under appropriate circumstances. In this case, the Assembly has charged a committee with conducting an investigation; and, in connection therewith, the house has directed the Speaker to hire an investigator to perform work on behalf of the committee. This could be viewed as similar to other instances in which the legislative branch utilizes outside experts to perform tasks that may require specialized knowledge or skills, such as actuarial services to oversee the retirement system or legal counsel. In some cases, these outside experts are hired in accordance with specific statutory procedures.³ In other cases, the house or body authorizes the hiring of the outside expert in a resolution or motion approved by the relevant committee on organization.⁴

Second, the ballot adopted by the Committee on Assembly Organization instructs the Special Counsel to assist the committee. The subpoenas signed by the Speaker and Chief Clerk, and requiring attendance before the Special Counsel, were issued in the name of the committee. This may also support the view that an appearance before the Special Counsel could be considered an appearance before the committee for purposes of s. 13.31, Stats.

There is statutory support, as well, for the proposition that an individual or an entity may be authorized to hear testimony on behalf of a legislative committee. Under ss. 13.32 and 13.34, Stats., the chair of the committee for which a subpoena was issued may initiate contempt proceedings against a person who fails to comply with the terms of the subpoena. However, the legislative subpoena statute indicates that the subpoena must “state when and where, **and before whom**, the witness is required to appear,” and the general legislative contempt statute states that a person may be held in contempt for “[r]efusing to attend or be examined as a witness, either before the house or a committee, **or before any person authorized to take testimony in legislative proceedings**, or to produce any books, records, documents, papers or keys according to the exigency of any subpoena.” [ss. 13.31 and 13.26 (1) (c), Stats.; emphasis added.] This language appears to indicate that someone other than the legislative committee may investigate or take testimony on behalf of the committee.

A court adopting this view would likely determine that an appearance before the Special Counsel should be considered an appearance before the committee. In that case, the subpoenas would be deemed valid because all of the requirements under s. 13.31, Stats., would be met.

³ The Joint Survey Committee on Retirement Systems (JSCRS) routinely contracts for outside actuarial reports to assist the committee in evaluating proposed changes to the retirement system, as provided under the statutes. [s. 13.50, Stats.] The statutes specifically authorize the Joint Survey Committee on Tax Exemptions (JSCTE) to employ personnel as required for the performance of its duties, in accordance with procedures specified in the statutes. [s. 13.52, Stats.] Also, the Joint Committee on Legislative Organization (JCLLO) is specifically authorized to employ an outside staff of professional consultants for the purpose of studying ways to improve legislative staff services and organization. [s. 13.90 (1) (f), Stats.]

⁴ Most often, this approach has been used to hire outside legal counsel to represent the body, a house, or a subunit or member. For example, on October 12, 2005, JCLLO authorized the hiring of an outside law firm to represent the defendants in *State of Wisconsin v. David A. Zien and Scott L. Gunderson*. On February 14, 1997, JCLLO adopted a ballot authorizing the Co-Chairs of JCLLO to select and retain legal counsel to represent the Joint Committee on Review of Administrative Rules (JCRAR) in a lawsuit, *Wisconsin's Environmental Decade v. Dept. of Commerce*, and to direct costs to be paid in equal shares by the Senate and Assembly.

Richard A. Champagne, Chief
Legal 608.504.5801 • Research 608.504.5802



One East Main Street, Suite 200
Madison, WI 53703 • <http://legis.wisconsin.gov/lrb>

MEMORANDUM

TO: Speaker Robin Vos
FROM: Michael Gallagher, senior coordinating attorney
DATE: July 7, 2021
SUBJECT: Legislative subpoenas

On March 23, 2021, the Wisconsin Assembly directed the Assembly Committee on Campaigns and Elections (Elections Committee) to investigate the administration of recent elections in this state.¹ Then, on May 21, 2021, the Committee on Assembly Organization passed a motion authorizing the speaker to hire legal counsel and employ investigators to assist the Elections Committee in its investigation.

You have asked for a summary of how legislative subpoenas compelling witness testimony or the production of documents may be issued in connection with the Election Committee's investigation and how immunity from liability is obtained for witnesses compelled to testify or produce documents in the course of the investigation.

Inherent legislative authority to conduct investigations and issue subpoenas

The legislature has inherent and "broad discretionary power to investigate any subject respecting which it may desire information in aid of the proper discharge of its function to make or unmake written laws, or perform any other act delegated to it by the fundamental law, state or national."² Such an investigation may be carried out "by a joint committee, or by a committee of either or both houses acting independently, or . . . in any other manner which to [the legislature] might seem most convenient and proper."³

¹ See 2021 Wis. AR 15, as shown by 2021 Wis. ASA 2.

² *Goldman v. Olson*, 286 F. Supp. 35, 43 (W.D. Wis. 1968) (quoting *State ex rel. Rosenhein v. Frear*, 138 Wis. 173, 176-77, 119 N.W. 894, 895 (1909)). See also *In re Falvey*, 7 Wis. 630, 638 (1858) ("I have no doubt of the [constitutional] power of the legislature to investigate the matters named in the joint resolutions."); *Mason's Manual of Legislative Procedure* (Denver, CO: NCSL, 2020), Sec. 795 (1) ("[The] right of a legislative body to make investigations in order to assist it in the preparation of wise and timely laws must exist as an indispensable incident and auxiliary to the proper exercise of legislative power.") *Mason's Manual* is the primary authority on legislative parliamentary procedures in the states.

³ *In re Falvey*, 7 Wis. at 638.

The legislature's inherent investigative power "carries with it the power in proper cases to compel the attendance of witnesses and the production of books and papers by means of legal process."⁴

Rules governing the issuance of legislative subpoenas in Wisconsin

In Wisconsin, the rules governing legislative subpoenas are largely established by statute.⁵ Any subpoena issued in connection with a legislative investigation must be signed by the presiding officer and the chief clerk of the house, in this case, the assembly.⁶ The "presiding officer" is the representative who opens and presides over the daily sessions of the assembly.⁷ The presiding officer in the assembly is almost always the speaker or the speaker pro tempore, but the presiding officer may also be the majority leader or his or her designee, for example, if the speaker and speaker pro tempore are temporarily absent.⁸

A legislative subpoena may be issued to compel the testimony of any witness or the production of documents and other records.⁹ Additionally, a legislative subpoena "may require such attendance forthwith or on a future day," may be served by any person, and must be returned to the chief clerk in the same manner as subpoenas from the circuit court are served and returned.¹⁰

The subpoena itself must state "when and where, and before whom, the witness is required to appear" and may designate the "books, records, documents and papers" that must be produced. Finally, subpoenaed witnesses appearing before a committee receive as compensation "\$2 for each day's attendance and 10 cents per mile, one way, for travel to attend as such witness."¹¹

Witness immunity

Wis. Stat. § 13.35 provides use immunity to any person compelled to testify or produce documents before a house or committee of the legislature. Specifically, no testimony the person gives nor document or other record the person produces "shall be competent testimony or be used in any trial or criminal proceeding against such person in any court."¹² Wis. Stat. § 13.35 also on its face provides immunity from prosecution "for any fact or act touching which the person is required to testify,"¹³ but Wis. Stat. § 972.085 limits immunity from liability under

⁴ *Mason's Manual*, *supra* note 2, Sec. 795 (5). See also *In re Falvey*, 7 Wis. at 641-42 (upholding confinement for failure to appear pursuant to a legislative subpoena). With respect to the enforcement of legislative subpoenas, see Wis. Stat. §§ 13.32 to 13.34, as well as Wis. Stat. §§ 13.26 (1) (c) (contempt for refusal to testify or produce documents) and 13.27 (punishment for contempt).

⁵ See Wis. Stat. §§ 13.31 to 13.36.

⁶ Wis. Stat. § 13.31.

⁷ Assembly Rules 3m (1) (a) and 95 (57m).

⁸ Assembly Rule 4. Assembly Rule 4 provides a complete line of succession in the event of temporary absences of officers and certain members.

⁹ Wis. Stat. § 13.31.

¹⁰ *Id.* See also Wis. Stat. § 885.03 ("Any subpoena may be served by any person by exhibiting and reading it to the witness, or by giving the witness a copy thereof, or by leaving such copy at the witness's abode.").

¹¹ Wis. Stat. § 13.36.

¹² Wis. Stat. § 13.35 (1).

¹³ *Id.*

Wis. Stat. § 13.35, as well as under numerous other statutes, to “immunity only from the use of the compelled testimony or evidence in subsequent criminal or forfeiture proceedings, as well as immunity from the use of evidence derived from that compelled testimony or evidence.” Nevertheless, a person compelled to testify before a house or committee of the legislature may be prosecuted for committing perjury in giving such testimony and may not refuse to testify or produce subpoenaed documents on the grounds that the testimony or documents “may tend to disgrace the person or otherwise render the person infamous.”¹⁴

Conclusion

The legislature has inherent power to conduct investigations in connection with its lawmaking function and to undertake certain actions in carrying out those investigations, including issuing subpoenas to compel testimony and the production of documents. Additionally, the Wisconsin Statutes establish rules governing legislative subpoenas in Wisconsin and provide use immunity to witnesses who are compelled to testify or produce documents in a legislative investigation, such as the Election Committee’s investigation into the conduct of recent elections in this state.

I hope this information is helpful. Please let me know if the LRB can provide any additional assistance.

¹⁴ In the absence of immunity from prosecution, the Fifth Amendment right against self-incrimination very likely still applies to witnesses subpoenaed to testify before a committee or house of the legislature.



ROBIN J. VOS

SPEAKER OF THE WISCONSIN STATE ASSEMBLY

TO: Members of the Committee on Assembly Organization
FROM: Speaker Robin Vos, Chair
DATE: August 27, 2021
SUBJECT: Ballot 21-06 ~ Authorization to designate special counsel

[MOTION] *It is moved that the Committee on Assembly Organization authorizes the Speaker of the Assembly to designate the legal counsel hired pursuant to the May 28, 2021, ballot adopted by the Committee on Assembly Organization, as special counsel to oversee an Office of Special Counsel. The special counsel shall direct an elections integrity investigation, assist the Elections and Campaign Committee, and hire investigators and other staff to assist in the investigation.*

I am recommending adoption of this motion. Please review and indicate your approval by circling "aye" or "no", signing your name, and inserting the date. Thank you.

[If this ballot is not returned to the Speaker's office by Monday, August 30, 2021 at 10:00 a.m., you will be designated as not voting.]

Speaker Robin Vos

AYE NO

FILED

NOV 29 2021

CIRCUIT COURT
WAUKESHA, COUNTY, WI

EXHIBIT C

Richard A. Champagne, Chief
Legal 608.504.5801 • Research 608.504.5802



One East Main Street, Suite 200
Madison, WI 53703 • <http://legis.wisconsin.gov/lrb>

MEMORANDUM

TO: Speaker Robin Vos

FROM: Rick Champagne, chief
Michael Gallagher, senior coordinating attorney
Sarah Walkenhorst Barber, senior legislative attorney

DATE: August 5, 2021

SUBJECT: Legislative committee investigation process

On March 23, 2021, the Wisconsin State Assembly directed the Assembly Committee on Campaigns and Elections (Elections Committee) to “investigate the administration of elections in Wisconsin, focusing in particular on elections conducted after January 1, 2019.”¹ On May 21, 2021, the Committee on Assembly Organization adopted a motion authorizing the assembly speaker, on behalf of the assembly, to hire legal counsel and employ investigators to assist the Elections Committee in its investigation. Speaker Robin Vos retained former Supreme Court Justice Michael Gableman to assist the Elections Committee in its investigation, eventually assigning him the role of special counsel.

You have asked us to discuss the process for conducting a legislative committee investigation. It has been more than half a century since the state legislature last employed a full-fledged committee investigation of this kind.² Neither the Wisconsin Statutes nor the assembly rules provide a comprehensive process for conducting a legislative investigation—there is no road map. To be sure, there are constraints on committee investigations that we will discuss in this memorandum. These constraints relate to the issuance and enforcement of subpoenas, the application of Wisconsin’s open meetings law to legislative committee hearings, and the privileges and constitutional rights of witnesses.

However, it is equally important to note that the legislature’s power to conduct investigations is coextensive with its power to legislate, which is plenary. Committee investigations are essential for the lawmaking process and for the legislature to carry out its oversight duties. The power to conduct investigations includes the power to determine the scope and manner of investigations. So long as the legislature acts within the boundaries of the legal constraints on the conduct of

¹ 2021 Wis. AR 15, as shown by ASA 2.

² See *Goldman v. Olson*, 286 F. Supp. 35 (W.D. Wis. 1968).

investigations, the legislature may establish whatever process it considers most efficacious to achieve its legislative goals.

Broad legislative power to conduct investigations

The Wisconsin State Legislature's legislative power is plenary, limited only by the Wisconsin Constitution, the United States Constitution, and, under the supremacy clause, federal law.³ That plenary power includes broad authority to conduct investigations as the legislature sees fit in the furtherance of its legislative functions. Investigations allow the legislature to determine the necessity for new or amended laws, as well as provide for checks and balances over the actions of other branches of state government.

It is well established that the state legislature has inherent and "broad discretionary power to investigate any subject respecting which it may desire information in aid of the proper discharge of its function to make or unmake written laws, or perform any other act delegated to it by the fundamental law, state or national."⁴ Without the ability to investigate or conduct hearings on proposed legislation, the legislature may not have the information necessary to carry out its constitutional obligations. Legislative investigations of one sort or another are the precursor for informed legislation. For that reason, the state legislature has "a constitutional right" to conduct investigations.⁵

Additionally, "the manner of conducting [a legislative] investigation, rests . . . entirely in the sound discretion of the legislature."⁶ As the Wisconsin Supreme Court reasoned in its early years, in 1858: "For if the legislature have the power to investigate at all, it has the power of choosing how the investigation shall be had."⁷ Once the legislature has decided on the necessity of an investigation, it is within its core constitutional powers for the legislature to determine how the investigation would be conducted. As the Wisconsin Supreme Court further noted, a legislative investigation may be carried out "by a joint committee, or by a committee of either or both houses acting independently, or . . . *in any other manner which to [the legislature] might seem most convenient and proper.*"⁸ Finally, the Wisconsin Supreme Court has repeatedly stated—most recently in 2019—that it "will not, under separation of powers concepts and affording the comity and respect due a co-equal branch of state government, interfere with the

³ See State ex rel. McCormack v. Foley, 18 Wis. 2d 274, 277 (1962) ("The framers of the Wisconsin Constitution vested the legislative power of the state in a senate and assembly. The exercise of such power is subject only to the limitation and restraints imposed by the Wisconsin Constitution and the Constitution and laws of the United States."); Libertarian Party v. State, 199 Wis. 2d 790, 801 (1996) ("Our legislature has plenary power except where forbidden to act by the Wisconsin Constitution."); Town of Beloit v. County of Rock, 2003 WI 8, ¶ 23 ("The Legislature has plenary power to act except where forbidden by the Wisconsin Constitution.")

