

OFFICE OF THE SPECIAL COUNSEL

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MEMORANDUM

TO: COMMITTEE ON CAMPAIGNS AND ELECTIONS

Chairwoman Janel Brandtjen

Clerk Bill Savage

**RE: Committee on Campaigns and Elections Rules of Procedure Related to
2021 Wisconsin Assembly Resolution 15.**

Overview

This memorandum proposes the passing of Committee rules of procedure to facilitate the Committee's direction to investigate elections conducted after January 1, 2019, the Special Counsel's appointment to do the same, and the Special Counsel's direction to assist this Committee with its investigation.

Background

On May 17, 2021, the Wisconsin Assembly resolved and directed 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. 2021 Assembly Resolution 15 (hereafter, the "Resolution"). Chairwoman Brandtjen noted in a public hearing, that the Committee set aside one month for hearings and invited clerks to come and testify. Though some clerks pledged to attend and give testimony, they failed to do so.

On August 27, 2021, the Speaker of the Assembly created the Office of the Special Counsel and appointed retired Justice Michael J. Gableman as the Special Counsel. Ballot 21-06. The Special Counsel was directed to conduct an election integrity investigation and assist this Committee in carrying out the directives of the Resolution.

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The Special Counsel caused subpoenas to be issued for documents, information, and deposition testimony. As was true for the Commission's attempt to hear testimony and take evidence, the recipients of the Special Counsel's subpoenas chose not to comply and instead to bring lawsuits challenging the ability of the Committee and the Special Counsel to conduct their investigations.

The Need for Rules of Procedure

The central objection to the Special Counsel's depositions, and to some extent, the production of documents, is that there is no basis for the legislature to take depositions, any testimony must be made in public, and all testimony must occur before the Committee. The Special Counsel disagrees with these allegations. However, in the interests of expediting the investigation, the Special Counsel proposes an alternative approach.

The alternative approach is the creation of rules of committee procedure to conduct the investigation which specifically allows for depositions in closed settings, the use of the Office of Special Counsel in the Committee's investigation, and the sharing for information by the Office of Special Counsel and the Committee.

These rules of procedure are permitted by Wisconsin Statute, are similar to the rules and procedures employed by the January 6 Select Committee, and would remove all objections that the Committee and the Special Counsel's investigations are anything but legislative review that is immune from judicial intervention.

Legal Analysis

- I. **This Committee has the power to create and implement rules of procedure to conduct its business of investigating election administration.**

Every legislative committee may adopt such rules for the conduct of its business as are necessary. Wis. Stat. § 13.45(5). These rules are beyond judicial intervention

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League of Women Voters v. Evers, 387 Wis. 2d 511, 540 (Wis. 2019) (citing Wis. Const. art. IV, § 8). This is because “[t]he Wisconsin Constitution itself affords the Legislature absolute discretion to determine the rules of its own proceedings.” *Id.* The courts will not intermeddle, in the absence of constitutional directives to the contrary, in what is viewed as a purely legislative concern. *Id.* at 538 (*Milwaukee Journal Sentinel v. Wisc. Dep't of Admin*, 319 Wis. 2d 439, 456 (Wis. 2009)).

The inability of the judiciary to enjoin the legislative process is a jurisdictional one. The constitutional system of Wisconsin government and the tripartite branches divest the courts of “jurisdiction to enjoin the legislative process at any point.” *Id.* (citing *Goodland v. Zimmerman*, 243 Wis. 459, 469, 10 N.W.2d 180 (1943)). The Wisconsin Supreme Court has held that “[t]his court will not, under separation of powers concepts and affording the comity and respect due a co-equal branch of state government, interfere with the conduct of legislative affairs.” *Id.* at 537 (citing *State ex rel. La Follette v. Stitt*, 114 Wis. 2d 358, 368, 338 N.W.2d 684 (1983)).

The jurisdictional barrier exists because “[t]he judiciary may not interfere with the legislature's execution of its constitutional duties” *Id.* at 537. This extends to whether internal operating rules or procedural statutes have been complied with by the legislature in the course of its enactments.” *Id.* at 539 (citing *La Follette*, 114 Wis. 2d at 364, 338 N.W.2d 684). The constitution confers no power on the judiciary to enjoin or invalidate laws as a consequence for deficiencies in the implementation of internally-imposed legislative procedures. *Id.* at 540.

A. The Committee has broad discretion to create rules to conduct its business.

There are only two limitations to the legislature’s broad discretion in making rules. First, the rules must not be contrary to a constitutionally mandated legislative procedure. *Id.* at 539-40. Second, it cannot create rules in contravention of existing law. Wis. Stat. § 13.45(5). This means that the Committee cannot create rules that avoid the Open Meetings statutes. *See* Wis. Stat. §§ 19.81–19.98. The next consideration is if an investigatory deposition in a closed setting constitutes a “meeting” of a “governmental body.” *Id.* at § 19.82(1)(2).

