

“Men must be aggressive for what is right if government is to be saved from men who are aggressive for what is wrong.” - Robert LaFollette, former Governor of Wisconsin

Elections in the United States are the bedrock of our representative democracy. Elections in our state of Wisconsin are subject to law, including the fundamental law of the State, the Constitution of Wisconsin, and the Constitution of the United States. These laws are complicated, and fair elections are not a mere checkbox exercise. To secure republican government it is important not just that the law is followed, but that all citizens have confidence that the law is followed. In the run up to the election of November 3, 2020, polling showed that a majority of Americans did not have confidence that their vote would count. In a democracy, this is unacceptable. To help alleviate these justified fears on the part of so many Americans, and so many Wisconsinites, the state Assembly saw fit to establish a new office, the Office of the Special Counsel, to investigate the November 2020 election in our state. As head of this new office, I am authorized by state law to take all reasonable steps to investigate what happened in November 2020, what should have happened, why there was a difference between the two, and to recommend steps to secure our democracy going forward.

This interim report is a first step in discharging that mission.

While this report does not definitively answer all questions that might be asked about the November 2020 election, it takes an important step in collating those questions and presenting them in a structured manner. Over the roughly 60 days my office has been funded, we have spoken with, and listened to, everyone who has wanted to talk. This open-door policy will remain throughout the entirety of this investigation, and any future investigation the office is charged with investigating. While we have drawn some criticism from those in the media who would suggest that my discussions with various individuals or groups implies an endorsement of their views, this is not the case. But I do not apologize for this open-door policy: the views of all Wisconsinites matter, and sidelining or even laughing at serious concerns of any citizen of this state would call into question whatever results my investigation comes to.

In the short time the Office of the Special Counsel has been funded, we have not only met with many individuals and groups, but we have collected, and in some cases compelled by law, the production of, relevant information. Further, our investigation has gone beyond, and will

continue to go beyond, the investigation conducted by the Legislative Audit Bureau (LAB). One purpose of this interim report is to lay out for the public how the OSC investigation differs from the LAB investigation.

Notwithstanding lawsuits and threats of lawsuits supported by high-priced, out-of-state lawyers, my office expects to depose governmental officials, under oath, to determine whether state and federal law were followed in the November 2020 election, whether good management held, and if not, who might have been responsible. We stand prepared to refer all relevant information to appropriate state and federal law enforcement authorities, if necessary. The wagon-circling by possible bad actors in our state is concerning, and is not limited to my investigation: the City of Madison, the City of Milwaukee, and the town of Little Suamico all refused to fully cooperate even with the LAB investigation, cooperation which our legislature and the people are entitled to by our State Constitution.

Make no mistake: I sincerely hope the law was followed in Wisconsin. It would give me the greatest satisfaction to deliver to the speaker of the Assembly and to the public a final report which analyzes the November 2020 election in a complete and thorough manner, and which comes to the conclusion that no major overhaul of our laws or practice are necessary, and that everything happened on the up-and-up. And yet, as the following interim report demonstrates, many questions are as-yet unanswered. Among these questions: were all lawful votes, and only lawful votes, counted? Did the machines work as advertised? Were all election processes followed to the letter? Did clerks and other election officials have all the tools they needed to deal with the unprecedented challenges posed by the COVID lockdowns and by historic (and likely never to be repeated) levels of absentee voting? Did outside corporate money unduly influence the election? And above all: what changes can the state of Wisconsin make to ensure that our future elections are secure, and more importantly, widely known to be secure?

In the coming weeks, this investigation will continue to collect and analyze information about the November 2020 election, because the public has a right to know what happened. I have no partisan agenda: I am running for no office, and I do not believe there is any lawful remedy in the state of Wisconsin to change the certification of its electors from our current President Joe Biden to former President Donald Trump. Furthermore, I do not come with any preconceived answers to any questions. Why were so many voter registrations at a single address? Why were so many voter registrations given under a single phone number? Why was there a "blip" at 4

a.m. in the reported statewide returns the morning after the election? All of these questions may have innocent explanations.