⁴ Goldman, 286 F. Supp. at 43 (quoting State ex rel. Rosenhein v. Frear, 138 Wis. 173, 176–77 (1909)).

⁵ In re Falvey, 7 Wis. 630, 638 (1858).

⁶ In re Falvey, 7 Wis. at 638.

⁷ *Id.*

⁸ *Id.* (emphasis added).

conduct of legislative affairs.”⁹ Investigations are essential legislative affairs. For this reason, the court’s noninterference doctrine applies to the manner in which the legislature chooses to conduct its investigations. The legislature determines the process for conducting its investigations.

General process governing legislative committee investigations

2021 Assembly Resolution 15 directs the Elections Committee to investigate the administration of Wisconsin elections, focusing in particular on elections held after January 1, 2019. The resolution does not establish a process or set constraints for the Elections Committee to conduct its investigation. Assembly rules also do not specify how committee investigations are to be conducted, other than that the speaker must issue subpoenas with the countersignature of the assembly chief clerk.¹⁰ Moreover, the Wisconsin Statutes do not lay out a process for committee investigations, except with respect primarily to the issuance and enforcement of subpoenas, as discussed further below.¹¹ For these reasons, the Elections Committee determines the ground rules for the conduct of committee proceedings, including investigations, subject only to applicable law and legislative rules.

The Wisconsin Legislature has a committee system characterized by strong committee chairpersons. Committees typically meet at the call of their chairpersons and conduct committee proceedings as directed by the committee chairperson, who may set committee procedures by directive or may allow the committee by majority vote to set its procedures. If the Elections Committee chairperson establishes the procedures for conducting the committee investigation by directive, the chairperson may decide when the committee will convene, how committee members may participate in the proceedings, and who will be required or invited to testify before the committee.

The Elections Committee chairperson may request special counsel to take actions all necessary for the committee to conduct its investigation, including taking depositions or questioning witnesses before the full committee when it meets. With respect to depositions, it should be noted that it is contempt for a person to refuse “to attend or be examined as a witness, either before the house or a committee, *or before any person authorized to take testimony in legislative proceedings.*”¹² Pursuant to Committee on Assembly Organization action, the special counsel is retained by the speaker on behalf of the entire assembly. Because the speaker must approve all contractual arrangements with the special counsel, which includes issues relating to the scope of representation, the manner in which the special counsel assists the committee is determined entirely by the speaker. The speaker determines the types of legal and investigatory services the

⁹ League of Women Voters of Wis. v. Evers, 2019 WI 75, ¶ 36 (quoting State ex rel. La Follette v. Stitt, 114 Wis. 2d 358, 368 (1983)).

¹⁰ Assembly Rule 3 (1) (o).

¹¹ This is in contrast to some states, such as Maine, whose statutes establish rules and procedures governing a legislative committee’s investigative process and questioning of witnesses. See Me. Rev. Stat. tit. 3, ch. 21.

¹² Wis. Stat. § 13.26 (1) (c) (emphasis added).

special counsel will provide the committee, as well as the powers the special counsel possesses to conduct the investigation. The committee chairperson may determine the role of special counsel at committee proceedings.

Compelling the testimony of witnesses and production of documents

According to *Mason's Manual of Legislative Procedure*, a legislature's investigation power "carries with it the power in proper cases to compel the attendance of witnesses and the production of books and papers by means of legal process."¹³ Without the right to require the participation of witnesses and the production of documents, a legislature would be unable to conduct a proper and complete investigation. In Wisconsin, the process for issuing and enforcing legislative subpoenas is established by statute.¹⁴ A subpoena issued in connection with a legislative investigation must be signed by the presiding officer—in the assembly, the speaker—and countersigned by the chief clerk of the house.¹⁵

A legislative subpoena may be issued to compel the testimony of any witness or the production of documents and other records.¹⁶ A legislative subpoena "may require such attendance forthwith or on a future day," may be served by any person, and must be returned to the chief clerk in the same manner as subpoenas from the circuit court are served and returned.¹⁷ There is no standard form for legislative subpoenas. However, at the very least, a legislative subpoena must state "when and where, and before whom, the witness is required to appear" and may designate the "books, records, documents and papers" that must be produced.¹⁸ In this respect, the subpoena must inform the recipient of the subject of the investigation.

Legislative subpoenas may be enforced in several ways. First, "summary process" may be issued for witnesses refusing to testify or produce documents.¹⁹ The summary process must be signed by the presiding officer and the chief clerk of the house issuing the subpoena and directed to the sergeant at arms, "commanding the sergeant at arms 'in the name of the state of Wisconsin' to take the body of the person so failing to attend, naming that person, and bring the person forthwith before the house whose subpoena the person disobeyed."²⁰ The person may be held in custody until he or she complies with the subpoena.²¹

¹³ *Mason's Manual of Legislative Procedure* (Denver: NCSL, 2020), Sec. 795 (5). See also *In re Falvey*, 7 Wis. at 641–42 (upholding confinement for failure to appear pursuant to a legislative subpoena).

¹⁴ See Wis. Stat. §§ 13.31 to 13.36.

¹⁵ Wis. Stat. § 13.31. Also, see Assembly Rule 3 (1) (o).

¹⁶ *Id.*

¹⁷ *Id.* See also Wis. Stat. § 885.03 ("Any subpoena may be served by any person by exhibiting and reading it to the witness, or by giving the witness a copy thereof, or by leaving such copy at the witness's abode.").

¹⁸ Wis. Stat. § 13.31. Additionally, subpoenaed witnesses receive as compensation "\$2 for each day's attendance and 10 cents per mile, one way, for travel to attend as such witness." Wis. Stat. § 13.36.

¹⁹ Wis. Stat. § 13.32 (1).

²⁰ Wis. Stat. § 13.32 (2). See also Wis. Stat. § 13.33 with respect to enforcing the summary process.

²¹ Wis. Stat. § 13.32 (2).

A person who refuses to testify or produce documents may also be held in contempt. In that case, the committee chairperson certifies the witness's refusal to the house.²² Upon certification, the person refusing to testify or produce documents may be taken by the sergeant at arms or his or her assistant before the house "to be dealt with according to law."²³

Alternatively, and the most likely course of action for enforcing a legislative subpoena, a legislative subpoena may be enforced in state court pursuant to Wis. Stat. § 885.12, which provides:

If any person, without reasonable excuse, fails to attend as a witness, or to testify as lawfully required before any . . . committee, or other officer or person authorized to take testimony, or to produce a book or paper which the person was lawfully directed to bring, or to subscribe the person's deposition when correctly reduced to writing, any judge of a court of record or a circuit court commissioner in the county where the person was obliged to attend may, upon sworn proof of the facts, issue an attachment for the person, and unless the person shall purge the contempt and go and testify or do such other act as required by law, may commit the person to close confinement in the county jail until the person shall so testify or do such act, or be discharged according to law. The sheriff of the county shall execute the commitment.²⁴

It should also be noted that in lieu of or before resorting to the issuance of a legislative subpoena to a person or for the production of documents, special counsel could seek to conduct informal interviews of witnesses or make informal requests for documents. These would be fact finding activities in which special counsel seeks to determine if witness testimony is important for the committee investigation or if documents in possession of witnesses would assist the committee. These interviews need not be conducted under oath. Additionally, Wisconsin's public records law provides another avenue for requesting the production of records pertinent to the Elections Committee's investigation.²⁵

Open meetings

Wisconsin's open meetings law generally applies to meetings of legislative committees, including meetings at which witnesses testify in the course of a committee's investigation. Such meetings must be preceded by public notice and, unless otherwise provided in assembly or joint rules or one of the exemptions in Wis. Stat. § 19.85 (1) applies, must be held in open session.²⁶ The requirements governing the content, timing, and publication of a public meeting notice are

²² Wis. Stat. § 13.34.

²³ *Id.* See also Wis. Stat. §§ 13.26 (1) (c) (contempt for refusal to testify or produce documents) and 13.27 (punishment for contempt).

²⁴ See also 20 Wis. Op Att'y. Gen. 765, a 1931 attorney general opinion in which the attorney general states that Wis. Stat. § 885.12 (then Wis. Stat. § 325.12) provides a means of enforcing a legislative subpoena.

²⁵ See Wis. Stat. §§ 19.31 to 19.39.

²⁶ Wis. Stat. § 19.83 (1). Also, see Wis. Stat. § 19.87 (2).

provided under Wis. Stat. § 19.84. Conducting a meeting in open session means the meeting is “held in a place reasonably accessible to members of the public and open to all citizens at all times.”²⁷ Importantly, the open meetings law would not apply to depositions taken by the special counsel on behalf of the Elections Committee, provided that at least half of the members of the committee are not also present at the deposition.²⁸

Due process and other witness rights

When the legislature conducts an investigation, including subpoenaing witnesses to provide mandatory testimony, those witnesses have been found to be entitled to certain due process and other rights. The United States Supreme Court has recognized the duty of citizens to cooperate with Congress and state legislatures in investigations but noted that, with that obligation, there is an assumption “that the constitutional rights of witnesses will be respected” by the investigating body “as they are in a court of justice.”²⁹

A witness in the context of a legislative investigation is not entitled to all rights due to a criminal defendant. For example, the witness does not have any right to compel attendance of or cross-examine witnesses. However, witnesses do retain individual constitutional rights in the context of legislative investigations³⁰ and courts have expressly upheld certain rights of witnesses in that context: “Witnesses cannot be compelled to give evidence against themselves. They cannot be subjected to unreasonable search and seizure. Nor can the First Amendment freedoms of speech, press, religion, or political belief and association be abridged.”³¹

There is relatively little reported case law on Wisconsin legislative investigations and the rights of witnesses who appear before committees. Federal courts have opined more frequently on this issue, usually involving actions of congressional committees. The principles established in these cases with respect to witness rights in congressional committee investigations are applicable to committee investigations in Wisconsin.

Due Process

Under the Fourteenth Amendment to the United States Constitution, the state may not “deprive any person of life, liberty, or property, without due process of law.” While the legislative investigative authority is broad and includes the authority to hold a party in contempt for failure to comply with a subpoena, there are limitations to the investigative authority and power to compel a witness based on due process. It has been held, for example, that punishing a witness

²⁷ Wis. Stat. § 19.82 (3).

²⁸ Wis. Stat. § 19.82 (2). See also State ex rel. Newspapers, Inc. v. Showers, 135 Wis. 2d 77, 102 (1987) (holding that open meetings requirements apply whenever members of a governmental body gather with the purpose to engage in governmental business and the number of members present is sufficient to determine the governmental body’s course of action).

²⁹ Watkins v. United States, 354 U.S. 178, 187–88 (1957).

³⁰ Trump v. Mazars USA, 140 S. Ct. 2019, 2032 (2020) (“[R]ecipients of legislative subpoenas retain their constitutional rights throughout the course of an investigation”); Quinn v. United States, 349 U.S. 155, 161 (1955) (“[F]urther limitations on the power to investigate are found in the specific individual guarantees of the *Bill of Rights*.”).

³¹ Watkins at 188.

for contempt if the witness declines to cooperate with a request for information that is beyond the scope of the authorized investigation would violate due process.³² In examining a Wisconsin legislative investigation, the United States District Court for the Western District of Wisconsin held that although the Wisconsin Statutes do not contain any express provision “that punishment for contempt may be visited upon a witness only if the question which he refuses to answer is pertinent to the question under inquiry,” such a requirement “must be implied to save the contempt statutes from unconstitutionality” and would otherwise violate due process.³³

Parties seeking information through a legislative investigation must provide some clarity and fair warning to a witness about what is expected or risk that the witness may have a claim for violation of due process.³⁴ Further, while it is clear that a legislature may exercise the power to punish contemptuous conduct, if the legislature seeks to punish a person for contempt, that person must be afforded notice and an opportunity to respond before such punishment is imposed.³⁵

First Amendment

First Amendment freedoms also have been found applicable in the legislative investigation context. In order to invade these freedoms, there must be a substantial connection or “nexus” between the information sought and a subject of “subordinating, overriding, and compelling state interest.”³⁶ Clearly, the administration of state elections would be such an interest. In one United States Supreme Court case, for example, the court found that the applicable committee did not lay an adequate foundation for demanding records of a legitimate organization’s membership and that, as a result, its demands infringed upon the witnesses’ First and Fourteenth Amendments freedoms of association under the Constitution.³⁷ When a governmental entity is compelling disclosure of information, the Supreme Court has imposed “exacting scrutiny” and required that “[t]o withstand this scrutiny, the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.”³⁸

Fourth Amendment

³² *Goldman*, 286 F. Supp. at 44.

³³ *Id.*

³⁴ *Raley v. Ohio*, 360 U.S. 423, 438 (1959) (“A State may not issue commands to its citizens, under criminal sanctions, in language so vague and undefined as to afford no fair warning of what conduct might transgress them.”).

³⁵ *Groppi v. Leslie*, 404 U.S. 496, 499–500, 507 (1972).

³⁶ *Goldman*, 286 F. Supp. at 46. See also *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 538, 543–44, 545, 546, 551, 555 (1963) (“[I]t is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition that the State convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest.”); see also *Kalkstein v. DiNapoli*, 228 A.D.2d 28, 30–31, 653 N.Y.S.2d 710, 712 (App. Div. 1997) (“When such [a First Amendment] right is implicated, the government’s quest for information is precluded unless it shows ‘that there are governmental interests sufficiently important to outweigh the possibility of infringement [of First Amendment rights].’”)

