
From: Redell, Carol <Carol.Redell@legis.wisconsin.gov>
Date: Thursday, May 12, 2022 at 7:07 AM
To: Dylan Winters <dylan.winters@americanoversight.org>
Cc: Rep.Vos <Rep.Vos@legis.wisconsin.gov>, Fawcett, Steve <Steve.Fawcett@legis.wisconsin.gov>, Blazel, Ted <Ted.Blazel@legis.wisconsin.gov>
Subject: RE: Public Records Law Request (WI-REP-22-0055)

EXTERNAL SENDER

Dylan Winters
American Oversight
dylan.winters@americanoversight.org

Dear Mr. Winters:

Please be advised that our office is in receipt of your payment of \$58.94 for record location and retrieval costs for the Representative Vos open records request. All records responding to your request are attached electronically.

Carol Redell
Office of the Assembly Chief Clerk
17 West Main Street, Suite 401
Madison, Wisconsin 53703
608.266.1501
carol.redell@legis.wi.gov

From: "Rep.Brandtjen" <Rep.Brandtjen@legis.wisconsin.gov>

Sent: Tuesday, January 18, 2022, 1:34 PM

*To: *Legislative All Assembly <ALLASM@legis.wisconsin.gov>;
Legislative All Senate <ALLSEN@legis.wisconsin.gov>

*Subject: Assembly Committee on Campaigns and Elections -
EXECUTIVE SESSION*

Assembly

EXECUTIVE SESSION

Committee on Campaigns and Elections

The committee will hold an executive session on the following items at the time specified below:

Wednesday, January 19, 2022

2:00 PM

400 Northeast

Executive session to begin at 2:00 pm or after the conclusion of the informational hearing.

Committee Motion to support Special Counsel

Representative Janel Brandtjen
Chair

From: "Rep.Brandtjen" <Rep.Brandtjen@legis.wisconsin.gov>

Sent: Tuesday, January 18, 2022, 11:44 AM

*To: *Legislative All Assembly <ALLASM@legis.wisconsin.gov>;
Legislative All Senate <ALLSEN@legis.wisconsin.gov>

*Subject: Assembly Committee on Campaigns and Elections - Hearing
published*

Assembly

INFORMATIONAL HEARING

Committee on Campaigns and Elections

The committee will hold a public hearing on the following items at the time specified below:

Wednesday, January 19, 2022

1:00 PM

400 Northeast

Invited speakers only

WEC Database Analysis

Committee Motion to support Special Counsel

Representative Janel Brandtjen
Chair

From: "Rep.Brandtjen" <Rep.Brandtjen@legis.wisconsin.gov>

Sent: Tuesday, December 7, 2021, 2:21 PM

*To: *Legislative All Assembly <ALLASM@legis.wisconsin.gov>;
Legislative All Senate <ALLSEN@legis.wisconsin.gov>

*Subject: Hearing published - Assembly Committee on Campaigns and
Elections*

*Attachments: Public_Notice_(Informational2)_12-8-
21_Campaigns_and_Elections.docx*

Assembly

INFORMATIONAL HEARING
Committee on Campaigns and Elections

The committee will hold a public hearing on the following items at the time specified below:

Wednesday, December 8, 2021
2:20 PM
417 North (GAR Hall)

Invited Speaker - Erick Kaardal

Election Abuses

Representative Janel Brandtjen
Chair

Assembly

INFORMATIONAL HEARING

Committee on Campaigns and Elections

The committee will hold a public hearing on the following items at the time specified below:

Wednesday, December 8, 2021
2:20 PM
417 North (GAR Hall)

Invited Speaker - Erick Kaardal

Election Abuses

Representative Janel Brandtjen
Chair

From: "Rep.Brandtjen" <Rep.Brandtjen@legis.wisconsin.gov>

Sent: Tuesday, December 7, 2021, 2:36 PM

To: *Legislative All Assembly <ALLASM@legis.wisconsin.gov>; *Legislative All Senate <ALLSEN@legis.wisconsin.gov>

Subject: RE: Hearing published - Assembly Committee on Campaigns and Elections

For clarification, there are two hearings for Campaigns & Elections tomorrow. The first is at 1pm and the second is at 2:20pm.

From: Rep.Brandtjen <Rep.Brandtjen@legis.wisconsin.gov>

Sent: Tuesday, December 07, 2021 2:21 PM

To: *Legislative All Assembly <ALLASM@legis.wisconsin.gov>; *Legislative All Senate <ALLSEN@legis.wisconsin.gov>

Subject: Hearing published - Assembly Committee on Campaigns and Elections

Assembly

INFORMATIONAL HEARING

Committee on Campaigns and Elections

The committee will hold a public hearing on the following items at the time specified below:

Wednesday, December 8, 2021

2:20 PM

417 North (GAR Hall)

Invited Speaker - Erick Kaardal

Election Abuses

Representative Janel Brandtjen
Chair

From: "Fawcett, Steve" <Steve.Fawcett@legis.wisconsin.gov>

Sent: Monday, October 25, 2021, 11:46 AM

To: "Savage, Bill" <Bill.Savage@legis.wisconsin.gov>

Subject: RE: Law suit

I left Rep. Brandtjen a voicemail Friday, at the number you provided me, asking her to call me back.

