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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, 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.