In fact, in the many discussions I and my office have had with the many fine public servants in the state of Wisconsin, I have learned that complicated questions may have simple answers. But many complicated questions deserve honest, but complicated answers, that take time to process and report. So I ask each reader of this interim report to take this as a jumping-off point for learning about how our democracy in the state of Wisconsin works. And again, please reach out to my office if you have any information of relevance. Your voice matters.

Michael J. Gableman

Special Counsel

What is the OSC Investigation?

November 3, 2020 was election day nationwide, and was, in our State of Wisconsin, the culmination of months of work by dedicated election workers and volunteers. It was a monumental and expensive undertaking that is critical to our representative democracy in the state. However, it is beyond debate that questions remain about the integrity of that election. In discharging its duty under both the Federal and State Constitutions, the Wisconsin General Assembly saw fit, on June 26, 2021, to appoint a Special Counsel and to subsequently establish a permanent Office of the Special Counsel to investigate the election, to make findings, and to report those findings and other recommendations to the Assembly. This report comprises a first step in fulfilling that duty.

The Office of the Special Counsel is an authorized governmental agency of the State of Wisconsin, and its employees, including and especially the Special Counsel himself, take care to abide by all applicable state and federal laws, including open records laws and regulations relating to the practice of law, and to abide by the highest ethical standards to maintain a commitment to transparency, inclusion, and accountability. As such, the Office has established various internal policies and continues to maintain records, and commits to full disclosure of all public records upon the conclusion of the present investigation.

To-date, the Office has already collected and reviewed thousands of governmental and other documents, and interviewed numerous governmental and other witnesses, and will continue to do so until the conclusion of the present investigation. The Office has been allocated a modest budget, and has relied heavily upon volunteers and input by citizens' groups: the vast majority of the Office budget, while allocated, has not been spent, with the single greatest expense thus far being office space.

The Office may be reached by [mail / phone]. As noted below, testimony compelled by this Office bears with it the promise, mandated by Wisconsin law, that any information we collect may not be used in a criminal proceeding against the individual that provided it. This Office already has been in contact with certain whistleblowers and commits to taking all steps to protect the interests of those and future whistleblowers.

Constitutional Background

Pursuant to the federal Constitution, Article I, Section 4, it is state legislatures who are authorized to set “The Times, Places and Manner of holding Elections for Senators and Representatives...” And the Supreme Court of the United States has clarified that this means that in our state the Wisconsin legislature bears primary responsibility for establishing rules regarding things like voter registration, poll watching, penalties, ballot counting, and certification. This primacy of the state legislature is ratified by the Wisconsin Constitution as well, which in Article IV, Section 1 declares that “The legislative power shall be vested in a senate and assembly.” Whether this means that the state Assembly and Senate may, by Joint Resolution, tighten up or loosen election security for federal elections, and whether there are limits on how much of this constitutional responsibility can and should be delegated to other state actors (such as the Wisconsin Elections Commission), is an open question in state law.

It remains beyond debate, however, that both the Federal and Wisconsin Constitutions contemplate broad authority for the state legislature in administering federal elections, and plenary authority for the state legislature in administering its own state elections. This background principle is absolute, limited only by certain, enumerated constitutional guarantees of a republican form of government, and guarantees against discrimination.

This absolute authority brings with it the legislative prerogative to gather information, debate bills, and pass laws. In discharging these duties the legislature has authority to conduct oversight, including the ability to compel production of documents, and to compel testimony. Under Wis. Statutes § 885, the legislature has the authority to subpoena information from individuals. Because this legislative subpoena is a part of common law legislative authority--that without access to all available information a legislature cannot properly legislate--and because this subpoena does not directly tie into or contemplate criminal proceedings, criminal due process rights are not ordinarily implicated. Furthermore, the legislative subpoena process is governed by § 13.35, which expressly provides that documents and testimony provided by a witness pursuant to a subpoena cannot “be used in any trial or criminal proceeding against such person in court.”