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The depositions would likely fall under the definition a meeting of government body. *Id.* That does not mean that the depositions must be held in a public and open forum. There are several exceptions to the Open Meetings law. *Id.* at § 19.85. Depositions would most likely be subject to a closed session pursuant to 19.85(1)(f).

This specific subsection permits a closed session when there is consideration of the financial history, social or other personal histories, preliminary consideration of specific personnel problems, or the investigation of charges against specific persons, which, if discussed in public would be likely to have a substantial adverse effect upon the reputation of any person referred to in such histories or data, or involved in such problems or investigations. *Id.* Additionally, there is less robust support for a closed session found in 19.85(1)(a)(c)(e).

B. The Committee rules for a closed deposition can conform to the Open Meetings exceptions.

To hold a closed meeting, there are certain procedural rules that must be followed. The first requirement is public notice of the holding of a deposition. *Id.* at 19.84. The next is that the Committee would need to announce that the meeting will be closed and the agenda to be taken up during the closed meeting. *Id.* at 19.85. The majority of a quorum of the Committee would have to vote in favor of the closed setting. *Id.* Finally, there are some requirements about when the meeting could be reopened and closed again. *Id.* at 19.85(2).

None of these requirements must occur simultaneously with a proceeding before the Committee. *Id.* at 19.85(1). Instead, the law does not prohibit the Committee from meeting, setting dates for depositions, giving notice of the depositions and that they will be closed, and conducting the deposition as part of its investigation in any location convenient to the Committee.

Conclusion and Proposal

A central objection by WEC and the five cities is that there is no authority for depositions, or the type of investigation being conducted by the Committee or the Special Counsel. The authority for depositions and the use of investigatory tactics

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employed by the Special Counsel is inherently contemplated by Wisconsin statute and the power of legislative review. However, the tactics are not explicitly authorized. Rather than expend time and state resources litigating the inherent authority of the legislature to conduct its own type of investigation for its own review, a more streamlined approach exists.

That approach is the creation of rules for conducting the Committee's business in investigating election administration. The Committee has the ability create rules that utilize the Special Counsel and his resources for investigation of election administration. This would create the authority for the tactics needed by this Committee to investigate elections and the ability of the Special Counsel to employ those tactics.

The opposition has been so engrossed with repeatedly claiming that there is no authority for the investigation methods that they have overlooked this Committee's power to create its own authority and rules for the manner and method in which the investigation can be conducted. Moreover, this rulemaking power is beyond the reach of the judiciary because there is not a constitutionally mandated method of legislative investigation and review and the Committee's rules of procedure would not offend any currently existing law.

The Office of the Special Counsel proposes that the Committee create and approve the attached rules of procedure.

CONTACT:

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WISCONSIN STATE ASSEMBLY

2021–2022 Regular Session

Assembly Committee on Campaigns and Elections

RESOLUTION CREATING COMMITTEE RULES FOR THE IMPLEMENTATION OF 2021 ASSEMBLY RESOLUTION 15

WHEREAS the Committee was directed by 2021 Assembly Resolution 15 (hereafter, “the Resolution”) to investigate the administration of Wisconsin’s elections, focusing in particular on elections conducted after January 1, 2020.

WHEREAS the Special Counsel was appointed by the Speaker of the Assembly to direct an elections integrity investigation, assist the Campaigns and Elections Committee, and hire investigators and other staff to assist in the investigation.

WHEREAS the Committee and the Special Counsel have been thwarted in carrying out their duties to fulfill the Resolution by a noncompliant State agency, State employees, municipalities, city officials, special interest groups, and others.

WHEREAS the Committee is empowered by Wis. Stat. § 13.45(5) to adopt such rules for the conduct of its business as are necessary.

WHEREAS the Committee finds it necessary to adopt rules to implement and carry out the Resolution.

THEREFORE, IT IS RESOLVED that the Committee, by a quorum of its members, does pass, create, and promulgate the following Committee Rules for the Implementation of the Resolution.

1. The Committee may act through the Office of the Special Counsel in carrying out the Resolution.
2. The Office of the Special Counsel may act as empowered by the Speaker to assist in carrying out the Resolution.
3. The Committee may have public hearings in which persons testify under oath and the penalty of perjury.
4. The Committee may, by a simple majority, permit the Office of the Special Counsel to question persons or witnesses testifying before the Committee. The questions by the Office of the Special Counsel permitted by this paragraph shall be in addition to any questions asked by the members of the Committee and in no manner shall preclude members of the Committee from questioning any person or witness.
5. The Committee or the Office of the Special Counsel may compel the production of documents, tangible items, and intangible items by use of a legislative subpoena.
6. The Committee or the Office of the Special Counsel may compel the appearance of a person to give testimony in open or closed Committee sessions by use of a legislative subpoena.
7. The Committee or the Office of the Special Counsel may compel the appearance of a person to give testimony, under oath, in open or closed depositions by use of a legislative subpoena.
8. The Office of the Special Counsel shall take depositions in a closed, non-public setting when the Special Counsel is using a deposition to do any of the following:

