GEORGE L. CHRISTENSON
MILWAUKEE COUNTY CLERK

FOR IMMEDIATE RELEASE: September 3, 2021
Contact: Brian Rothgery, 608-219-2064

Milwaukee County Clerk George Christenson Rejects Invalid Subpoena

MILWAUKEE – On Friday, September 3, County Clerk George Christenson announced that he will not appear before a state Assembly committee, and asserted that the subpoena he received last month was invalid. The subpoena, signed by Representative Janel Brandtjen, (R-Menomonee Falls) demanded that he appear before the state Assembly Committee on Campaigns and Elections on Sept. 7 and bring with him all ballots cast in the Nov. 2020 presidential election and other election-related materials.

Clerk Christenson has reviewed the subpoena with Milwaukee County Corporation Counsel to determine its legitimacy, as it was not signed by the Assembly Speaker or Assembly Chief Clerk as required by state law.

Clerk Christenson released the following statement on the subpoena and future investigations into the November 2020 election:

> *"The subpoena issued by Representative Brandtjen is invalid. Because this subpoena is not valid, I will not be appearing before the Assembly Committee on Campaigns and Elections on September 7.*
>
> *"Milwaukee County's elections are transparent and fair. We have proven this fact on numerous occasions. We conducted our regular post-election canvass and audit. In November, we conducted an extensive and highly publicized recount of the presidential election. Most recently, we participated in the Legislative Audit Bureau's election audit. These inquiries have consistently shown that there were no major instances of fraud or irregularities in how Milwaukee County administered the November 2020 election.*
>
> *"Now Speaker Vos has approved $680,000 in taxpayer money to conduct yet another investigation into the election. We will respond to any lawful requests for information over the course of this investigation. If former Justice Gableman would like us to participate in his investigation, my office is happy to sit down with him to educate him on how elections work."*

Clerk Christenson has served as Milwaukee County Clerk since 2017, where he oversees the Milwaukee County Election Commission.

###

OFFICE OF CORPORATION COUNSEL

Client-Driven. Community-Focused.

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Assistant Corporation Counsel

September 3, 2021

Re: Subpoena relating to the November 2020 election

VIA ELECTRONIC MAIL ONLY

Dear Representative Brandtjen,

Milwaukee County is in receipt of the subpoena dated August 6 (Exh. A), addressed to Milwaukee County Clerk George Christenson. I write in response to that subpoena on behalf of Clerk Christenson, in my capacity as the County's chief legal officer. Respectfully, we request that all further correspondence on this matter be directed to me, as well.

As you are aware, neither the presiding officer nor the chief clerk of the Assembly cosigned the subpoena as required under sections 13.31-13.36 of the Wisconsin statutes.

We acknowledge that section 885.01(4), as referenced in the subpoena, confers general subpoena authority to any member of any committee that is authorized to take testimony. However, section 13.31 confers specific subpoena authority for summoning a witness to appear before a legislative committee. In addition, sections 13.32-13.36 set forth the specific procedures, rights, and processes that are unique to witnesses compelled to appear before a committee.

Under longstanding and indisputable principles of statutory construction, sections 13.31-13.36, and not section 885.01(4), must govern. First, when statutes address the same topic and conflict, as here, the more specific statute – that is, section 13.31 – controls. *See, e.g.*, *Lornson v. Siddiqui*, 2007 WI 92, ¶ 65, 302 Wis.2d 519, 735 N.W.2d 55. Second, statutes are to be read, whenever possible, to avoid making any statute superfluous. *See, e.g.*, *Hutson v. State Pers. Comm'n*, 2003 WI 97, ¶ 49, 263 Wis.2d 612, 665 N.W.2d 212. If section 885.01(4) controls in this circumstance, then section 13.31 becomes impermissibly superfluous.

Therefore, because your subpoena was not cosigned by both the presiding officer and the chief clerk of the Assembly, we respectfully submit that it is legally invalid and void. *See also* Memorandum of the Wisconsin Legislative Council to Rep. Spreitzer, Aug. 10, 2021 (Exh. B); Memorandum of the Wisconsin Legislative Council to Rep. Spreitzer, June 10, 2021 (Exh. C). In addition, the subpoena was not validly served, as required by sections 13.31 and 885.03 of the Wisconsin Statutes. As such, we regret to inform you that we cannot comply with your subpoena.

Notwithstanding the foregoing, Milwaukee County is committed to election transparency and accountability. We will cooperate with valid subpoenas and other reasonable requests related to the current audit proceeding under former Wisconsin Supreme Court Justice Gabelman's leadership, to the extent permitted under applicable state and federal law. *See* U.S. Dep't of Justice Guidance, July 28, 2021 (Exh. D).