This office has, to-date, issued seventeen subpoenas for documents and testimony for governmental information from sitting governmental officials, and has obtained some voluntary compliance. These subpoenas, properly issued pursuant to and in furtherance of the legislature's core oversight function, have nevertheless been attacked in the media, and are subject to pending litigation and threats of litigation, and have involved nationwide attention and the pro bono work of out-of-state attorneys. Given non-compliance with the Legislative Audit Bureau (LAB) investigation and the plenary authority of the legislature, the Assembly and this Office are currently jointly defending these subpoenas. The legislature, and the public, have a right to all available information about the 2020 election in Wisconsin.

The LAB, established in 1971, is authorized by Wisconsin statutes to "conduct[] postaudits of the accounts and other financial records of departments to assure that all financial transactions have been made in a legal and proper manner." Wis. Statutes § 13.94(1). This agency has a large staff and a history of working with all state instrumentalities, but its relatively narrow mission is to ensure that taxpayer money is well-spent. Its recent report notes up-front that it is concerned with "audits and evaluations of public finances and the management of public programs." As such, its interest is not in addressing public concerns, nor the concerns of the full legislature, but of responding to directed audits of the "records of each department" of the state of Wisconsin. It is accordingly not granted authority to request subpoenas, although it does have broad authorization to access governmental data. Further, and as the recommendations in the recent LAB report suggest, its ability to make recommendations is statutorily limited to the four corners of current Wisconsin law, and it does not generally make recommendations to improve the law. When it does, as in the case of the current report, these changes are extraordinarily modest, perhaps recognizing its dubious authorization. Finally, its sole product is a "detailed report" to the legislature, which includes discussion of any "illegal or improper expenditures." To the extent illegal or improper conduct does not implicate the state fisc, that conduct is apparently outside the purview of LAB inquiry.

By contrast, the OSC investigation has a wide mandate to investigate the 2020 election in Wisconsin, beyond mere "waste, fraud, and abuse."

Can Companies be Involved in Running Wisconsin Elections?: Delegation and Undue Corporate Influence

Why would such a coordinated attack be made on robust legislative oversight? While this Office draws no conclusions yet, initial interviews and discussions with clerks suggests that there is widespread confusion about the appropriate role of outside money in administering Wisconsin elections. Public and non-public evidence already in this Office's possession that indicates undue influence by well-funded outside groups, who leveraged large grants to certain Wisconsin cities in order to coopt our election apparatus to their benefit. The recent LAB investigation did not adequately look into these concerns by clerks and the public, concerns which led to some clerks quitting, and numerous unanswered complaints to WEC. Indeed, contracts made between outside groups and certain municipalities led directly to actions contrary to Wisconsin state law, which clerks have noted harmed both election security and the physical safety of voters.

How much authority can clerks contract away to private organizations? As the LAB report contends: "Statutes do not specify the actions and responsibilities that consultants are allowed to take at polling places and central count locations on Election Day." Nevertheless, for the purposes of legislative inquiry, this cannot be the end of the story. Whether certain organizations and individuals operated within a grey area in state law does not preclude obtaining all relevant facts and attempting to draw fine distinctions to facilitate legislative oversight, to dialogue with the public, and to present legislative recommendations.

Oblique reference to at least one major issue is made in the LAB report which bears mentioning. Specifically, the LAB report notes the following:

"We asked the clerks of all 39 municipalities whether consultants worked at central count locations during the November 2020 General Election. Clerks indicated that consultants associated with non-profit organizations worked at the central count locations in 2 of the 39 municipalities. Specifically:

- One municipality indicated that a consultant attended the August 2020 primary as an observer, helped to modify the municipality's election training materials from August 2020 until October 2020, and was at the central count location on Election Day in

November 2020 to provide technical assistance for electronic voting equipment. The municipality indicated that at least five poll workers monitored such assistance at all times.