³⁷ *Gibson*, 372 U.S. at 557–58.

³⁸ *Ams. for Prosperity Found. v. Bonta*, 210 L. Ed. 2d 716, 727, 141 S. Ct. 2373 (2021) (quoting *Doe v. Reed*, 561 U. S. 186, 196 (2010)).

A legislative investigation could affect a witness's Fourth Amendment right against an unreasonable search and seizure if a subpoena is too general or unreasonably broad. The scope of the information sought in a legislative investigation is subject to a balancing of the interests of the legislature versus the interest of the witness in maintaining privacy. For example, in one case examining the compelled disclosure of a United States senator's personal diaries in the context of an ethics investigation, a federal district court found that the court "must . . . balance Senator Packwood's expectation of privacy in his personal diaries against the Ethics Committee's interest in examining them for evidence of misconduct, and the nature of the scrutiny it proposes to give them."³⁹ The court found that the procedural protections offered by the committee were sufficient to alleviate any Fourth Amendment concerns.⁴⁰

For this reason, if a committee issues an overbroad or general subpoena, the Fourth Amendment could be available as a defense if the witness refuses to produce the subpoenaed material.⁴¹ If the subpoena clearly relates to the subject of the committee investigation, Fourth Amendment concerns are less likely to present an obstacle to the investigation.

Fifth Amendment

The Fifth Amendment guarantees a person's right against self-incrimination: "[N]or shall any person . . . be compelled in any criminal case to be a witness against himself."⁴² The invocation of the privilege against self-incrimination has been upheld in the legislative investigation context but is available only to natural persons, not to corporations or unincorporated organizations.⁴³ A witness is not excused from testifying before the committee on the grounds that doing so would incriminate the person. The witness must affirmatively assert the privilege, although there is not "ritualistic formula" necessary for invoking the privilege.⁴⁴ A witness may waive the privilege, including by disclosure of facts or a statement that an admission would not subject the person to criminal prosecution.⁴⁵ A witness may not be held in contempt merely because that witness invokes the privilege against self-incrimination.⁴⁶ In order to compel testimony from a witness pleading Fifth Amendment privileges, the legislative body must provide the witness with immunity.⁴⁷ Wis. Stats. s. 13.35 provides for this immunity.

³⁹ *Senate Select Comm. on Ethics v. Packwood*, 845 F. Supp. 17, 22 (D.D.C.1994).

⁴⁰ *Id.* at 22. Indeed, comparing the required disclosure to disclosures previously required from former President Nixon, the court stated: "It would be presumptuous for this Court to find the Ethics Committee's procedure to represent an 'unreasonable' search when the Supreme Court and its own Circuit Court of Appeals have sustained a more extensive and intrusive examination of similar private papers and recordings of a former president in the vindication of a governmental interest in the 'historical' legacy of the nation, surely no more compelling than that of preserving the probity of the United States Senate in the public's perception and in fact." *Id.*

⁴¹ *The Rights of a Witness Before a Congressional Committee*, 29 Fordham L. Rev. 357, 360 (61 (1960) ("[I]f a committee employs a dragnet seizure of private papers, with the hope that something might turn up, or issues a subpoena duces tecum which lacks particularity, or subpoenas papers without legislative authority, the [Fourth] amendment will be available as a defense.").

⁴² U.S. Const. amend. V.

⁴³ *Rogers v. United States*, 340 U.S. 367, 371-72 (1951); *United States v. Murdock*, 284 U.S. 141, 148 (1931).

⁴⁴ *Quinn*, 349 U.S. at 170.

⁴⁵ *The Rights of a Witness Before a Congressional Committee*, 29 Fordham L. Rev. 357, 364-65 (1960).

⁴⁶ Roberto Iraola, *Self-Incrimination and Congressional Hearings*, 54 Mercer L. Rev. 939, 955-56 (2003)

⁴⁷ *Id.*

Privileges and the right to counsel

Finally, witnesses may also retain certain privileges. The United States Supreme Court, for instance, has recently stated that in the context of legislative investigations, “recipients have long been understood to retain common law and constitutional privileges with respect to certain materials, such as attorney-client communications and governmental communications protected by executive privilege.”⁴⁸ In legislative investigations, witnesses may be able to withhold certain communications.

It is important to note that the Sixth Amendment to the United States Constitution provides the right to have the assistance of counsel for defense in all criminal prosecutions.⁴⁹ Because legislative investigations are not criminal prosecutions, that right to counsel does not apply. That said, in practice, witnesses are often allowed to have counsel attend to advise, and some states do provide by statute for a right to counsel in the investigation context.⁵⁰ Wisconsin does not have such a statute.

Conclusion

Committee investigations are an integral part of the legislative process. Legislative committees may conduct investigations at their own initiative or as directed by the full house.⁵¹ The full assembly, through adoption of 2021 Assembly Resolution 15, directed the Elections Committee to investigate the administration of state elections, pursuant to the legislature’s constitutional duty “to make laws and to exercise its oversight and investigative authority.” The Committee on Assembly Organization subsequently authorized the retention of special counsel to assist the Elections Committee in this investigation.

The special counsel’s authority is established and circumscribed by the speaker, acting on behalf of the assembly. The special counsel may investigate any matter covered by 2021 Assembly Resolution 15 and may do so through informal interviews and requests for documents and through the issuance of legislative subpoenas signed by the speaker and the assembly chief clerk. In assisting the Elections Committee in conducting the investigation, the special counsel must provide competent and timely legal services and seek to gather evidence for determining whether state elections, in particular since January 1, 2019, have been conducted in compliance with Wisconsin law.

The Wisconsin Statutes and legislative rules do not prescribe a committee investigative process. How the Elections Committee will proceed and conduct the investigation is a matter within the authority of the committee chairperson. The chairperson will determine when the committee meets, how committee members will participate in the proceedings, and which witnesses will be required or invited to appear before the committee. Throughout the investigation process, the

⁴⁸ *Trump*, 140 S. Ct. at 2032.

⁴⁹ U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”).

⁵⁰ *See, e.g.*, Haw. Rev. Stat. § 21-11.

⁵¹ Joint Rule 84 (s) and Wis. Stat. § 13.31.

chairperson must ensure that the investigation is conducted according to law and that the due process and other constitutional rights of witnesses are protected.

We hope this information is helpful. Please let us know if the LRB can provide any additional assistance.

STATE OF WISCONSIN

CIRCUIT COURT

WAUKESHA COUNTY

MICHAEL J. GABLEMAN, IN HIS OFFICIAL CAPACITY AS SPECIAL COUNSEL TO THE WISCONSIN ASSEMBLY,
EX REL. WISCONSIN STATE ASSEMBLY,

Petitioner

v.

Case No.: 2021GF605

SATYA RHODES-CONWAY, PERSONALLY, AND IN HER OFFICIAL
CAPACITY AS MAYOR OF MADISON, WISCONSIN,

Respondent

WRIT OF ATTACHMENT OF THE PERSON

THE STATE OF WISCONSIN, to the person named above as Respondent:

You are hereby notified that pursuant to Wisconsin Statutes § 13.31 and Wisconsin Statutes § 885.12, the Petitioner named above has filed a verified complaint with this Court attesting that you are noncompliant with a valid legislative subpoena.

Within 45 days of receiving this notice, you must produce the documents and testimony as required by law.

Dated this ____ day of _____, 2021.

WITNESS MY HAND AND SEAL

Circuit Court Judge

STATE OF WISCONSIN

CIRCUIT COURT

WAUKESHA COUNTY

MICHAEL J. GABLEMAN, IN HIS OFFICIAL CAPACITY AS SPECIAL
COUNSEL TO THE WISCONSIN ASSEMBLY, EX REL. WISCONSIN STATE
ASSEMBLY,

Petitioner

v.

Case No. 2021GF605

ERIC GENRICH, PERSONALLY, AND IN HIS OFFICIAL CAPACITY
AS MAYOR OF GREEN BAY, WISCONSIN,

FILED

Respondent

NOV 29 2021

CIRCUIT COURT
WAUKESHA, COUNTY, WI

PETITION FOR A WRIT OF ATTACHMENT OF THE PERSON

PLEASE TAKE NOTICE that Petitioner Michael J. Gableman, in his official capacity as Special Counsel to, and on behalf, of the Wisconsin State Assembly, moves this Court, pursuant to Wisconsin Statutes § 13.31 and Wisconsin Statutes § 885.12, to issue a writ of attachment to Eric Genrich to comply with the duly issued legislative subpoena *duces tecum* of October 22, 2021.

Whereas, the subpoena (Exhibit A, attached), was lawfully issued and set a time and place certain, October 22, 2021 in Waukesha County, for delivery of certain documents and for testimony by said person.

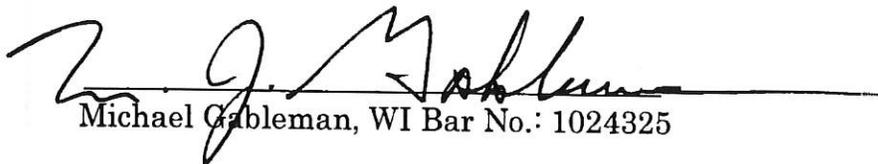
Whereas, that time and place certain was unilaterally continued by the Special Counsel during a period of negotiations with the City attorney, to November 15, 2021 at 9:00am in Waukesha County.

Whereas, Eric Genrich did fail to appear on November 15, 2021 without justification.

Now, therefore, Petitioner respectfully requests that the Waukesha County Circuit Court issue a writ of attachment on the person of Eric Genrich and order the Waukesha County Sheriff to execute such commitment until Eric Genrich has fulfilled her legal duties in responding to said subpoena.

DULY SWORN AND
RESPECTFULLY SUBMITTED,

Signature:


Michael Gableman, WI Bar No.: 1024325

SPECIAL COUNSEL to the WISCONSIN
ASSEMBLY

P.O. Box 510766

New Berlin, WI 53151

T: (262) 2020-8722

E: coms@wispecialcounsel.org

NOTARY STATEMENT:

State of Wisconsin

County of Waukesha

This document was sworn before me on November 29th, 2021 by Michael J. Gableman.

Signature of Notary 

Title Notary

My commission expires on 7/9/22



FILED

NOV 29 2021

CIRCUIT COURT
WAUKESHA, COUNTY, WI

EXHIBIT A

WISCONSIN STATE ASSEMBLY

2021-2022 Regular Session

Assembly Committee on Campaigns and Elections

SUBPOENA DUCES TECUM

STATE OF WISCONSIN)
) ss.
COUNTY OF WAUKESHA)

THE STATE OF WISCONSIN TO: Hon. Eric Genrich
Mayor, City of Green Bay
100 N. Jefferson St.
Green Bay WI 54301

PURSUANT TO WIS. STAT. § 13.31 YOU ARE HEREBY COMMANDED TO APPEAR in person before the Special Counsel or his designee on **Friday, October 22, 2021 at 9:00 am** at **200 South Executive Drive, Suite 101, Brookfield, WI 53005**, to give evidence and testimony with regard to the November 2020 General Election in Wisconsin (the "Election") including, *but not limited to*, potential irregularities and/or illegalities related to the Election.

You are further commanded to bring with you originals or copies, if originals are not available, of all documents contained in your files and/or in your custody, possession, or control, pertaining to the Election. Responsive documents include, *but are not limited to*, the items set forth on Exhibit A, attached hereto and incorporated herein. Please direct any inquiries to (262) 202-8722.

FAILURE TO COMPLY WITH THIS SUBPOENA MAY CONSTITUTE CONTEMPT OF THE LEGISLATURE, PURSUANT TO WIS. STAT. § 13.26(1)(C) AND IS SUBJECT TO PUNISHMENT, INCLUDING IMPRISONMENT, PURSUANT TO WIS. STAT. § 13.27.

Dated at ~~Platteville~~ Wisconsin this 4 day of March 2021.

WISCONSIN STATE ASSEMBLY

By: 

REP. ROBIN VOS, SPEAKER
Wisconsin State Assembly

By:  _____

Edward A. Blazel, in Madison, WI
Wisconsin State Assembly, Chief Clerk

SCHEDULE A

GENERAL INSTRUCTIONS

1. These Instructions incorporate the Definitions attached to the subpoena. Please read them carefully before reading this document.
2. In complying with this subpoena, you are required to produce all responsive Documents that are in your possession, custody, or control. You shall also produce Documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as Documents that you have placed in the temporary possession, custody, or control of any third party. Subpoenaed Documents shall not be destroyed, modified, removed, transferred, or otherwise made inaccessible to the Special Counsel.
3. All Documents produced in response to this subpoena shall be sequentially and uniquely Bates-stamped.
4. In the event that any entity, organization, or person identified in this subpoena has been, or is also known by any other name than that herein identified, the subpoena shall be read also to include that alternative identification.
5. It shall not be a basis for refusal to produce Documents that any other person or entity also possesses non-identical or identical copies of the same Documents.
6. If a date or other descriptive detail set forth in this subpoena referring to a Document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the subpoena, you are required to produce all Documents that would be responsive as if the date or other descriptive detail were correct.
7. Documents produced in response to this subpoena shall be produced as they were kept in the normal course of business together with copies of file labels, dividers, or identifying markers with which they were associated when the subpoena was served.
8. If you withhold any Document pursuant to a claimed right protected by the state or federal constitution, or pursuant to a claim of non-disclosure privileges including, but not limited to, the deliberative-process privilege, the attorney-client privilege, attorney work product protections, any purported privileges, protections, or exemptions from disclosure under Wis. Stat. § 19.35 or the Freedom of Information Act, then you must comply with the following procedure:
 1. You may only withhold that portion of a Document over which you assert a claim of privilege, protection, or exemption. Accordingly, you may only withhold a Document in its entirety if you maintain that the entire Document is privileged or protected. Otherwise you must produce the Document in redacted form.
 2. In the event that you withhold a Document—in whole or in part—on the basis of a privilege, protection, or exemption, you must provide a privilege log containing the following information concerning each discrete claim of privilege, protection, or exemption:
 - the privilege, protection, or exemption asserted;
 - the type of Document;
 - the date, author, and addressee;