- A. Considering the performance evaluation data of any public employee over which the Committee has jurisdiction or exercises responsibility.
 - B. Deliberating the investing of public funds or conducting other specified public business in which competitive or bargaining reasons require a closed session.
 - C. Considering financial, medical, social or personal histories, or disciplinary data of specific persons, preliminary consideration of specific personnel problems or the investigation of charges against specific persons which, if discussed in public, would be likely to have a substantial adverse effect upon the reputation of any person referred to in such histories or data, or
 - D. Conferring with legal counsel for the governmental body who is rendering oral or written advice concerning strategy to be adopted by the body with respect to litigation in which it is or is likely to become involved.
9. All depositions conducted by the Special Counsel shall be stenographically or electronically recorded and reduced to a transcript. In addition to stenographic or electronic recordation, the Special Counsel may video record any deposition. All transcripts shall be retained by the Special Counsel and produced to the Committee or the Speaker at the conclusion of the Special Counsel's investigation or the issuance of a final report.
10. The Committee or the Office of the Special Counsel may, in thier sole discretion, permit witnesses to testify remotely by video, Zoom, Switch, etc.

11. All deposition transcripts shall be made subject to open records at the conclusion of the investigation of the Special Counsel or upon the issuance of a final report.
12. During open or closed hearings before the Committee, the Committee may utilize members of their offices and staff, a member of the Office of the Special Counsel, experts, or technical advisors during any hearing. The members, staff, experts, or technical advisors may be present and observe the hearing provide direct advice to an interested Committee member, Committee member's staff, the Special Counsel, or member of the Office of the Special Counsel.
13. During any open or closed depositions taken by or before the Office of the Special Counsel, the Special Counsel may, in his sole discretion, utilize members of the Committee's offices and staff, a member of the Office of the Special Counsel, experts, or technical advisors during any hearing. The members, staff, experts, or technical advisors may be present and observe the hearing provide direct advice to the Special Counsel or member of the Office of the Special Counsel.
14. The Special Counsel may delegate the taking of depositions or questioning of witnesses to any member of his office that he deems suitable and appropriate. If such delegation is to occur at or during a public or closed hearing before the Committee, then such delegation shall be approved by either the Chairwoman of the Committee or a majority of a quorum of the Committee.
15. Any person testifying before the Committee or the Office of the Special Counsel may attend the deposition with an attorney of the witness's choosing. However, the attorney may not answer for the witness, instruct the witness on the manner in which he or she is to answer a question, instruct the witness on the words to provide the

Committee or Office of Special Counsel in response to a question, interfere with the question-and-answer process, make objections, or disrupt the hearing or deposition. Nothing in this paragraph shall be construed as prohibiting the witness's attorney from consulting with a witness about his or her answer and advising the witness not to answer on the basis of the right against self-incrimination. Provided, however, that a witness who utilizes the rights inherent in the Fifth Amendment to the United States Constitution or Article 1, § 8 of the Wisconsin Constitution must clearly and unequivocally invoke the right in response to a question from the Committee or the Office of the Special Counsel.

APPROVED, AUTHORIZED, AND IMPLEMENTED BY:

BY: _____
REP. BRANTJEN, **Chair**

Signed at
_____,
Wisconsin on this _____ **DAY**
of **DECEMBER, 2021.**

BY: _____
REP. SANFELIPPO, **Vice Chair**

Signed at
_____,
Wisconsin on this _____ **DAY**
of **DECEMBER, 2021.**

BY: _____
REP. TUSLER, **Member**

Signed at
_____,
Wisconsin on this _____ **DAY**
of **DECEMBER, 2021.**

BY: _____
REP. THIESFELDT, **Member**

Signed at
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Wisconsin on this _____ **DAY**
of **DECEMBER, 2021.**

BY: _____
REP. MURPHY, **Member**

Signed at
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Wisconsin on this _____ **DAY**
of **DECEMBER, 2021.**

BY: _____
REP. ROZAR, **Member**

Signed at
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Wisconsin on this _____ **DAY**
of **DECEMBER, 2021.**

BY: _____
REP. SPREITZER, **Member**

Signed at
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Wisconsin on this _____ **DAY**
of **DECEMBER, 2021.**

BY: _____
REP. SUBECK, **Member**

Signed at
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Wisconsin on this _____ **DAY**
of **DECEMBER, 2021.**

BY: _____
REP. EMERSON, **Member**

Signed at

Wisconsin on this _____ DAY
of DECEMBER, 2021.