- A second municipality indicated that a consultant provided logistical support and offered elections administration recommendations but did not have the authority to make decisions and did not count ballots. The municipality indicated that the consultant initially wore a city employee identification badge at the central count location on Election Day in November 2020 but subsequently became an observer after the deputy clerk spoke with WEC's administrator about this individual."

This cursory reporting is concerning, because it substantially waters down already-public information relating to the involvement by a number of nonprofits in election administration, and it suggests that problems were raised and adequately resolved by clerks and WEC. In fact, in both instances, evidence is already available to this Office that is inconsistent with LEB reporting, and which indicates a more widespread and deeper issue. For example, one individual referred to in the LAB report was directly involved in all aspects of management of election officials, was entrusted with the only sets of physical keys to the central count location, and was engaged in the management of the transport of ballots, and had instructed the counting of unlawful ballots that had arrived at central count beyond the lawful time window. The actions of this individual apparently was the precipitating factor in the resignation of one municipal clerk in protest.

Furthermore, under Wis. Statutes § 7.41, there are express rules for "members of the public" to exercise their right to observe Wisconsin elections, which includes limitations on the ability of observers to obtain confidential voter information, or to communicate with election officials. Individuals are, under Wisconsin law, either election officials or members of the public, and do not "become" observers, as the LAB report suggests. Finally, an issue involving possible unauthorized access to election materials, or impersonation of a municipal employee, cannot be remedied by *ex parte* discussion with a single bureaucrat at WEC. None of these issues is directly addressed by the LAB report.

The LAB report also fails to address to what degree state instrumentalities may properly contract with outside groups. Clerks have already raised concerns to this Office that there are

certain election administration functions which they are simply unable to perform. Clerks and the public have raised concerns about the ability of outside contractors to legally bind election officials with onerous contractual terms. Specifically, this Office is already reviewing contracts by certain nonprofits which gave preferential access to voter data to those groups and which prohibited contracting municipalities from exercising their legal right to change election procedures, lest they be on the hook for paying money back to those groups. Clerks have also raised concerns about technical contracts which limit their ability to review the inner workings of equipment and software related to voter registration and vote tabulation.

Another major concern raised by numerous members of the public is whether outside contractors abided by all applicable state and federal antidiscrimination laws, a question not addressed in the LAB report. This Office has also already uncovered evidence of selective targeting of voters by these private groups, raising the question of to what extent nonpartisan government agencies were turned into partisan get-out-the-vote operations, or whether this targeting was on any other unlawful basis. Some of this targeting was apparently in the context of recommending ballot “drop boxes” in certain locations, but not others, apparently in violation of Wisconsin Stat. § 6.855 (see below). Each of these facts, if true, are concerning, and this Office continues to investigate the extent of this entanglement. Furthermore, in the absence of a strong and independent clerk culture, with networks for advice and without properly administered, statutorily mandated training for clerks, the possibility of undue outside influence in our elections increases (see below).

Some clerks have noted to this office that the complexity and scope of Wisconsin elections will *always* and *necessarily* mean delegation of at least some election functions to private companies. But clerks have suggested a line must be drawn somewhere and many express concern over the 2020 election. Indeed, one current clerk specifically recommended to this Office that private money be prohibited. This Office continues to investigate precisely how much authority was ceded to private entities in that election.

Who Runs Wisconsin Elections?: Finger-Pointing and the Wisconsin Elections Commission

Clerk Authority

While the law has changed somewhat, the core of constitutional and statutory authority to administer elections in the state of Wisconsin still resides with county and municipal clerks. Under Wisconsin Statutes § 7.15(1), the municipal clerk has “charge and supervision” of not only state, but also federal elections within a municipality. In turn, these clerks report electoral results to the county clerk, and provide county clerks with all materials the county clerks need to discharge their lawful duty to administer elections in their county. While municipal clerks are appointed by political, often partisan officials such as mayors, county clerks in our state are directly elected. Ultimately, therefore, the responsibility for ensuring election security resides with the county clerks.