- the relationship of the author and addressee to each other; and
 - a general description of the nature of the Document that, without revealing information itself privileged or protected, will enable the Office of the Special Counsel to assess your claim of privilege, protection, or exemption.
3. In the event a Document or a portion thereof is withheld under multiple discrete claims of privilege, protection, or exemption, each claim of privilege, protection, or exemption must be separately logged.
 4. In the event portions of a Document are withheld on discrete claims of privilege, protection, or exemption, each separate claim of privilege, protection, or exemption within that Document must be separately logged.
 5. You must produce the privilege log contemporaneously with the withholding of any Document in whole or in part on the basis of a privilege, protection, or exemption.
 6. You must certify that your privilege log contains only those assertions of privilege, protection, or exemption as are consistent with these Instructions and are warranted by existing law or by a non-frivolous argument for extending, modifying, or reversing existing law, or for establishing new law.
 7. Failure to strictly comply with these provisions constitutes waiver of any asserted privilege, protection, or exemption.
9. Neither the Office of the Special Counsel nor the Committee recognizes any purported contractual privileges, such as non-disclosure agreements, as a basis for withholding the production of a Document. Any such assertion shall be of no legal force or effect, and shall not provide a justification for such withholding or refusal, unless and only to the extent that the Special Counsel has consented to recognize the assertion as valid.
 10. This subpoena is continuing in nature and applies to any newly-discovered information. Any Document not produced because it has not been located or discovered by the return date shall be produced immediately upon subsequent location or discovery.
 11. If you discover any portion of your response is incorrect in a material respect you must immediately and contemporaneously submit to the Office of the Special Counsel, in writing, an explanation setting forth: (1) how you became aware of the defect in the response; (2) how the defect came about (or how you believe it to have come about); and (3) a detailed description of the steps you took to remedy the defect.
 12. A cover letter shall be included with each production and include the following:
 - a. The Bates-numbering range of the Documents produced, including any Bates-prefixes or -suffixes;
 - b. If the subpoena is directed to an entity as opposed to an individual, a list of custodians for the produced Documents, identifying the Bates range associated with each custodian;
 - c. A statement that a diligent search has been completed of all Documents in your possession, custody, or control that reasonably could contain responsive material;
 - d. A statement that the search complies with good forensic practices;

- e. A statement that Documents responsive to this subpoena have not been destroyed, modified, removed, transferred, or otherwise made inaccessible to the Office of the Special Counsel since the date of receiving the subpoena or in anticipation of receiving the subpoena;
 - f. A statement that all Documents located during the search that are responsive have been produced to the Office of the Special Counsel or withheld in whole or in part on the basis of an assertion of a claim of privilege or protection in compliance with these Instructions; and
 - g. Your signature, attesting that everything stated in the cover letter is true and correct and that you made the statements under penalty of perjury.
13. You must identify any Documents that you believe contain confidential or proprietary information. However, the fact that a Document contains confidential or proprietary information is not a justification for not producing the Document, or redacting any part of it.
14. Electronically-stored Documents must be produced to the Office of the Special Counsel in accordance with the attached Electronic Production Instructions in order to be considered to be in compliance with the subpoena. Failure to produce Documents in accordance with the attached Electronic Production Instructions, may, in an exercise of the Special Counsel's discretion, be deemed an act of contumacy.
15. If properties or permissions are modified for any Documents produced electronically, receipt of such Documents will not be considered full compliance with the subpoena.

ELECTRONIC PRODUCTION INSTRUCTIONS

The production of electronically-stored Documents shall be prepared according to, and strictly adhere to, the following standards:

- 16. Documents shall be produced in their native format with all meta-data intact.
- 17. Documents produced shall be organized, identified, and indexed electronically.
- 18. Only alphanumeric characters and the underscore ("_") character are permitted in file and folder names. Special characters are not permitted.
- 19. Production media and produced Documents shall not be encrypted, contain any password protections, or have any limitations that restrict access and use.
- 20. Documents shall be produced to the Office of the Special Counsel on one or more memory sticks, thumb drives, or USB hard drives. Production media shall be labeled with the following information: production date, name of the subpoena recipient, Bates range.
- 21. All Documents shall be Bates-stamped sequentially and should not duplicate any Bates-numbering used in producing physical documents.

Schedule B

DEFINITIONS

22. "All," "any," and "each" shall each be construed as encompassing any and all. The singular includes the plural number, and vice versa. The masculine includes the feminine and neuter genders.
23. "And" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this subpoena any information that might otherwise be construed to be outside its scope.
24. "Ballot" means a ballot related to the Election, including mail-in ballots, early in-person ballots, provisional ballots, and physical ballots cast in person the day of the election.
25. "Committee" means the committee named in the subpoena.
26. "Communication" means each manner or means of disclosure or exchange of information (in the form of facts, ideas, inquiries, or otherwise), regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in an in-person meeting, by telephone, facsimile, e-mail (desktop or mobile device), text message, MMS or SMS message, regular mail, telexes, releases, intra-company messaging channels, or otherwise.
27. "Communication with," "communications from," and "communications between" means any communication involving two or more people or entities, regardless of whether other persons were involved in the communication, and includes, but is not limited to, communications where one party is cc'd or bcc'd, both parties are cc'd or bcc'd, or some combination thereof.
28. "CTCL" means the Center for Tech and Civic Life.
29. "Documents" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (emails), text messages, instant messages, MMS or SMS messages, contracts, cables, telexes, notations of any type of conversation, telephone call, voicemail, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electronic records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
30. "Election" means the November 3, 2020, Wisconsin General Election for, inter alia, President of the United States.

31. "Employee" means a current or former: officer, director, shareholder, partner, member, consultant, senior manager, manager, senior associate, permanent employee, staff employee, attorney, agent (whether de jure, de facto, or apparent, without limitation), advisor, representative, attorney (in law or in fact), lobbyist (registered or unregistered), borrowed employee, casual employee, consultant, contractor, de facto employee, independent contractor, joint adventurer, loaned employee, part-time employee, provisional employee, or subcontractor.
32. When referring to a person, "to identify" means to give, to the extent known: (1) the person's full name; (2) present or last known address; and (3) when referring to a natural person, additionally: (a) the present or last known place of employment; (b) the natural person's complete title at the place of employment; and (c) the individual's business address. When referring to documents, "to identify" means to give, to the extent known the: (1) type of document; (2) general subject matter; (3) date of the document; and (4) author, addressee, and recipient.
33. "Forensic Image" means a bit-by-bit, sector-by-sector direct copy of a physical storage device, including all files, folders and unallocated, free and slack space. Forensic images include not only all the files visible to the operating system but also deleted files and pieces of files left in the slack and free space.
34. "Indicating" with respect to any given subject means anything showing, evidencing, pointing out or pointing to, directing attention to, making known, stating, or expressing that subject of any sort, form, or level of formality or informality, whatsoever, without limitation.
35. "Party" refers to any person involved or contemplating involvement in any act, affair, contract, transaction, judicial proceeding, administrative proceeding, or legislative proceeding.
36. "Person" is defined as any natural person or any legal entity, including, without limitation, any business or governmental entity or association, and all subsidiaries, divisions, partnerships, properties, affiliates, branches, groups, special purpose entities, joint ventures, predecessors, successors, or any other entity in which they have or had a controlling interest, and any employee, and any other units thereof.
37. "Pertaining to," "referring," "relating," or "concerning" with respect to any given subject means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with, or is in any manner whatsoever pertinent to that subject.
38. "Possession, custody or control" means (a) documents that are in your possession, custody, or control, whether held by you or your employees; (b) documents that you have a legal right to obtain, that you have a right to copy, or to which you have access; and (c) documents that have been placed in the possession, custody, or control of any third party.
39. "Processes" means any processes, procedures, methodologies, materials, practices, techniques, systems, or other like activity, of any sort, form, or level of formality or informality, whatsoever, without limitation.
40. "You" or "Your" shall mean (in the case of an entity) the entity named in the subpoena, as well as its officers, directors, subsidiaries, divisions, predecessor and successor companies, affiliates, parents, any partnership or joint venture to which it may be a party. If the person named in the entity is either an individual or an entity, "you" and "your" also means your employees, agents, representatives, consultants, accountants and attorneys, including anyone who served in any such capacity at any time during the relevant time period specified herein.

EXHIBIT A**TO SUBPOENA DUCES TECUM**

These document requests are limited to the time period from January 1, 2020 to current:

1. All documents pertaining to election administration related to interactions, communication with, or comments regarding the Office of the Clerk of the City of Green Bay and the Chief of Staff of the Office of the Mayor of the City of Green Bay.
2. All documents and communications between the Office of the Mayor of the City of Green Bay with the Center for Tech and Civic Life ("CTCL"). This includes, but is not limited to, documents and communications with Tiana Epps-Johnson and Whitney May
3. All documents and communications between the Office of the Mayor of the City of Green Bay and the Wisconsin Elections Commission ("WEC") and its officials or employees regarding or in any way related to the election.
4. All documents and communications between the Office of the Mayor of the City of Green Bay and officials or employees of the Cities of Racine, Kenosha, Madison and Milwaukee and/or any other employee, representative agent or other person affiliated with these cities, regarding or in any way related to the Election.
5. All documents and communications between the Office of the Mayor of the City of Green Bay and employees of any group, organization, person or entity, including but not limited to CTCL, and/or any other employee, representative agent or other person affiliated with them, regarding or in any way related to the election.
6. All documents or communications between the Office of the Mayor of the City of Green Bay and CTCL and/or its employees Tiana Epps-Johnson and Whitney May, The National Vote At Home Institute and/or its employee Michael Spitzer-Rubenstein, The Elections Group and/or its employee Ryan Chew, Ideas42, Power to the Polls and/or Fair Elections Center, Mikva Challenge, US Digital Response, Center for Civic Design, Center for Election and Innovation Research ("CEIR"), Center for Secure and Modern Elections ("CSME") and/or its employee Eric Ming, The Brennan Center for Justice, HVS Productions, Facebook, Modern Selections and/or any other employee, representative agent or other person affiliated with the above named entities, regarding or in any way related to the election.

Subpoena of Parties

Coms <Coms@wispecialcounsel.org>

Thu 10/21/2021 11:37 AM

To: VanessaCh@greenbaywi.gov <VanessaCh@greenbaywi.gov>

Dear Ms. Chavez,

We have been trying to work with you in order to schedule the deposition of the person most knowledgeable as described in the Wisconsin State Assembly's subpoena of October 4, 2021 as well as to coordinate your client's compliance with the Assembly's subpoena duces tecum of that same date.

This office is currently reviewing the documents produced by the City of Green Bay last Friday, October 15.

In order to provide our office more time to review materials produced last week, as well as to give both parties additional time to reach an understanding of the scope and nature of the topics to be addressed in the deposition, we are continuing the return date from Friday, October 22, 2021 to Wednesday, November 17, 2021 at 9:30 a.m.

Thank you,
Mike Gableman
Office of the Special Counsel
Tel. (262) 202-8722

FILED

NOV 29 2021

**CIRCUIT COURT
WAUKESHA, COUNTY, WI**

EXHIBIT B



State of Wisconsin
2021 - 2022 LEGISLATURE

LRB-2247/1
MPG:skw

2021 ASSEMBLY RESOLUTION 15

March 17, 2021 - Introduced by Representatives SANFELIPPO, BRANDTJEN, MURPHY, ROZAR, THIESFELDT and TUSLER. Referred to Committee on Rules.

1 **Relating to:** directing the Assembly Committee on Campaigns and Elections to
2 investigate the administration of elections in Wisconsin.

3 Whereas, the ability of American citizens to exercise their right to vote is
4 foundational to our representative democracy; and

5 Whereas, the legitimacy of the American form of government depends on the
6 citizens' widespread confidence in the fairness of elections and acceptance of election
7 results; and

8 Whereas, preserving the integrity of the electoral process is one of our
9 government's most important responsibilities; and

10 Whereas, the administration of elections in Wisconsin is governed by an
11 extensive set of duly enacted laws; and

12 Whereas, however, election laws are not self-enforcing but rely on the good
13 faith efforts of election officials to dutifully carry out those laws as written in order
14 to ensure fair elections; and

2021 - 2022 Legislature

- 2 -

LRB-2247/1
MPG:skw

1 Whereas, the integrity of our electoral process has been jeopardized by election
2 officials who, either through willful disregard or reckless neglect, have failed to
3 adhere to our election laws by, at various times, ignoring, violating, and encouraging
4 noncompliance with bright-line rules established by the statutes and regulations
5 governing the administration of elections in Wisconsin; and

6 Whereas, it is the duty of the Wisconsin Legislature to make laws and to
7 exercise its oversight and investigative authority to determine the extent to which
8 elections in Wisconsin have been conducted in compliance with the law; now,
9 therefore, be it

10 ***Resolved by the assembly, That*** the Wisconsin Assembly hereby directs the
11 Assembly Committee on Campaigns and Elections to investigate the administration
12 of elections in Wisconsin, focusing in particular on elections conducted after January
13 1, 2019.

14

(END)



ROBIN J. VOS

SPEAKER OF THE WISCONSIN STATE ASSEMBLY

TO: Members of the Committee on Assembly Organization
FROM: Speaker Robin Vos, Chair
DATE: May 28, 2021
SUBJECT: Ballot 21-03 ~ Authorization to Obtain Legal Counsel and Employ Investigators

[MOTION] *It is moved that the Committee on Assembly Organization authorizes the Speaker of the Assembly to hire legal counsel and employ investigators to assist the Assembly Committee on Campaigns and Elections in investigating the administration of elections in Wisconsin. Speaker Vos, on behalf of the Assembly, shall approve all financial costs and contractual arrangements for hiring legal counsel and investigators.*

I am recommending adoption of this motion. Please review and indicate your approval by circling "aye" or "no", signing your name, and inserting the date. Thank you.

[If this ballot is not returned to the Speaker's office by Friday, May 28, 2021 at 3:00 p.m., you will be designated as not voting.]