From: Savage, Bill <Bill.Savage@legis.wisconsin.gov>

Sent: Monday, October 25, 2021 11:01 AM

To: Fawcett, Steve <Steve.Fawcett@legis.wisconsin.gov>

Subject: Law suit

Hi Steve, Rep. Brandtjen says she has not heard from you or the speaker. Needless to say she is concerned about this.

Thanks,

Bill Savage

Office of State Representative Janel Brandtjen

(608) 267-2367

(888) 534-0022-Toll Free

Fawcett, Steve

From: Fawcett, Steve
Sent: Friday, November 19, 2021 2:30 PM
To: 'Coms'
Subject: RE: EXTERNAL : RE: [10479788] Summons, Complaint, Affidavits.pdf

Thank you. Will forward to attorney Stadler.

From: Coms <Coms@wispecialcounsel.org>
Sent: Friday, November 19, 2021 1:58 PM
To: Fawcett, Steve <Steve.Fawcett@legis.wisconsin.gov>
Subject: RE: EXTERNAL : RE: [10479788] Summons, Complaint, Affidavits.pdf

Good Afternoon Steve,

I have attached all the documents that are relevant to the open records request up until August 30th, 2021. I have attached a cover sheet that describes what documents have been provided. Please let me know if you have any questions or concerns.

Very Respectfully,

AMERICAN
OVERSIGHT
Mike Gableman
WI Special Counsel

WI-REP-22-0055-A-000008

From: "Fawcett, Steve" <Steve.Fawcett@legis.wisconsin.gov>
Sent: Monday, October 11, 2021, 7:07 PM
Subject: Call Gableman



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.

Sent: Wednesday, October 27, 2021, 11:46 AM
To: "Blazel, Ted" <Ted.Blazel@legis.wisconsin.gov>
Cc: "'coms@wispécialcounsel.org'" <coms@wispécialcounsel.org>
Subject: Copies of Contracts

Ted,

Can you email a copy of both contracts we have with Justice Gableman to the email that I cc'd here?
Thanks!

Best,

Steve Fawcett
General Counsel
Office of Assembly Speaker Robin Vos
608.266.3387

Sent: Tuesday, November 16, 2021, 11:09 AM
To: "'coms@wispecialcounsel.org'" <coms@wispecialcounsel.org>
Subject: FW: Emailing: CommitteeInvestigations.pdf
Attachments: CommitteeInvestigations.pdf

Try this one.

Sent: Monday, November 15, 2021, 4:27 PM

To: "'coms@wispecialcounsel.org'" <coms@wispecialcounsel.org>

Subject: FW: Memo

Attachments: Legislative subpoenas.pdf

From: Gallagher, Michael <Michael.Gallagher@legis.wisconsin.gov>

Sent: Monday, November 15, 2021 4:18 PM

To: Fawcett, Steve <Steve.Fawcett@legis.wisconsin.gov>

Cc: Champagne, Rick <Rick.Champagne@legis.wisconsin.gov>

Subject: Memo

Steve: Here is the memo we provided on legislative subpoenas last summer. Let me know if you need more information.

Thanks.

Mike



Michael P. Gallagher

Assistant Chief Counsel
Wisconsin Legislative Reference Bureau
1 East Main Street, Suite 200
Madison, WI 53703
608.504.5811

<<Legislative subpoenas.pdf>>



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.

From: Phillip Trewyn <ttrewyn@sbcglobal.net>
Sent: Thursday, December 2, 2021, 8:09 AM
To: "Rep.Rodriguez@legis.wisconsin.gov" <Rep.Rodriguez@legis.wisconsin.gov>;
"Rep.Vos@legis.wisconsin.gov" <Rep.Vos@legis.wisconsin.gov>
Cc: "Kaitlyn.Wender@legis.wisconsin.gov" <Kaitlyn.Wender@legis.wisconsin.gov>;
"Mitch.Sands@legis.wisconsin.gov" <Mitch.Sands@legis.wisconsin.gov>;
"Tyler.Clark@legis.wisconsin.gov" <Tyler.Clark@legis.wisconsin.gov>;
"Abbey.Fabick@legis.wisconsin.gov" <Abbey.Fabick@legis.wisconsin.gov>;
"Steve.Fawcett@legis.wisconsin.gov" <Steve.Fawcett@legis.wisconsin.gov>
Subject: Please put an end to the Gableman election review

Good morning - Please put a stop to this farce of an election review. It's an absolute waste of taxpayer money and is beyond the pale in terms of being a fair and impartial review. What's even more frustrating is that I think you know all this. Stop embarrassing yourselves, the Republican party, and our state.