Nevertheless, these county clerks are often part-time government employees, and their offices are often run on shoestring budgets. For many counties, this means periods of time with little activity, and periods of time in the spring and fall with lots of activity. As a result, clerks take all the help they can get. Many good Wisconsinites volunteer to be election inspectors or other deputized election officials. And clerks often rely upon technology and management guidance to lighten their administrative burden.

Government Accountability Board Scandal and Creation of Wisconsin Elections Commission

To assist with developing best practices, the Wisconsin Elections Commission (WEC) was established in 2016. Prior to 2016, a large, opaque, and politically unaccountable agency, the Government Accountability Board (GAB), was charged with administering vast swaths of statewide ethics and election law. In the wake of a major statewide scandal that drew national attention, the John Doe investigations, the legislature and Governor took the unprecedented step of abolishing that agency and amending state election laws. Rather than returning the state to a system of clear delegations of authority and broad clerk autonomy, however, the amendments created WEC, drawing criticism from many quarters, including Kevin Kennedy,

the outgoing Director of GAB, who remarked that the new system would have essentially no changes, and that the new system would be “no more transparent” than the old one.

Pursuant to Wisconsin law, WEC is tasked with certain portions of “the administration of...laws relating to elections.” Wisconsin Statutes § 5.05(1). Precisely how far this delegation goes is an open question. WEC authority is expressly laid out in that section contemplates public rulemaking, investigation, and enforcement. However, the election code sections over which WEC has regulatory authority does include numerous provisions which expressly delegate authority to individual actors, such as county and municipal clerks. And, in fact, Wisconsin law delegates to the “board” the duty to certify the state’s electors in a presidential election, a job fulfilled in 2020 solely by the Chairperson of WEC, without board vote. § 7.70(5). The LAB report does not make an effort to systematically review these delegations, but does note in several places the “shared” election administration responsibilities.

Confusion about WEC Authority

While this Office draws no conclusions yet, initial interviews with clerks suggests that there is widespread confusion about what role the Wisconsin Elections Commission may lawfully play in the state, and some suggestion that WEC has acted outside its lawful purview. There is evidence that numerous complaints by clerks to WEC were ignored, and that some clerks even quit, loudly or quietly, in protest in the run up to the 2020 election. This problem is exacerbated by a lack of clarity as to the legal status of WEC guidance: some clerks are convinced that compliance with WEC guidance provides them with a legal “safe harbor” in the event their directives are challenged in court. The staff Director of WEC recently did state that this is not the case.

To the extent WEC guidance is merely persuasive, however, documents, such as online FAQs, are apparently issued without a full Commission vote. Other documents, as the LAB report notes in the case of the March 2020 Commission-approved guidance, are flatly contrary to law. As noted above, much authority is delegated to the WEC staff director. However, under Wisconsin law, there is apparently no current legal recourse other than a petition to WEC to challenge such unlawful behavior. When WEC tacitly or explicitly authorizes actions contrary to Wisconsin law, such as enabling poor security for access to statewide voter registration data systems, or authorizing “shortcuts” such as issuing absentee ballots without application or enabling widespread ballot curing, voters and candidates are left with no choice but to file

dead-on-arrival lawsuits. The LAB report, consistent with the LAB mission discussed above, did not investigate these issues, which the OSC continues to investigate and collate.

Lack of Legal Remedies

Furthermore, the LAB did not investigate various decisions WEC and other made in the run-up to the 2020 election, some of which appear designed to prevent the Wisconsin courts, including the Supreme Court of the state, from weighing in. Specifically, the decision by WEC to quickly issue ballots without a party candidate on the ballot was the determining factor in the Wisconsin Supreme Court declining to address the merits of that exclusion. In the 2020 case of *Hawkins v. Wisconsin Elections Commission*, the narrow majority held that because WEC had claimed that it had already issued some questioned ballots, that there was no time to properly address the claims of the excluded party candidate. In other words, the actions of WEC itself operated to prevent our state's highest court from addressing whether its actions were lawful. The Chief Justice of the Wisconsin Supreme Court wrote a scathing dissent, noting that "The court's silence not only affirms lawless conduct by the Commission, but also provides no directive for the required treatment of nomination papers in the future." This Office continues to look into recommendations to ensure that this remedial gap in Wisconsin law is repaired.