Speaker Robin Vos

AYE NO



ROBIN J. VOS

SPEAKER OF THE WISCONSIN STATE ASSEMBLY

TO: Members of the Committee on Assembly Organization
FROM: Speaker Robin Vos, Chair
DATE: August 27, 2021
SUBJECT: Ballot 21-06 ~ Authorization to designate special counsel

[MOTION] *It is moved that the Committee on Assembly Organization authorizes the Speaker of the Assembly to designate the legal counsel hired pursuant to the May 28, 2021, ballot adopted by the Committee on Assembly Organization, as special counsel to oversee an Office of Special Counsel. The special counsel shall direct an elections integrity investigation, assist the Elections and Campaign Committee, and hire investigators and other staff to assist in the investigation.*

I am recommending adoption of this motion. Please review and indicate your approval by circling "aye" or "no", signing your name, and inserting the date. Thank you.

[If this ballot is not returned to the Speaker's office by Monday, August 30, 2021 at 10:00 a.m., you will be designated as not voting.]

Speaker Robin Vos

AYE NO

COORDINATING ATTORNEY INDEPENDENT CONTRACTOR AGREEMENT

This Independent Contractor Agreement (Agreement) is entered into this 25th day of June 2021 by and between The Wisconsin Assembly (Assembly) and Consultare LLC, by and through its President, Michael J. Gableman, an independent contractor (Contractor), in consideration of the mutual promises made herein, as follows:

Term of Agreement

This Agreement will become effective on July 1, 2021, and will continue in effect until October 31, 2021, unless altered or extended by mutual agreement of Assembly and the Contractor.

Services to be Rendered by Contractor

Contractor agrees to:

- Coordinate the day to day investigatory work relating to potential irregularities and/or illegalities connected to the 2020 November election in Wisconsin.
- Analyze and delegate to the investigators leads/allegations from whatever source derived, including- but not limited to- those that have been submitted to the Assembly Committee on Campaigns and Elections, raised in the media, provided to members of the Legislature before or during the investigation, or generated through the course of this investigation;
- Receive investigative reports from investigators and keep a weekly report of investigative findings.
- Routinely consult with investigators to help direct them in the nature and manner of their investigatory work.
- Compile all investigator reports and weekly attorney reports into a final report related to the election investigation, to be submitted to the Speaker of the Assembly, and;
- Keep all information/findings related to the services rendered under this agreement confidential, except when working with Integrity Investigators and such designee(s) of the Assembly whom the Speaker shall from time to time identify in writing to the Consultant for such purposes. At present, the Speaker hereby designates Attorney Steve Fawcett as the Assembly's point of contact with the Contractor. The identity of the Assembly point of contact with whom the Contractor may share such information may be modified from time to time in writing by the Speaker. The requirement for confidentiality set forth in this paragraph extends to any and all employees or agents of the Contractor.

Method of Performing Services

Contractor will determine the method, details, and means of performing the above-described services.

Compensation

In consideration for the services to be performed by Contractor, the Assembly agrees to pay Contractor the sum of Eleven Thousand dollars (\$11,000), on a monthly basis, the first such payment due on July 15, 2021, and payment continuing on and through the 15th day of each subsequent month subject to this Agreement (August, September, and October 2021) until the "Term of Agreement" recited herein has ended.

Equipment, Supplies and Related Expenses

Contractor will supply all equipment and supplies required to perform the services under this Agreement. Contractor will also be responsible for all related expenses, including but not limited to mileage or hotel stays, required to perform the services under this Agreement.

Workers Compensation

Contractor agrees to hold harmless and indemnify the Assembly for any and all claims arising out of any injury, disability, or death of the Contractor and Contractor's employees or agents. The Contractor also agrees to provide workers' compensation insurance for Contractor's employees and agents where necessary.

Insurance

Contractor agrees to hold the Assembly free and harmless from any and all claims arising from any negligent act or omission by the Contractor or Contractor's employees or agents during the performance of any duties under this Agreement. The Contractor should consider maintaining a policy of insurance to cover any negligent acts committed by the Contractor or Contractor's employees or agents during the performance of any duties under this Agreement.

Obligations of the Assembly

The Assembly agrees to meet the terms of all reasonable requests of Contractor necessary to the performance of Contractor's duties under this Agreement.

Assignment

Neither this Agreement nor any duties or obligations under this Agreement may be assigned by the Assembly or Contractor without the prior written consent of the Assembly and Contractor.

Termination of Agreement

Neither party may terminate this Agreement at any time prior to the "Term of Agreement" recited herein absent good cause, except at the sixty (60) day mark either party may terminate the last two months of the contract, by written notice, should either party desire to terminate the contract. If no such termination occurs by the sixty (60) day mark, the contract shall be fulfilled in full by both parties unless terminated for good cause.

Notices

Any notices to be given hereunder by either party to the other may be made either by personal delivery or by mail. Mailed notices shall be addressed to the parties at the following addresses:

Contractor:

Consultare LLC
c/o Michael J. Gableman, President
P.O. Box 510145
New Berlin, WI 53151

Assembly:

Speaker Robin Vos
c/o Steve Fawcett
PO BOX 8953
Madison WI 53708

Dispute Resolution

In the event the parties disagree to the terms or execution of the contract, the parties agree to notify the other party as soon as possible to said conflict and work in good faith to find a resolution. In the event that no resolution can be found, the parties agree that any conflict arising out of this contractual agreement is within the sole jurisdiction of the Circuit or Court for Waukesha County, which is the jurisdiction for the home County of residence of the Contractor.

Entire Agreement

This Agreement supersedes any and all other agreements, either oral or in writing, between the parties hereto with respect to the performance of services by Contractor and the Assembly, and contains all the covenants and agreements between the parties with respect to the rendering of such services in any manner whatsoever. Each party to this Agreement acknowledges that no representations, inducements, promises, or agreements, orally or otherwise, have been made by any party, or anyone acting on behalf of any party, which are not embodied herein, and that no other agreement, statement, or promise not contained in this Agreement shall be valid or binding. Any modification of this Agreement will be effective only if it is in writing and signed by the other party.

Partial Invalidity

If any provision of this Agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remaining provisions shall nevertheless continue in full force without being impaired or invalidated in any way.

Governing Law

This Agreement shall be governed by and construed in accordance with the laws of the State of Wisconsin.

Assembly, by:  Date: 6-24-2021

Contractor, by:  Date: June 26, 2021

FIRST AMENDMENT TO AGREEMENT

THIS FIRST AMENDMENT TO AGREEMENT (this "First Amendment") is made and entered into as of August 20, 2021, by and among THE WISCONSIN STATE ASSEMBLY (the "Assembly"), and CONSULTARE LLC, a Wisconsin limited liability company, by and through its President, Michael J. Gableman ("Gableman"), and together with the Assembly, the "Parties" and each a "Party").

RECITALS

- A. The Parties entered into that certain Independent Contractor Agreement effective July 1, 2021 (the "IC Agreement").
- B. The Parties desire to amend the IC Agreement to (1) approve and provide additional resources, including the budget attached hereto as Exhibit A, in order for Gableman to perform the Services required under the IC Agreement and (2) to confirm that Gableman shall act as the Custodian of Records with regard to the investigation that is subject of the IC Agreement.
- C. Capitalized terms used and not defined herein shall have the meaning given the same in the IC Agreement.

AMENDMENT

NOW, THEREFORE, in consideration of the foregoing recitals, the mutual covenants and agreements contained herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the IC Agreement is amended and/or supplemented as follows:

1. Incorporation of Recitals. The recitals set forth in the section entitled "Recitals" above are hereby incorporated into this First Amendment as if set forth in full herein.
2. Budget. The Assembly hereby approves and incorporates the Budget attached hereto as Exhibit A, which funds shall be made available by the Assembly to Gableman for reimbursement of costs and expenses for the purposes identified in the Budget.
3. Office of The Special Counsel. There shall be, and is hereby established, The Office of The Special Counsel (the "Office") for the investigation that is the subject of the IC Agreement and Michael J. Gableman, as Special Counsel, shall control such Office, which Office shall be the Custodian of Records with regard to the records related to the investigation that is the subject of the IC Agreement.
4. Miscellaneous. In the event of any conflict between the terms and provisions of this First Amendment and the IC Agreement, the terms and provisions of this First Amendment shall control. If any provision of this First Amendment or the application thereof shall, for any reason and to any extent, be invalid or unenforceable, neither the remainder of this First Amendment nor the application of the provision to other persons, entities or circumstances shall be affected thereby, but instead shall be enforced to the maximum extent permitted by law. This First Amendment may be executed in multiple counterpart signature pages, all of which taken together shall be construed as one and the same document. Facsimile and electronic (i.e., ".pdf") signatures of this First Amendment shall be treated as original signatures to this First Amendment and shall be binding on the Parties.

[signature page follows]

IN WITNESS WHEREOF, the Parties hereby enter into this First Amendment as of the date first written above.

THE WISCONSIN STATE ASSEMBLY

By: 

Robin J. Vos, Speaker

CONSULTARE LLC

By: 

Michael J. Gableman, President

EXHIBIT A

BUDGET

[to be attached]

Ex. A to First Amendment

Wisconsin 2020 Election Special
Counsel Budget

WEC	Private Admin of Elections	Voting Machines	Total *
Special Counsel	18,334.00	18,334.00	65,000.00
Administrative Assistant	5,333.00	5,333.00	18,000.00
Investigator #1	8,334.00	8,334.00	25,000.00
Investigator #2	8,334.00	8,334.00	25,000.00
Investigator #3	25,000.00		25,000.00
Investigator #4			25,000.00
Investigator #5	8,334.00	8,334.00	25,000.00
Rent			10,000.00
Office Equipment			2,000.00
Communications			15,000.00
Data Analysis Contractor		325,000.00	325,000.00
Outside Legal Counsel			50,000.00
Travel (reimb. @ federal rate)			25,000.00
Court Reporting			50,000.00
Service of Process/Filing			3,000.00
TOTAL			676,000.00

*5 months (09/01/21-12/31/21)
 +Investigators paid per month, plus reasonable expenses including reimbursement for mileage, lodging and food

INDEMNIFICATION AGREEMENT

THIS MASTER INDEMNIFICATION AGREEMENT (this "Agreement") is made and entered into as of _____, 2021, by and among **THE WISCONSIN STATE ASSEMBLY** (the "Assembly"), and **CONSULTARE LLC**, a Wisconsin limited liability company, by and through its President, Michael J. Gableman in his individual capacity (collectively, "Gableman", and together with the Assembly, the "Parties" and each a "Party") and shall constitute a binding contract for indemnification of Gableman by the Assembly with respect to the liabilities of Gableman described herein.

RECITALS

A. Gableman has agreed with the Assembly to act as the Coordinating Attorney or Special Counsel with respect to the Assembly's inquiry and investigation of potential irregularities and/or illegalities connected to the 2020 November election in Wisconsin (the "Inquiry"), pursuant to that certain Independent Contractor Agreement attached hereto as Exhibit A (the "IC Agreement").

B. The nature and subject of the Inquiry and Gableman's position as the Coordinating Attorney or Special Counsel under the IC Agreement may subject Gableman to legal challenges, suits and/or other obligations or liabilities.

C. Gableman requires that the Assembly indemnify and hold Gableman harmless for any such legal challenges, suits and/or other obligations or liabilities in accordance with and upon the terms of this Agreement.

D. The Parties wish and intend by this Agreement to provide for the indemnification of Gableman for all legal challenges, suits and/or other obligations or liabilities arising out of or in any way related to the Inquiry and/or the IC Agreement.

E. The Assembly is aware of Gableman's reliance on this Agreement and the indemnification provided herein in acting as the Coordinating Attorney or Special Counsel and engaging in the Inquiry.

AGREEMENTS

NOW, THEREFORE, in consideration of the foregoing recitals, the mutual covenants and agreements contained herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

1. **Incorporation of Recitals.** The recitals set forth in the section entitled "Recitals" above are hereby incorporated into the Agreement section of this Agreement as if set forth in full herein, and the Parties hereby acknowledge and agree that each such recital is true and correct.

2. **Agreement.** This Agreement and its terms shall govern, to wit: any and all claims, losses, costs, expenses (including, without limitation, reasonable expenses of investigation and reasonable attorneys' fees and expenses in connection with any action, suit or proceeding),

liabilities and damages (including, without limitation, special, consequential and other similar damages) ("Costs"), that the Gableman Indemnified Parties (defined below) shall incur, suffer or become subject to, that arise out of, result from, or relate to the IC Agreement and/or the Inquiry, other than Costs resulting from recklessness or willful misconduct of any Gableman Indemnified Party(ies).

3. **Indemnification of Gableman by the Assembly**

(a) **Indemnification.** The Assembly shall indemnify and defend Gableman, and their respective members, directors, employees and investigators (the "Gableman Indemnified Parties") and each a "Gableman Indemnified Party") against, and shall hold each of them harmless from, any and all Costs that any Gableman Indemnified Party may incur, suffer or become subject to, that arise out of, result from, or relate to any of the matters identified herein, including without limitation Gableman's involvement as Coordinating Attorney or Special Counsel for the Inquiry pursuant to the IC Agreement, unless caused by the willful misconduct of a Gableman Indemnified Party. The Assembly acknowledges and agrees that the indemnification and hold harmless obligations set forth herein shall apply notwithstanding anything in the IC Agreement, or any other agreements between Gableman and the Assembly.

(b) **Procedures for Claims.**

- (i) The Gableman Indemnified Parties agree to give prompt notice to the Assembly of the assertion of any claim, or the commencement of any suit, action or proceeding in respect of which indemnity may be sought under Section 3 (each a "Action" and, collectively, the "Actions"). The failure by any Gableman Indemnified Party so to notify the Assembly in accordance with this Section 3(b)(i) shall not relieve the Assembly from any liability that it may have to the Gableman Indemnified Party with respect to any Action pursuant to this Section 3, except to the extent the failure to notify shall actually prejudice the Assembly.
- (ii) The Assembly shall allow Gableman to select legal counsel of its choice, that the Assembly shall engage to contest and defend any Action and the Assembly shall conduct the defense of the Action actively and diligently.

4. **Waiver of Breach.** The failure or delay of a Party at any time to require performance by any other Party of any provision of this Agreement, even if known, shall not affect the right of such Party to require performance of that provision or to exercise any right, power, or remedy hereunder, and any waiver by any Party of any breach or any provision of this Agreement shall not be construed as a waiver of any continuing or succeeding breach of such provision, a waiver of the provision itself, or a waiver of any right, power, or remedy under this Agreement. No notice to or demand on any Party in any case shall, of itself, entitle such Party to other or further notice or demand in similar or other circumstances.