Phill Trewyn
City of Oak Creek, WI resident

<https://www.jsonline.com/story/news/politics/2021/12/01/michael-gableman-hires-investigator-who-sought-to-overturn-2020-election/8823272002/>

Gableman hires investigator who has brought legal challenges seeking to overturn Wisconsin's presidential results

Patrick Marley

Milwaukee Journal Sentinel

MADISON – Michael Gableman as part of his election review for Republicans hired one investigator who has sought to overturn the presidential results and another who this year worked closely with a felon to examine Wisconsin's ballots.

In hourlong testimony before an Assembly committee, Gableman on Wednesday said he made legal filings this week against the mayors of Green Bay and Madison because he believed they had not cooperated with him. No record of the filings could be found in the state's online database of court cases

and officials from the two cities said they did not know what Gableman was talking about.

Gableman, a former state Supreme Court justice, also insisted he was properly reimbursed by taxpayers for the cost of his travel this summer to South Dakota and Arizona.

Assembly Speaker Robin Vos of Rochester in August said taxpayers would not bear those costs and Vos' spokeswoman this week said the state would seek to recover those costs. Taxpayers were billed at least \$2,750 for the trips.

Joe Biden defeated Donald Trump in Wisconsin by about 20,000 votes, or 0.6 percentage points. Recounts, court rulings and a recent audit have not turned up evidence questioning the results, but Republicans have said they continue to have questions.

Vos hired Gableman this summer to review the election. He has given Gableman a taxpayer-funded budget of \$676,000. Gableman said he has spent about \$175,000 of that amount.

Gableman used his testimony to attack Democrats, election officials and a "suddenly incurious press."

He complained that Democratic lawmakers wouldn't meet with him in private and accused election officials and the mayors of Green Bay and Madison of "trying to run and hide from accountability to the citizens they are supposed to serve." The officials whom he targeted disputed that characterization, saying they had responded to his inquires appropriately.

Gableman provides staff names

For months, Gableman has refused to name many of the people he has hired. On Wednesday, he named all but one of them.

Among them is Ron Heuer, the president of the Wisconsin Voters Alliance and the chairman of the Kewaunee County Republican Party. Heuer is looking into voting at nursing homes as part of Gableman's review, Gableman said.

The voters alliance brought three lawsuits over aspects of the election — two of which sought to overturn the results. Courts threw out all three cases.

The voters alliance brought the lawsuit with the help of the conservative Thomas More Society and the Minneapolis law firm Mohrman, Kaardal & Erickson. Gableman is sharing office space with the society and the law firm, recently released records show.

Gableman said sharing office space helped save money.

"I do treat the taxpayer money as if it is my own by being prudent and cautious with it," he said.

In September and October, Gableman had Gary Wait on his payroll.

Wait is a former private investigator who this year has been working with Peter Bernegger to collect copies of ballots and other election data so they could review them. Bernegger was convicted of mail and bank fraud in 2009 and released from federal prison in 2014, records show.

Gableman said he had also hired three former police officers to assist him, though one of them worked for him for just a few weeks in November.

Gableman said he would keep the name of a data expert he is using "classified" for personnel reasons. Gableman said he wanted to "protect his best interests with a small-time employer."

Gableman said two of the members of his team, Andrew Kloster and Clint Lancaster, are performing legal work for him. Neither are licensed as attorneys in Wisconsin, according to the State Bar of Wisconsin.

Gableman said he planned to soon make public some of the documents that have been requested from him under the state's open records law. He said he would withhold some records while his review is ongoing to prevent hurting his efforts.

Gableman told the committee he believed he had addressed all relevant questions about his work by detailing who is working for him.

"I have eliminated any reasonable criticism over any purported lack of transparency," Gableman said.

Much of Gableman's focus has been on \$8.8 million in grants the state's five largest cities received from the Center for Tech and Civic Life to help them run their elections. The voters alliance's unsuccessful legal challenges have centered on the grants as well.

Legal filings against mayors

Gableman has subpoenaed election officials and the mayors of the five cities. His interviews have not taken place, in part because Democratic Attorney General Josh Kaul in October sued to block some of the subpoenas. A hearing is slated for Dec. 23.

Gableman told the Assembly Elections Committee on Wednesday that he submitted legal filings this week in Waukesha County — where Gableman is based — against Green Bay Mayor Eric Genrich and Madison Mayor Satya Rhodes-Conway.

Gableman said he made the filings because "those two simply failed without reason or excuse to appear for their depositions and answer questions."