Absentee Balloting

A second action that has evaded both LAB and state judicial review involves the issue of absentee balloting. Precisely what rules govern the requirements for mail-in and in-person absentee voting in the state of Wisconsin? Following the letter of state statute, Subchapter IV of the state election code, Wis. Statute §§ 6.84 *et seq*, there are numerous requirements for absentee ballot request, collection, and counting. But many of these plain rules were apparently abrogated by WEC and municipalities in 2020, with COVID-19 as an excuse. One issue involved the mass self-certification of individuals as "indefinitely confined" under the statute, a category which enables a voter to evade state voter ID requirements, but which is intended to apply to the physically immobile, such as residents of a retirement home. Presented to the Wisconsin Supreme Court, again the majority ducked a merits ruling, prompting the Chief Justice to note that it appears the Court "cannot be bothered with addressing what the statutes require to assure that absentee ballots are lawfully cast." In the absence of legal remedy, it is up to the state legislature to address the various equitable questions and set a policy going forward.

One major issue that has been identified involves an event known as “Democracy in the Park,” which were citywide ballot-collection events in Madison before the election. The LAB report mentions this issue in passing as a “Special Event” occurring in a “specified outdoor setting.” Without explaining the issue, the report recommends that the Legislature “clarify” statutes so that individuals know whether or not they can return absentee ballots contrary to the procedures laid down in Wis. Statutes § 6.855. In other words, the LAB report implicitly notes that the statutes were violated by Democracy in the Park, and recommends that the law be changed.

What was Democracy in the Park, and why has it been the subject of numerous citizen complaints, lawsuits, and legislative inquiries apart from this Office’s investigation? While this Office draws no conclusions, it appears the events, which occurred on September 26 and October 3, 2020, involved numerous possible violations of state law, calling into question the validity of ballots so collected. Specifically, these involved large outdoor gatherings where alleged designees of the City Clerk’s office assisted with ballot collection for over 17,000 votes. Given that these locations were not voted on by the City Council, as required by Wisconsin law, these events appear facially unlawful. Furthermore, it is not clear that all of the workers at those events were properly deputized and trained, or that they swore and filed the mandatory oath of office. Finally, this Office also seeks to review the processing of those ballots. Each of these fact-intensive avenues of inquiry are crucial for determining if those ballots were lawful, or fake.

Clerk Training

In addition, there is already some evidence that WEC failed to complete its statutorily mandated duties. As the LAB report correctly notes, Wisconsin law, Wis. Statutes § EL 12.01 *et seq.*, lays out training protocols for clerks. But county clerks are politically accountable to their voters, and WEC certification or lack of certification does not affect a clerk’s legal rights. However, if a clerk is *not* certificated by WEC, such as for failing to be properly trained, WEC is required by law to notify the “governing body” of that clerk’s municipality. In other words, WEC is mandated by law to train clerks, and clerks get a letter to their mayor or county board if they fail to comply. And yet, as the LAB found, at least 17.5% of clerks were not properly trained, and no letters from WEC went out explaining this. This Office continues to review the issue. Moreover, this Office already has ample evidence that in the absence of this legally-mandated training,

certain outside groups filled the vacuum, providing some municipalities with incorrect and even unlawful advice. In a sworn affidavit, at least one clerk has noted that outside advice negatively impacted the security of the vote and the physical safety of voters.

Exploitation of Elders

This Office continues to review the issues involving WEC more generally, as well as other plain rules that are apparently without remedy in Wisconsin law, such as the editing of ballots with red ink by clerks, and ballot harvesting at nursing homes and at unauthorized public events. A recent event by the Racine sheriff highlighted the alleged exploitation of some of our most vulnerable citizens by those dead-set on maximizing votes for their preferred presidential candidate. Furthermore, complaints were apparently made to WEC and ignored, in a system which the sheriff described as leading to our election system being “not just broken, but shattered.”