5. **Termination.** This Agreement shall terminate upon the mutual written agreement of the Parties hereto.

6. **No Assignment.** No Party to this Agreement may assign its rights or delegate obligations under this Agreement without the prior written consent of the other Party hereto.

7. **Invalidity.** If any provision, clause or part of this Agreement or its application under certain circumstances, is held invalid, the remainder of the Agreement, or the applications of each provision, clause or part under other circumstances, shall not be affected.

8. **Amendments.** Amendments to this Agreement must be in writing and signed by each of the Parties hereto.

9. **Governing Law.** This Agreement shall be governed by and interpreted in accordance with the internal laws of the State of Wisconsin.

10. **Binding Effect.** Each of the Parties hereto, their successors and assigns, their respective heirs, personal representatives, pledgees or trustees, are bound by this Agreement and shall execute any instruments and perform acts, or refrain from performing the acts that may be necessary or proper to carry out the intent and purpose of this Agreement.

11. **Effective Date and Counterparts.** This Agreement shall take effect upon execution by all Parties. This Agreement may be executed and delivered in counterparts via facsimile, e-mail transmission or original, and each such duly executed counterpart shall be of the same validity, force and effect of the original.

[signature page follows]

IN WITNESS WHEREOF, the Parties hereby enter into this Agreement as of the date first written above.

THE WISCONSIN STATE ASSEMBLY

By: 

Robin J. Vos, Speaker

CONSULTARE LLC

By: 

Michael J. Gableman, President

MICHAEL J. GABLEMAN

Michael J. Gableman

Wisconsin Legislative Council



Anne Sappenfield
Director

TO: REPRESENTATIVE MARK SPREITZER
FROM: Peggy Hurley, Staff Attorney, and Brian Larson, Senior Staff Attorney
RE: Legislative Subpoena Authority and Special Counsel
DATE: October 6, 2021

You asked this office to review copies of subpoenas issued to elections officials in the Cities of Green Bay and Milwaukee and to determine whether the subpoenas comply with the requirements of s. 13.31, Stats. State law specifically states that a legislative subpoena may compel a person to appear before, or to provide documents to, a legislative committee. However, other statutes and case law support the conclusion that a duly authorized representative of a committee may serve as agent for the committee. Therefore, issuance of the subpoenas appears to be valid, and carrying out and enforcing the subpoenas must protect the due process and First Amendment rights of the individuals subpoenaed.

BACKGROUND

2021 Assembly Resolution 15 was passed by the Assembly earlier this year and directs the Assembly Committee on Campaigns and Elections to investigate the administration of elections in Wisconsin, focusing in particular on elections conducted after January 1, 2019. Pursuant to this resolution, the Committee on Assembly Organization adopted separate ballots on May 28 and August 27, 2021, to authorize the Speaker of the Assembly to hire legal counsel and to designate that individual as special counsel to oversee an Office of Special Counsel.

The August 27, 2021, ballot provides that the Special Counsel shall direct an elections integrity investigation, assist the Assembly Committee on Campaigns and Elections, and hire investigators and other staff.

On September 28, 2021, the Speaker and the Chief Clerk of the Assembly executed subpoenas, on behalf of the Assembly Committee on Campaigns and Elections, to require certain officials to appear before the Special Council on October 15, 2021. The subpoenas were signed and served in accordance with the statutes.

LEGISLATIVE SUBPOENA AUTHORITY

Sections 13.31 to 13.36, Stats., establish the procedures for compelling a witness to appear before a legislative committee and produce documents and records before the committee. The statutes set forth specific provisions relating to service of process, summary process to take custody of a witness, consequences for refusal to testify, immunity for testimony procured by subpoena, and witness fees for testifying before a legislative committee.

- 2 -

The legislative subpoena statute, s. 13.31, Stats., states:

The attendance of witnesses **before any committee of the legislature, or of either house thereof, appointed to investigate any subject matter**, may be procured by subpoenas signed by the presiding officer and chief clerk of the senate or assembly. Such subpoenas shall state when and where, and before whom, the witness is required to appear, and may require such attendance forthwith or on a future day named and the production of books, records, documents and papers therein to be designated, and may also require any officer of any corporation or limited liability company, or other person having the custody of the keys, books, records, documents or papers of any such business entity, to produce the same before such committee. Such subpoenas may be served by any person and shall be returned to the chief clerk of the house which issued the same as subpoenas from the circuit court are served and returned. (Emphasis added.)

This statute and case law¹ establish that a witness may be compelled to appear before a legislative committee charged with investigatory authority.

DISCUSSION

Validity of Subpoena

A plain language reading of the phrase “before any committee of the legislature, or of either house thereof, appointed to investigate any subject matter” in s. 13.31, Stats., appears to contemplate that a witness may be compelled to appear and to produce documents before a legislative committee, so long as that committee is appointed to investigate the subject matter to which the subpoena pertains. The Office of Special Counsel is not a legislative committee, although it has been charged with assisting the Assembly Committee on Campaigns and Elections.

Some of the duties of the chair established in ss. 13.32 (1) and 13.34, Stats., also indicate that current statutes anticipate that a witness would appear before a legislative committee. Specifically, the chair of the committee may file with the presiding officer a certificate stating that the summoned person failed to appear or refused to answer questions or provide requested documents. Additionally, s. 13.36, Stats., directs that the chair of the committee before which a witness appeared may document the witness' appearance in order to authorize the payment of witness fees.

If a court considers the statutes directly and specifically relating to legislative subpoenas and applies a plain language analysis, these statutes appear to compel a witness to appear, and produce documents for, a legislative committee and not a separate entity. However, a court may refrain from questioning whether an authorized investigation should be carried out in a specific manner by an independent branch.² When considering the Legislature's authority to carry out its duties, the Wisconsin Supreme Court has consistently held that unless an action interferes with a constitutional provision or right, it

¹ See *Goldman v. Olson*, 286 F. Supp. 35 (W.D. Wis. 1968).

² The Wisconsin Supreme Court has held that the Legislature has all “authority ... appropriate to achieve the ends” of its express law-making authority. *Wisconsin Carry, Inc. v. City of Madison*, 2017 WI 19 ¶ 54 n.38; *Johnston v. City of Sheboygan*, 30 Wis.2d 179, 186 (1966) (quoting *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (“Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”)).

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will not interfere with the Legislature on matters of legislative procedure or purely legislative matters. [*Ozanne v. Fitzgerald*, 2011 WI 43 (2011); *La Follette v. Stitt*, 114 Wis. 2d 358 (1983).] In addition, a court may find that it is not entirely clear what it means for a witness to appear “before” a committee for purposes of this provision and that a plain language analysis is insufficient.

There are several facts that indicate an appearance before the Special Counsel might be interpreted as an appearance before the committee. First, a legislative committee may utilize outside experts to perform work on its behalf under appropriate circumstances. In this case, the Assembly has charged a committee with conducting an investigation; and, in connection therewith, the house has directed the Speaker to hire an investigator to perform work on behalf of the committee. This could be viewed as similar to other instances in which the legislative branch utilizes outside experts to perform tasks that may require specialized knowledge or skills, such as actuarial services to oversee the retirement system or legal counsel. In some cases, these outside experts are hired in accordance with specific statutory procedures.³ In other cases, the house or body authorizes the hiring of the outside expert in a resolution or motion approved by the relevant committee on organization.⁴

Second, the ballot adopted by the Committee on Assembly Organization instructs the Special Counsel to assist the committee. The subpoenas signed by the Speaker and Chief Clerk, and requiring attendance before the Special Counsel, were issued in the name of the committee. This may also support the view that an appearance before the Special Counsel could be considered an appearance before the committee for purposes of s. 13.31, Stats.

There is statutory support, as well, for the proposition that an individual or an entity may be authorized to hear testimony on behalf of a legislative committee. Under ss. 13.32 and 13.34, Stats., the chair of the committee for which a subpoena was issued may initiate contempt proceedings against a person who fails to comply with the terms of the subpoena. However, the legislative subpoena statute indicates that the subpoena must “state when and where, **and before whom**, the witness is required to appear,” and the general legislative contempt statute states that a person may be held in contempt for “[r]efusing to attend or be examined as a witness, either before the house or a committee, **or before any person authorized to take testimony in legislative proceedings**, or to produce any books, records, documents, papers or keys according to the exigency of any subpoena.” [ss. 13.31 and 13.26 (1) (c), Stats.; emphasis added.] This language appears to indicate that someone other than the legislative committee may investigate or take testimony on behalf of the committee.

A court adopting this view would likely determine that an appearance before the Special Counsel should be considered an appearance before the committee. In that case, the subpoenas would be deemed valid because all of the requirements under s. 13.31, Stats., would be met.

³ The Joint Survey Committee on Retirement Systems (JSCRS) routinely contracts for outside actuarial reports to assist the committee in evaluating proposed changes to the retirement system, as provided under the statutes. [s. 13.50, Stats.] The statutes specifically authorize the Joint Survey Committee on Tax Exemptions (JSCTE) to employ personnel as required for the performance of its duties, in accordance with procedures specified in the statutes. [s. 13.52, Stats.] Also, the Joint Committee on Legislative Organization (JCLO) is specifically authorized to employ an outside staff of professional consultants for the purpose of studying ways to improve legislative staff services and organization. [s. 13.90 (1) (f), Stats.]

⁴ Most often, this approach has been used to hire outside legal counsel to represent the body, a house, or a subunit or member. For example, on October 12, 2005, JCLO authorized the hiring of an outside law firm to represent the defendants in *State of Wisconsin v. David A. Zien and Scott L. Gunderson*. On February 14, 1997, JCLO adopted a ballot authorizing the Co-Chairs of JCLO to select and retain legal counsel to represent the Joint Committee on Review of Administrative Rules (JCRAR) in a lawsuit, *Wisconsin's Environmental Decade v. Dept. of Commerce*, and to direct costs to be paid in equal shares by the Senate and Assembly.

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MEMORANDUM

TO: Speaker Robin Vos
FROM: Michael Gallagher, senior coordinating attorney
DATE: July 7, 2021
SUBJECT: Legislative subpoenas

On March 23, 2021, the Wisconsin Assembly directed the Assembly Committee on Campaigns and Elections (Elections Committee) to investigate the administration of recent elections in this state.¹ Then, on May 21, 2021, the Committee on Assembly Organization passed a motion authorizing the speaker to hire legal counsel and employ investigators to assist the Elections Committee in its investigation.

You have asked for a summary of how legislative subpoenas compelling witness testimony or the production of documents may be issued in connection with the Election Committee's investigation and how immunity from liability is obtained for witnesses compelled to testify or produce documents in the course of the investigation.

Inherent legislative authority to conduct investigations and issue subpoenas

The legislature has inherent and "broad discretionary power to investigate any subject respecting which it may desire information in aid of the proper discharge of its function to make or unmake written laws, or perform any other act delegated to it by the fundamental law, state or national."² Such an investigation may be carried out "by a joint committee, or by a committee of either or both houses acting independently, or . . . in any other manner which to [the legislature] might seem most convenient and proper."³

¹ See 2021 Wis. AR 15, as shown by 2021 Wis. ASA 2.

² Goldman v. Olson, 286 F. Supp. 35, 43 (W.D. Wis. 1968) (quoting *State ex rel. Rosenhein v. Frear*, 138 Wis. 173, 176-77, 119 N.W. 894, 895 (1909)). See also *In re Falvey*, 7 Wis. 630, 638 (1858) ("I have no doubt of the [constitutional] power of the legislature to investigate the matters named in the joint resolutions."); *Mason's Manual of Legislative Procedure* (Denver, CO: NCSL, 2020), Sec. 795 (1) ("[The] right of a legislative body to make investigations in order to assist it in the preparation of wise and timely laws must exist as an indispensable incident and auxiliary to the proper exercise of legislative power.") *Mason's Manual* is the primary authority on legislative parliamentary procedures in the states.

³ *In re Falvey*, 7 Wis. at 638.

The legislature's inherent investigative power "carries with it the power in proper cases to compel the attendance of witnesses and the production of books and papers by means of legal process."⁴

Rules governing the issuance of legislative subpoenas in Wisconsin

In Wisconsin, the rules governing legislative subpoenas are largely established by statute.⁵ Any subpoena issued in connection with a legislative investigation must be signed by the presiding officer and the chief clerk of the house, in this case, the assembly.⁶ The "presiding officer" is the representative who opens and presides over the daily sessions of the assembly.⁷ The presiding officer in the assembly is almost always the speaker or the speaker pro tempore, but the presiding officer may also be the majority leader or his or her designee, for example, if the speaker and speaker pro tempore are temporarily absent.⁸

A legislative subpoena may be issued to compel the testimony of any witness or the production of documents and other records.⁹ Additionally, a legislative subpoena "may require such attendance forthwith or on a future day," may be served by any person, and must be returned to the chief clerk in the same manner as subpoenas from the circuit court are served and returned.¹⁰

The subpoena itself must state "when and where, and before whom, the witness is required to appear" and may designate the "books, records, documents and papers" that must be produced. Finally, subpoenaed witnesses appearing before a committee receive as compensation "\$2 for each day's attendance and 10 cents per mile, one way, for travel to attend as such witness."¹¹

Witness immunity

Wis. Stat. § 13.35 provides use immunity to any person compelled to testify or produce documents before a house or committee of the legislature. Specifically, no testimony the person gives nor document or other record the person produces "shall be competent testimony or be used in any trial or criminal proceeding against such person in any court."¹² Wis. Stat. § 13.35 also on its face provides immunity from prosecution "for any fact or act touching which the person is required to testify,"¹³ but Wis. Stat. § 972.085 limits immunity from liability under

⁴ *Mason's Manual*, *supra* note 2, Sec. 795 (5). See also *In re Falvey*, 7 Wis. at 641-42 (upholding confinement for failure to appear pursuant to a legislative subpoena). With respect to the enforcement of legislative subpoenas, see Wis. Stat. §§ 13.32 to 13.34, as well as Wis. Stat. §§ 13.26 (1) (c) (contempt for refusal to testify or produce documents) and 13.27 (punishment for contempt).

⁵ See Wis. Stat. §§ 13.31 to 13.36.