Online court records do not show any filings made this week by Gableman or against Genrich and Rhodes-Conway. Officials from the two cities said they were unaware of any filings.

"No one with the City has been provided with any other recent information or requests regarding Mr. Gableman's 'investigation' or any pending legal proceedings," Genrich said in a written statement.

Genrich said Green Bay has answered Gableman's inquiries, noting it had provided him nearly 20,000 pages of documents.

He and Madison City Attorney Michael Haas said they had not heard back from Gableman after telling him about a month ago where they believed matters stood regarding the subpoenas.

Rhodes-Conway said she is happy to talk about the election but believes she should give her testimony publicly, not behind closed doors as Gableman has requested.

"It's been clear all along that this is not a serious investigation — it's basically a temper tantrum by people who are upset with some of the results of the Nov. 2020 election," she said in a written statement.

Heated testimony

Gableman's exchanges with the Assembly Elections Committee were at times contentious. Democratic Rep. Jodi Emerson of Eau Claire left in the middle of his testimony after telling him she wouldn't stay if he continued to raise his voice.

Democrats on the committee contended Gableman appeared to have made up his mind before completing his work.

"I don't trust that you're out for the truth," said Democratic Rep. Mark Spreitzer of Beloit.

Gableman reacted strongly to that charge.

"I now ask that his comments be stricken from the record," Gableman said, even though legislative committees don't maintain transcripts or strike testimony. "This is beyond the pale and I will pack up my books and go if this is how it's going to be."

Gableman last year claimed without evidence that elected officials had allowed bureaucrats to "steal our vote."

He has surrounded himself with election conspiracy theorists and in August attended a forum hosted by Mike Lindell, the MyPillow executive who has falsely claimed the Chinese hacked the election. That month Gableman and others working with him visited Arizona to observe a partisan review of ballots there.

Vos said at the time that Gableman would have to cover the travel costs out of his \$11,000-a-month salary. He said he could not bill taxpayers for flights, hotels or other costs for those trips.

Three months later, taxpayers paid Gableman and his team at least \$2,750 for such costs, records show. Vos spokeswoman Angela Joyce said the payments should not have been made and the Assembly would seek to recover the costs from Gableman.

Gableman on Wednesday insisted the payments were appropriate and said Joyce must not have been aware of how the contract he has with the Assembly works.

"The travel is covered," Gableman said. "It was certainly not a pleasure trip. It was done for work."

Vos and Joyce did not respond to questions Wednesday about whether they stood by their claims that the travel costs should not be covered.

Gableman said accompanying him on the trip to Arizona were two attorneys he later hired — Kloster and Carol Matheis.

Gableman did not meet with Uihleins

Recently released records show Gableman in October visited the Pleasant Prairie headquarters of Uline, the packaging company headed by Republican megadonor Richard Uihlein.

Gableman said Wednesday he had not met with Uihlein or his wife, Liz. He said he made the trip "to meet somebody in Pleasant prairie who is unaffiliated with the Uline corporation to get a matter, a clerical matter, done and a document signed."

Uihlein is a major backer of the No Better Friend Corp., a political group whose board of advisers includes Gableman. No Better Friend is run by Marine veteran Kevin Nicholson, who is considering running for governor or U.S. senator next year.

Contact Patrick Marley at patrick.marley@jrn.com. Follow him on Twitter at [@patrickdmarley](https://twitter.com/patrickdmarley).

Sent: Friday, October 29, 2021, 4:13 PM
To: 'Joseph Santeler' <joesanteler@gmail.com>
Cc: "'coms@wispecialcounsel.org'" <coms@wispecialcounsel.org>
Bcc: "Joyce, Angela" <Angela.Joyce@legis.wisconsin.gov>
Subject: RE: Gableman Subpoena Testimony

Dear Mr. Santeler,

This question is best addressed to the Office of Special Counsel. I have cc'd them on this email and said address is the best way to contact them.

Sincerely,

Steve Fawcett
General Counsel
Office of Assembly Speaker Robin Vos
608.266.3387

From: Joseph Santeler <joesanteler@gmail.com>
Sent: Wednesday, October 6, 2021 9:35 AM
To: Fawcett, Steve <Steve.Fawcett@legis.wisconsin.gov>
Subject: Gableman Subpoena Testimony

Mr. Fawcett:

As you are the designated point of contact with Michael Gableman and Consultare LLC in the June 26, 2021 Agreement concerning election investigations, I write to ask whether you expect the October 15th testimony sought in Mr. Gableman's recent subpoenas to election officials to be open and accessible to members of the public. If you are deferring to anyone else on this question, including but not limited to Mr. Gableman or any of his agents, I would appreciate their contact information to the extent it is available to you or your office.

Thank you,
Joe Santeler