In the run-up to the November 3, 2020 election, clerks and WEC took numerous steps to alleviate public fears about COVID-19. But in this chaos was the opportunity for electoral advantage. Wisconsin law mandates under Wis. Statutes § 6.875 that individuals in various types of communal living facility may have special access to absentee voting in person, but only subject to the rules of § 6.875. These rules govern the “Special Voting Deputies” that a municipality may train and authorize to collect absentee votes in person: this is the *only* lawful method for harvesting absentee ballots outside normal procedures, and Special Voting Deputies swear an oath and become duly-authorized “election officials.” Without the availability of Special Voting Deputies under statute, it would be much more difficult for many senior citizens or those in assisted living facilities to vote, as they would be required to show up at a central, authorized voting location. Yet in 2020, at the recommendation of their top bureaucrat, WEC voted to unilaterally prohibit the use of Special Voting Deputies, explaining that COVID-19 made it too dangerous to allow for Special Voting Deputies to enter these facilities.

On its own, this action might have been lawful, although the availability of Special Voting Deputies to municipalities appears mandatory under § 6.875: in other words, even if WEC stated they were unavailable due to WEC’s assessment of COVID risks, clerks might still have been able to appoint them. The result of this action would have been to make voting much more

difficult, but not impossible, for individuals in these group homes. WEC's official action, on its own, might have depressed turnout. But WEC's unofficial action filled the gap, apparently replacing a lawful, statutory scheme with the kind of machine politics reticent of the Gilded Age. WEC and some clerks apparently instructed residential care staff to act in a manner unauthorized by law, collecting and assisting in completing ballots for individuals in these group homes, including those with dementia. This led to record-high turnout and voting by individuals who had not voted for nearly a decade.

On its face, this type of activity could lead to criminal referral for the residential care staff, as the top staff member on WEC has noted. But residential care staff represent the "little fish" in this alleged criminal enterprise. This Office is reviewing this apparent gap in the Wisconsin criminal law, to facilitate referrals and legislative recommendations. This includes reviewing legal methods for ensuring our senior citizens are not bullied, and that retirement and nursing homes are not hotbeds of unlawful election activity, merely because these citizens cannot fight back. This also includes determining how far "public health" justifications should go in enabling administrative agencies to suspend state laws for any given election.

WEC Self-Dealing

Numerous members of the public, and clerks, have questioned what authority clerks have to operate consistent with their understanding of state law, to the extent that WEC issued facially binding guidance giving the green light to these various schemes. Some clerks feel that WEC may legally bind the clerks in granular decisions about their local needs. Other clerks are concerned about repercussions for not following WEC guidance. Many clerks have expressed disagreement with WEC conclusions, and some have done so publicly. Numerous members of the public have raised concerns about WEC "self-dealing": the discretionary nature of WEC intake, review, and response to complaints, and the fact that complaints about WEC are handled, under law, by WEC itself.

This Office continues to interview clerks and expects to discuss with WEC staff what the appropriate role for WEC is in future Wisconsin elections.

How can the Public be Confident in Our Elections?: The Black Box

As former GAB Director Kevin Kennedy noted, the new WEC system is, apparently, “no more transparent” than the old one which he ran. Without robust legislative oversight, many Wisconsinites are at risk of feeling that their vote does not count, or that there is widespread fraud in the state. Two major areas of inquiry are being looked at by the OSC, both dealing with the appropriate level of transparency for our election systems. First, the Office is reviewing the laws and procedures relating to the use of technological tools in administering the elections: the “voting machines” and the various election databases used by the state of Wisconsin. Second, the Office is reviewing barriers to public access to information, such as charges for access to voter registration data.