⁶ Wis. Stat. § 13.31.

⁷ Assembly Rules 3m (1) (a) and 95 (57m).

⁸ Assembly Rule 4. Assembly Rule 4 provides a complete line of succession in the event of temporary absences of officers and certain members.

⁹ Wis. Stat. § 13.31.

¹⁰ *Id.* See also Wis. Stat. § 885.03 ("Any subpoena may be served by any person by exhibiting and reading it to the witness, or by giving the witness a copy thereof, or by leaving such copy at the witness's abode.").

¹¹ Wis. Stat. § 13.36.

¹² Wis. Stat. § 13.35 (1).

¹³ *Id.*

Wis. Stat. § 13.35, as well as under numerous other statutes, to “immunity only from the use of the compelled testimony or evidence in subsequent criminal or forfeiture proceedings, as well as immunity from the use of evidence derived from that compelled testimony or evidence.”

Nevertheless, a person compelled to testify before a house or committee of the legislature may be prosecuted for committing perjury in giving such testimony and may not refuse to testify or produce subpoenaed documents on the grounds that the testimony or documents “may tend to disgrace the person or otherwise render the person infamous.”¹⁴

Conclusion

The legislature has inherent power to conduct investigations in connection with its lawmaking function and to undertake certain actions in carrying out those investigations, including issuing subpoenas to compel testimony and the production of documents. Additionally, the Wisconsin Statutes establish rules governing legislative subpoenas in Wisconsin and provide use immunity to witnesses who are compelled to testify or produce documents in a legislative investigation, such as the Election Committee's investigation into the conduct of recent elections in this state.

I hope this information is helpful. Please let me know if the LRB can provide any additional assistance.

¹⁴ In the absence of immunity from prosecution, the Fifth Amendment right against self-incrimination very likely still applies to witnesses subpoenaed to testify before a committee or house of the legislature.

FILED

NOV 29 2021

CIRCUIT COURT
WAUKESHA, COUNTY, WI

EXHIBIT C

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TO: Speaker Robin Vos

FROM: Rick Champagne, chief
Michael Gallagher, senior coordinating attorney
Sarah Walkenhorst Barber, senior legislative attorney

DATE: August 5, 2021

SUBJECT: Legislative committee investigation process

On March 23, 2021, the Wisconsin State Assembly directed the Assembly Committee on Campaigns and Elections (Elections Committee) to “investigate the administration of elections in Wisconsin, focusing in particular on elections conducted after January 1, 2019.”¹ On May 21, 2021, the Committee on Assembly Organization adopted a motion authorizing the assembly speaker, on behalf of the assembly, to hire legal counsel and employ investigators to assist the Elections Committee in its investigation. Speaker Robin Vos retained former Supreme Court Justice Michael Gableman to assist the Elections Committee in its investigation, eventually assigning him the role of special counsel.

You have asked us to discuss the process for conducting a legislative committee investigation. It has been more than half a century since the state legislature last employed a full-fledged committee investigation of this kind.² Neither the Wisconsin Statutes nor the assembly rules provide a comprehensive process for conducting a legislative investigation—there is no road map. To be sure, there are constraints on committee investigations that we will discuss in this memorandum. These constraints relate to the issuance and enforcement of subpoenas, the application of Wisconsin’s open meetings law to legislative committee hearings, and the privileges and constitutional rights of witnesses.

However, it is equally important to note that the legislature’s power to conduct investigations is coextensive with its power to legislate, which is plenary. Committee investigations are essential for the lawmaking process and for the legislature to carry out its oversight duties. The power to conduct investigations includes the power to determine the scope and manner of investigations. So long as the legislature acts within the boundaries of the legal constraints on the conduct of

¹ 2021 Wis. AR 15, as shown by ASA 2.

² See Goldman v. Olson, 286 F. Supp. 35 (W.D. Wis. 1968).

investigations, the legislature may establish whatever process it considers most efficacious to achieve its legislative goals.

Broad legislative power to conduct investigations

The Wisconsin State Legislature's legislative power is plenary, limited only by the Wisconsin Constitution, the United States Constitution, and, under the supremacy clause, federal law.³ That plenary power includes broad authority to conduct investigations as the legislature sees fit in the furtherance of its legislative functions. Investigations allow the legislature to determine the necessity for new or amended laws, as well as provide for checks and balances over the actions of other branches of state government.

It is well established that the state legislature has inherent and "broad discretionary power to investigate any subject respecting which it may desire information in aid of the proper discharge of its function to make or unmake written laws, or perform any other act delegated to it by the fundamental law, state or national."⁴ Without the ability to investigate or conduct hearings on proposed legislation, the legislature may not have the information necessary to carry out its constitutional obligations. Legislative investigations of one sort or another are the precursor for informed legislation. For that reason, the state legislature has "a constitutional right" to conduct investigations.⁵

Additionally, "the manner of conducting [a legislative] investigation, rests . . . entirely in the sound discretion of the legislature."⁶ As the Wisconsin Supreme Court reasoned in its early years, in 1858: "For if the legislature have the power to investigate at all, it has the power of choosing how the investigation shall be had."⁷ Once the legislature has decided on the necessity of an investigation, it is within its core constitutional powers for the legislature to determine how the investigation would be conducted. As the Wisconsin Supreme Court further noted, a legislative investigation may be carried out "by a joint committee, or by a committee of either or both houses acting independently, or . . . *in any other manner which to [the legislature] might seem most convenient and proper.*"⁸ Finally, the Wisconsin Supreme Court has repeatedly stated—most recently in 2019—that it "will not, under separation of powers concepts and affording the comity and respect due a co-equal branch of state government, interfere with the

³ See State ex rel. McCormack v. Foley, 18 Wis. 2d 274, 277 (1962) ("The framers of the Wisconsin Constitution vested the legislative power of the state in a senate and assembly. The exercise of such power is subject only to the limitation and restraints imposed by the Wisconsin Constitution and the Constitution and laws of the United States."); Libertarian Party v. State, 199 Wis. 2d 790, 801 (1996) ("Our legislature has plenary power except where forbidden to act by the Wisconsin Constitution."); Town of Beloit v. County of Rock, 2003 WI 8, ¶ 23 ("The Legislature has plenary power to act except where forbidden by the Wisconsin Constitution.")

⁴ Goldman, 286 F. Supp. at 43 (quoting State ex rel. Rosenhein v. Frear, 138 Wis. 173, 176–77 (1909)).

⁵ In re Fulvey, 7 Wis. 630, 638 (1858).

⁶ In re Fulvey, 7 Wis. at 638.

⁷ *Id.*

⁸ *Id.* (emphasis added).

conduct of legislative affairs.”⁹ Investigations are essential legislative affairs. For this reason, the court’s noninterference doctrine applies to the manner in which the legislature chooses to conduct its investigations. The legislature determines the process for conducting its investigations.

General process governing legislative committee investigations

2021 Assembly Resolution 15 directs the Elections Committee to investigate the administration of Wisconsin elections, focusing in particular on elections held after January 1, 2019. The resolution does not establish a process or set constraints for the Elections Committee to conduct its investigation. Assembly rules also do not specify how committee investigations are to be conducted, other than that the speaker must issue subpoenas with the countersignature of the assembly chief clerk.¹⁰ Moreover, the Wisconsin Statutes do not lay out a process for committee investigations, except with respect primarily to the issuance and enforcement of subpoenas, as discussed further below.¹¹ For these reasons, the Elections Committee determines the ground rules for the conduct of committee proceedings, including investigations, subject only to applicable law and legislative rules.

The Wisconsin Legislature has a committee system characterized by strong committee chairpersons. Committees typically meet at the call of their chairpersons and conduct committee proceedings as directed by the committee chairperson, who may set committee procedures by directive or may allow the committee by majority vote to set its procedures. If the Elections Committee chairperson establishes the procedures for conducting the committee investigation by directive, the chairperson may decide when the committee will convene, how committee members may participate in the proceedings, and who will be required or invited to testify before the committee.

The Elections Committee chairperson may request special counsel to take actions all necessary for the committee to conduct its investigation, including taking depositions or questioning witnesses before the full committee when it meets. With respect to depositions, it should be noted that it is contempt for a person to refuse “to attend or be examined as a witness, either before the house or a committee, *or before any person authorized to take testimony in legislative proceedings.*”¹² Pursuant to Committee on Assembly Organization action, the special counsel is retained by the speaker on behalf of the entire assembly. Because the speaker must approve all contractual arrangements with the special counsel, which includes issues relating to the scope of representation, the manner in which the special counsel assists the committee is determined entirely by the speaker. The speaker determines the types of legal and investigatory services the

⁹ League of Women Voters of Wis. v. Evers, 2019 WI 75, ¶ 36 (quoting State ex rel. La Follette v. Stitt, 114 Wis. 2d 358, 368 (1983)).

¹⁰ Assembly Rule 3 (1) (o).

¹¹ This is in contrast to some states, such as Maine, whose statutes establish rules and procedures governing a legislative committee’s investigative process and questioning of witnesses. See Me. Rev. Stat. tit. 3, ch. 21.

¹² Wis. Stat. § 13.26 (1) (c) (emphasis added).

special counsel will provide the committee, as well as the powers the special counsel possesses to conduct the investigation. The committee chairperson may determine the role of special counsel at committee proceedings.

Compelling the testimony of witnesses and production of documents

According to *Mason's Manual of Legislative Procedure*, a legislature's investigation power "carries with it the power in proper cases to compel the attendance of witnesses and the production of books and papers by means of legal process."¹³ Without the right to require the participation of witnesses and the production of documents, a legislature would be unable to conduct a proper and complete investigation. In Wisconsin, the process for issuing and enforcing legislative subpoenas is established by statute.¹⁴ A subpoena issued in connection with a legislative investigation must be signed by the presiding officer—in the assembly, the speaker—and countersigned by the chief clerk of the house.¹⁵

A legislative subpoena may be issued to compel the testimony of any witness or the production of documents and other records.¹⁶ A legislative subpoena "may require such attendance forthwith or on a future day," may be served by any person, and must be returned to the chief clerk in the same manner as subpoenas from the circuit court are served and returned.¹⁷ There is no standard form for legislative subpoenas. However, at the very least, a legislative subpoena must state "when and where, and before whom, the witness is required to appear" and may designate the "books, records, documents and papers" that must be produced.¹⁸ In this respect, the subpoena must inform the recipient of the subject of the investigation.

Legislative subpoenas may be enforced in several ways. First, "summary process" may be issued for witnesses refusing to testify or produce documents.¹⁹ The summary process must be signed by the presiding officer and the chief clerk of the house issuing the subpoena and directed to the sergeant at arms, "commanding the sergeant at arms 'in the name of the state of Wisconsin' to take the body of the person so failing to attend, naming that person, and bring the person forthwith before the house whose subpoena the person disobeyed."²⁰ The person may be held in custody until he or she complies with the subpoena.²¹

¹³ *Mason's Manual of Legislative Procedure* (Denver: NCSL, 2020), Sec. 795 (5). See also *In re Falvey*, 7 Wis. at 641–42 (upholding confinement for failure to appear pursuant to a legislative subpoena).

¹⁴ See Wis. Stat. §§ 13.31 to 13.36.

¹⁵ Wis. Stat. § 13.31. Also, see Assembly Rule 3 (1) (o).

¹⁶ *Id.*

¹⁷ *Id.* See also Wis. Stat. § 885.03 ("Any subpoena may be served by any person by exhibiting and reading it to the witness, or by giving the witness a copy thereof, or by leaving such copy at the witness's abode.").

¹⁸ Wis. Stat. § 13.31. Additionally, subpoenaed witnesses receive as compensation "\$2 for each day's attendance and 10 cents per mile, one way, for travel to attend as such witness." Wis. Stat. § 13.36.

¹⁹ Wis. Stat. § 13.32 (1).

²⁰ Wis. Stat. § 13.32 (2). See also Wis. Stat. § 13.33 with respect to enforcing the summary process.

²¹ Wis. Stat. § 13.32 (2).

A person who refuses to testify or produce documents may also be held in contempt. In that case, the committee chairperson certifies the witness's refusal to the house.²² Upon certification, the person refusing to testify or produce documents may be taken by the sergeant at arms or his or her assistant before the house "to be dealt with according to law."²³

Alternatively, and the most likely course of action for enforcing a legislative subpoena, a legislative subpoena may be enforced in state court pursuant to Wis. Stat. § 885.12, which provides:

If any person, without reasonable excuse, fails to attend as a witness, or to testify as lawfully required before any . . . committee, or other officer or person authorized to take testimony, or to produce a book or paper which the person was lawfully directed to bring, or to subscribe the person's deposition when correctly reduced to writing, any judge of a court of record or a circuit court commissioner in the county where the person was obliged to attend may, upon sworn proof of the facts, issue an attachment for the person, and unless the person shall purge the contempt and go and testify or do such other act as required by law, may commit the person to close confinement in the county jail until the person shall so testify or do such act, or be discharged according to law. The sheriff of the county shall execute the commitment.²⁴

It should also be noted that in lieu of or before resorting to the issuance of a legislative subpoena to a person or for the production of documents, special counsel could seek to conduct informal interviews of witnesses or make informal requests for documents. These would be fact finding activities in which special counsel seeks to determine if witness testimony is important for the committee investigation or if documents in possession of witnesses would assist the committee. These interviews need not be conducted under oath. Additionally, Wisconsin's public records law provides another avenue for requesting the production of records pertinent to the Elections Committee's investigation.²⁵

Open meetings

Wisconsin's open meetings law generally applies to meetings of legislative committees, including meetings at which witnesses testify in the course of a committee's investigation. Such meetings must be preceded by public notice and, unless otherwise provided in assembly or joint rules or one of the exemptions in Wis. Stat. § 19.85 (1) applies, must be held in open session.²⁶ The requirements governing the content, timing, and publication of a public meeting notice are

²² Wis. Stat. § 13.34.

²³ *Id.* See also Wis. Stat. §§ 13.26 (1) (c) (contempt for refusal to testify or produce documents) and 13.27 (punishment for contempt).

²⁴ See also 20 Wis. Op Att'y. Gen. 765, a 1931 attorney general opinion in which the attorney general states that Wis. Stat. § 885.12 (then Wis. Stat. § 325.12) provides a means of enforcing a legislative subpoena.