While this Office draws no conclusions yet, interviews with clerks, citizens, and other groups does suggest that there is widespread concern about the inability of an average citizen to track how elections are run. This inability has huge downstream consequences, as citizens are often presented with snippets of information reminiscent of the “confusopoly” in health insurance. Presented with outdated data sets of dubious quality, citizens seeking to use public information to confirm election results are unable to do so, while those with money and access (or preferential contracts, noted above) can access better data, more quickly. Further, the precise operations of voting machines are not readily accessible or understood by the public, or by commissioners on WEC itself. As with health insurance, the system operates on autopilot, with the insured praying that their bill is accurate, and with voters praying the system is working as advertised.

Elections systems in Wisconsin are governed by state and federal law. Specifically, the federal Election Assistance Commission (EAC) created under the Help America Vote Act of 2002 (HAVA) is tasked with approving all voting systems used in federal elections, and with approving all modifications of voting systems used in federal elections. 52 U.S.C. § 20971. As a part of this, voting systems vendors submit their proposed systems to the EAC for approval. Typically, once a system is tested and approved by the EAC, the vendor will make a similar application to WEC, which approves the system for sale and use within the state of Wisconsin. However, beginning in 2015 the state of Wisconsin allowed GAB (and now WEC) to approve systems for use in the state which are not approved by the EAC. Wis. Statutes § 5.591. While there is thus wide discretion vested in WEC to approve changes to voting systems, federal law

mandates that “all records and papers... relating to any application, registration, payment of poll tax, or other act requisite to voting in such election” be preserved by the State for twenty-two months following the election. 52 U.S.C. § 20701.

But as was made eminently clear in a recent WEC meeting made subsequent to an preservation request issued by this Office, WEC officials and staff are not at all clear as to what “modifications” require WEC approval, what modifications can lawfully be made, or what certain software updates actually entail. Further, WEC approval of actions that might violate federal recordkeeping laws are no guarantee of legal immunity for clerks with final say over what happens to voting machines in their locales. And in fact, as one machine vendor noted during that open meeting, in order to install a software update, that company would be obliged to entirely wipe a machine. Whether this technical process destroys election records in contravention of federal law is a question that WEC has yet been unable to answer.

In order to address this question, and other related questions, this Office has been allocated a budget to engage neutral, certificated data security experts, and has already taken steps to initiate an open and full technical audit of various voting systems, to demonstrate to election officials and the general public the security of these systems. Whatever the results, various clerks have already suggested that they themselves do not know precisely how the voting machines work, and rely entirely upon private contractors to assure them of system integrity. This in and of itself may be a problem.

Prior to the establishment of this Office, the Special Counsel did personally engage with various outside individuals relating to various voting machine concerns. Some of this has been reported in the media. This Office does not endorse the views of any particular outside individual, nor has this Office yet uncovered any evidence of foreign hacking of elections in the state of Wisconsin. Nevertheless, the opacity of elections systems has given rise to numerous theories about the 2020 election.

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A second issue related to the transparency of our election system in the state is the public availability of voter data. While this Office as yet draws no conclusions, there is already evidence that security surrounding the WisVote (SVRS) system is lax. This statewide system

enables clerks to track absentee ballot requests, and includes highly sensitive personal information. As such, it is subject to a high level of paper security laid out in WEC guidance. Nevertheless, there is already some evidence of unauthorized access to this database. Further, several clerks have complained that they were provided by WEC with numerous, unrequested access keys, leading to a security headache and concerns that the statewide system was not secure.

In addition to concerns about too much access, concerns have been raised about non enough access, or about unequal access, to voter registration information. WEC does provide statewide voter registration data for a fee up to, and usually, \$12,500. This fee is set by WEC administrative rule, and it is mandated by statute that the fee be set "at an amount estimated to cover both the cost of reproduction and the cost of maintaining the list at the state and local level." WEC Wis. Stat. § 6.36(6). Nevertheless, it is apparently the case that the fee is charged for each reproduction, no matter the actual cost, and that subsequent individuals requesting a list that has already been produced are charged the same rack-rate. Further, there is some evidence that outside groups were provided privileged access to this data without fee, and on an expedited basis. This Office continues to investigate this matter, and again, this issue is not addressed in the LAB report.

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Conclusion