²⁵ See Wis. Stat. §§ 19.31 to 19.39.

²⁶ Wis. Stat. § 19.83 (1). Also, see Wis. Stat. § 19.87 (2).

provided under Wis. Stat. § 19.84. Conducting a meeting in open session means the meeting is “held in a place reasonably accessible to members of the public and open to all citizens at all times.”²⁷ Importantly, the open meetings law would not apply to depositions taken by the special counsel on behalf of the Elections Committee, provided that at least half of the members of the committee are not also present at the deposition.²⁸

Due process and other witness rights

When the legislature conducts an investigation, including subpoenaing witnesses to provide mandatory testimony, those witnesses have been found to be entitled to certain due process and other rights. The United States Supreme Court has recognized the duty of citizens to cooperate with Congress and state legislatures in investigations but noted that, with that obligation, there is an assumption “that the constitutional rights of witnesses will be respected” by the investigating body “as they are in a court of justice.”²⁹

A witness in the context of a legislative investigation is not entitled to all rights due to a criminal defendant. For example, the witness does not have any right to compel attendance of or cross-examine witnesses. However, witnesses do retain individual constitutional rights in the context of legislative investigations³⁰ and courts have expressly upheld certain rights of witnesses in that context: “Witnesses cannot be compelled to give evidence against themselves. They cannot be subjected to unreasonable search and seizure. Nor can the First Amendment freedoms of speech, press, religion, or political belief and association be abridged.”³¹

There is relatively little reported case law on Wisconsin legislative investigations and the rights of witnesses who appear before committees. Federal courts have opined more frequently on this issue, usually involving actions of congressional committees. The principles established in these cases with respect to witness rights in congressional committee investigations are applicable to committee investigations in Wisconsin.

Due Process

Under the Fourteenth Amendment to the United States Constitution, the state may not “deprive any person of life, liberty, or property, without due process of law.” While the legislative investigative authority is broad and includes the authority to hold a party in contempt for failure to comply with a subpoena, there are limitations to the investigative authority and power to compel a witness based on due process. It has been held, for example, that punishing a witness

²⁷ Wis. Stat. § 19.82 (3).

²⁸ Wis. Stat. § 19.82 (2). See also State ex rel. Newspapers, Inc. v. Showers, 135 Wis. 2d 77, 102 (1987) (holding that open meetings requirements apply whenever members of a governmental body gather with the purpose to engage in governmental business and the number of members present is sufficient to determine the governmental body’s course of action).

²⁹ Watkins v. United States, 354 U.S. 178, 187–88 (1957).

³⁰ Trump v. Mazars USA, 140 S. Ct. 2019, 2032 (2020) (“[R]ecipients of legislative subpoenas retain their constitutional rights throughout the course of an investigation”); Quinn v. United States, 349 U.S. 155, 161 (1955) (“[F]urther limitations on the power to investigate are found in the specific individual guarantees of the *Bill of Rights*.”).

³¹ Watkins at 188.

for contempt if the witness declines to cooperate with a request for information that is beyond the scope of the authorized investigation would violate due process.³² In examining a Wisconsin legislative investigation, the United States District Court for the Western District of Wisconsin held that although the Wisconsin Statutes do not contain any express provision “that punishment for contempt may be visited upon a witness only if the question which he refuses to answer is pertinent to the question under inquiry,” such a requirement “must be implied to save the contempt statutes from unconstitutionality” and would otherwise violate due process.³³

Parties seeking information through a legislative investigation must provide some clarity and fair warning to a witness about what is expected or risk that the witness may have a claim for violation of due process.³⁴ Further, while it is clear that a legislature may exercise the power to punish contemptuous conduct, if the legislature seeks to punish a person for contempt, that person must be afforded notice and an opportunity to respond before such punishment is imposed.³⁵

First Amendment

First Amendment freedoms also have been found applicable in the legislative investigation context. In order to invade these freedoms, there must be a substantial connection or “nexus” between the information sought and a subject of “subordinating, overriding, and compelling state interest.”³⁶ Clearly, the administration of state elections would be such an interest. In one United States Supreme Court case, for example, the court found that the applicable committee did not lay an adequate foundation for demanding records of a legitimate organization’s membership and that, as a result, its demands infringed upon the witnesses’ First and Fourteenth Amendments freedoms of association under the Constitution.³⁷ When a governmental entity is compelling disclosure of information, the Supreme Court has imposed “exacting scrutiny” and required that “[t]o withstand this scrutiny, the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.”³⁸

Fourth Amendment

³² *Goldman*, 286 F. Supp. at 44.

³³ *Id.*

³⁴ *Raley v. Ohio*, 360 U.S. 423, 438 (1959) (“A State may not issue commands to its citizens, under criminal sanctions, in language so vague and undefined as to afford no fair warning of what conduct might transgress them.”).

³⁵ *Groppi v. Leslie*, 404 U.S. 496, 499–500, 507 (1972).

³⁶ *Goldman*, 286 F. Supp. at 46. See also *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 538, 543–44, 545, 546, 551, 555 (1963) (“[I]t is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition that the State convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest.”); see also *Kalkstein v. DiNapoli*, 228 A.D.2d 28, 30–31, 653 N.Y.S.2d 710, 712 (App. Div. 1997) (“When such [a First Amendment] right is implicated, the government’s quest for information is precluded unless it shows ‘that there are governmental interests sufficiently important to outweigh the possibility of infringement [of First Amendment rights].’”)

³⁷ *Gibson*, 372 U.S. at 557–58.

³⁸ *Ams. for Prosperity Found. v. Bonta*, 210 L. Ed. 2d 716, 727, 141 S. Ct. 2373 (2021) (quoting *Doe v. Reed*, 561 U.S. 186, 196 (2010)).

A legislative investigation could affect a witness's Fourth Amendment right against an unreasonable search and seizure if a subpoena is too general or unreasonably broad. The scope of the information sought in a legislative investigation is subject to a balancing of the interests of the legislature versus the interest of the witness in maintaining privacy. For example, in one case examining the compelled disclosure of a United States senator's personal diaries in the context of an ethics investigation, a federal district court found that the court "must . . . balance Senator Packwood's expectation of privacy in his personal diaries against the Ethics Committee's interest in examining them for evidence of misconduct, and the nature of the scrutiny it proposes to give them."³⁹ The court found that the procedural protections offered by the committee were sufficient to alleviate any Fourth Amendment concerns.⁴⁰

For this reason, if a committee issues an overbroad or general subpoena, the Fourth Amendment could be available as a defense if the witness refuses to produce the subpoenaed material.⁴¹ If the subpoena clearly relates to the subject of the committee investigation, Fourth Amendment concerns are less likely to present an obstacle to the investigation.

Fifth Amendment

The Fifth Amendment guarantees a person's right against self-incrimination: "[N]or shall any person . . . be compelled in any criminal case to be a witness against himself."⁴² The invocation of the privilege against self-incrimination has been upheld in the legislative investigation context but is available only to natural persons, not to corporations or unincorporated organizations.⁴³ A witness is not excused from testifying before the committee on the grounds that doing so would incriminate the person. The witness must affirmatively assert the privilege, although there is not "ritualistic formula" necessary for invoking the privilege.⁴⁴ A witness may waive the privilege, including by disclosure of facts or a statement that an admission would not subject the person to criminal prosecution.⁴⁵ A witness may not be held in contempt merely because that witness invokes the privilege against self-incrimination.⁴⁶ In order to compel testimony from a witness pleading Fifth Amendment privileges, the legislative body must provide the witness with immunity.⁴⁷ Wis. Stats. s. 13.35 provides for this immunity.

³⁹ *Senate Select Comm. on Ethics v. Packwood*, 845 F. Supp. 17, 22 (D.D.C.1994).

⁴⁰ *Id.* at 22. Indeed, comparing the required disclosure to disclosures previously required from former President Nixon, the court stated: "It would be presumptuous for this Court to find the Ethics Committee's procedure to represent an 'unreasonable' search when the Supreme Court and its own Circuit Court of Appeals have sustained a more extensive and intrusive examination of similar private papers and recordings of a former president in the vindication of a governmental interest in the 'historical' legacy of the nation, surely no more compelling than that of preserving the probity of the United States Senate in the public's perception and in fact." *Id.*

⁴¹ *The Rights of a Witness Before a Congressional Committee*, 29 Fordham L. Rev. 357, 360 (61 (1960) ("[I]f a committee employs a dragnet seizure of private papers, with the hope that something might turn up, or issues a subpoena duces tecum which lacks particularity, or subpoenas papers without legislative authority, the [Fourth] amendment will be available as a defense.").

⁴² U.S. Const. amend. V.

⁴³ *Rogers v. United States*, 340 U.S. 367, 371-72 (1951); *United States v. Murdock*, 284 U.S. 141, 148 (1931).

⁴⁴ *Quinn*, 349 U.S. at 170.

⁴⁵ *The Rights of a Witness Before a Congressional Committee*, 29 Fordham L. Rev. 357, 364-65 (1960).

⁴⁶ Roberto Iraola, *Self-Incrimination and Congressional Hearings*, 54 Mercer L. Rev. 939, 95556 (2003)

⁴⁷ *Id.*

Privileges and the right to counsel

Finally, witnesses may also retain certain privileges. The United States Supreme Court, for instance, has recently stated that in the context of legislative investigations, “recipients have long been understood to retain common law and constitutional privileges with respect to certain materials, such as attorney-client communications and governmental communications protected by executive privilege.”⁴⁸ In legislative investigations, witnesses may be able to withhold certain communications.

It is important to note that the Sixth Amendment to the United States Constitution provides the right to have the assistance of counsel for defense in all criminal prosecutions.⁴⁹ Because legislative investigations are not criminal prosecutions, that right to counsel does not apply. That said, in practice, witnesses are often allowed to have counsel attend to advise, and some states do provide by statute for a right to counsel in the investigation context.⁵⁰ Wisconsin does not have such a statute.

Conclusion

Committee investigations are an integral part of the legislative process. Legislative committees may conduct investigations at their own initiative or as directed by the full house.⁵¹ The full assembly, through adoption of 2021 Assembly Resolution 15, directed the Elections Committee to investigate the administration of state elections, pursuant to the legislature’s constitutional duty “to make laws and to exercise its oversight and investigative authority.” The Committee on Assembly Organization subsequently authorized the retention of special counsel to assist the Elections Committee in this investigation.

The special counsel’s authority is established and circumscribed by the speaker, acting on behalf of the assembly. The special counsel may investigate any matter covered by 2021 Assembly Resolution 15 and may do so through informal interviews and requests for documents and through the issuance of legislative subpoenas signed by the speaker and the assembly chief clerk. In assisting the Elections Committee in conducting the investigation, the special counsel must provide competent and timely legal services and seek to gather evidence for determining whether state elections, in particular since January 1, 2019, have been conducted in compliance with Wisconsin law.

The Wisconsin Statutes and legislative rules do not prescribe a committee investigative process. How the Elections Committee will proceed and conduct the investigation is a matter within the authority of the committee chairperson. The chairperson will determine when the committee meets, how committee members will participate in the proceedings, and which witnesses will be required or invited to appear before the committee. Throughout the investigation process, the

⁴⁸ *Trump*, 140 S. Ct. at 2032.

⁴⁹ U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”).

⁵⁰ *See, e.g.*, Haw. Rev. Stat. § 21-11.

⁵¹ Joint Rule 84 (s) and Wis. Stat. § 13.31.

chairperson must ensure that the investigation is conducted according to law and that the due process and other constitutional rights of witnesses are protected.

We hope this information is helpful. Please let us know if the LRB can provide any additional assistance.

STATE OF WISCONSIN

CIRCUIT COURT

WAUKESHA COUNTY
2021GF000605

MICHAEL J. GABLEMAN, IN HIS OFFICIAL CAPACITY AS SPECIAL COUNSEL TO THE WISCONSIN ASSEMBLY,
EX REL. WISCONSIN STATE ASSEMBLY,

Petitioner

v.

Case No.: 2021AFW05

ERIC GENRICH, PERSONALLY, AND IN HIS OFFICIAL CAPACITY
AS MAYOR OF GREEN BAY, WISCONSIN,

Respondent

WRIT OF ATTACHMENT OF THE PERSON

THE STATE OF WISCONSIN, to the person named above as Respondent:

You are hereby notified that pursuant to Wisconsin Statutes § 13.31 and Wisconsin Statutes § 885.12, the Petitioner named above has filed a verified complaint with this Court attesting that you are noncompliant with a valid legislative subpoena.

Within 45 days of receiving this notice, you must produce the documents and testimony as required by law.

Dated this ____ day of _____, 2021.

WITNESS MY HAND AND SEAL

Circuit Court Judge

STATE OF WISCONSIN

CIRCUIT COURT

WAUKESHA COUNTY

FILED

11-30-2021

Clerk of Circuit Court

Waukesha County

2021GF000605

Group File of Michael J. Gableman

Notice of Hearing

Case No: 2021GF000605

COURT ORIGINAL

This case is scheduled for: **Hearing**

Date 12-22-2021	Time 09:00 am	Location Courtroom C267
Circuit Court Judge/Circuit Court Commissioner Ralph M. Ramirez		515 West Moreland Boulevard P.O. Box 1627 Waukesha WI 53187-1627

This matter will not be adjourned by the court except upon formal motion for good cause or with the specific approval of the court upon stipulation by all parties.

IT IS MANDATORY THAT ALL ATTORNEYS APPEAR IN PERSON.

****PETITIONER IS REQUIRED TO NOTIFY RESPONDENT(S) OF THE HEARING.****

For further information, please call Nicole, Legal Clerk for Branch 3, at (262) 548-7543. Please dress appropriately for court proceedings. Failure to appear at the above-entitled hearing may result in judgment being taken against you.

All adjournment requests and requests to cancel hearings must be made in writing.

If you require reasonable accommodations due to a disability to participate in the court process, please call prior to the scheduled court date. Please note that the court does not provide transportation.

Waukesha County Circuit Court
Date: November 30, 2021

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Michael J. Gableman

P.O. Box 510766, as Special Counsel to the Wisconsin Assembly, New Berlin,
WI 53151

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