Our track record with respect to our commitment to election transparency and accountability is amply demonstrated by our lawful, efficient execution of the November 2020 election recount, the results of which were affirmed against various legal challenges by both the federal and state courts, including the United States Supreme Court (*see Trump v. Biden*, 394 Wis. 2d 629, 951 N.W.2d 568 (Wis. 2020); *Trump v. Wisconsin Elections Commission*, 983 F.3d 919 (7th Cir. 2020), *cert. denied*, 141 S. Ct. 1516 (2021)), as well as our full cooperation with the nonpartisan Legislative Audit Bureau's most recent July 2021 forensic audit of Milwaukee County's election processes and procedures.

In sum, Milwaukee County will have participated in no less than seven reviews of our November 2020 election, as listed below:

1. Regular post-election canvass;[1]
2. Post-election hand-counted audit of four randomly selected reporting units;
3. The recount;
4. The state court-based challenge to the recount results (*Trump v. Biden*, 394 Wis. 2d 629, 951 N.W.2d 568 (Wis. 2020));
5. The federal court-based challenge to the recount results (*Trump v. Wisconsin Elections Commission*, 983 F.3d 919 (7th Cir. 2020), *cert. denied*, 141 S. Ct. 1516 (2021));
6. The forensic audit conducted by the nonpartisan Legislative Audit Bureau; and
7. The forensic audit being led by former Justice Gabelman.

As stated by the members of the Election Infrastructure Government Coordinating Council (GCC) Executive Committee[2] and the members of the Election Infrastructure Sector Coordinating Council (SCC),[3] "[t]he November 3rd election was the most secure in American history. … **There**

[1] The canvass is the official tally of votes for any given election. The purpose of the canvass is to account for every ballot cast and ensure that every valid vote cast is included in the election totals. The canvass accounts for every ballot cast on Election Day, every on-time absentee ballot, every accepted provisional ballot, and every on-time overseas and military absentee ballot. Wis. Stat. § 7.60. *See generally* Wis. Stat. Ch. 7, Subch. 2.

[2] The members of the GCC at the time of the statement's release were Cybersecurity and Infrastructure Security Agency (CISA) Assistant Director Bob Kolasky, U.S. Election Assistance Commission Chair Benjamin Hovland, National Association of Secretaries of State (NASS) President Maggie Toulouse Oliver, National Association of State Election Directors (NASED) President Lori Augino, and Escambia County (Florida) Supervisor of Elections David Stafford.

[3] The members of the SCC at the time of the statement's release were Chair Brian Hancock (Unisyn Voting Solutions), Vice Chair Sam Derheimer (Hart InterCivic), Chris Wlaschin (Election Systems & Software), Ericka Haas (Electronic Registration Information Center), and Maria Bianchi (Democracy Works).

is no evidence that any voting system deleted or lost votes, changed votes, or was in any way compromised." Cybersecurity and Infrastructure Security Agency, *Joint Statement from GCC & SCC*, Nov. 12, 2020, at 1, https://www.cisa.gov/news/2020/11/12/joint-statement-elections-infrastructure-government-coordinating-council-election (emphasis in original).

Furthermore, Wisconsin election officials identified just 27 potential cases of voter fraud out of 3.3 million ballots cast in the November presidential election. These cases have been appropriately forwarded to local district attorneys for possible prosecution. Scott Bauer, *Wisconsin election officials flagged just 27 possible voter fraud cases out of more than 3 million ballots cast*, May 21, 2021, https://www.jsonline.com/story/news/politics/elections/2021/05/21/voter-fraud-wisconsin-election-clerks-flagged-just-27-possible-cases/5210661001/.

Finally, as stated most recently by U.S. Senator Ron Johnson, in reference to the November 2020 election in Wisconsin, "[t]here's nothing obviously skewed about the results. … [President Trump] didn't get 51,000 votes that other [in-state] Republicans got, and that's why he lost." Patrick Marley, *Ron Johnson says the Wisconsin presidential results were 'not skewed' in a conversation with a woman posing as a conservative*, Aug. 31, 2021, https://www.jsonline.com/story/news/politics/2021/08/31/ron-johnson-says-wisconsins-presidential-results-not-skewed/5670186001/.

In closing, Milwaukee County remains fully committed to election transparency and accountability. We strive every day, without allegiance to any political party or candidate, and without rhetoric, to ensure the public's faith in our democratic processes. Debates about election laws and governance are an important part of our democracy, as are election reviews guided by law, but such debates and reviews must resound in fact, and be conducted with sober, nonpartisan diligence.

Milwaukee County will faithfully continue to execute our election responsibilities in conformity with all applicable laws.

Regards,

/s/
MARGARET C. DAUN
Milwaukee County Corporation Counsel

Cc: Milwaukee County Executive David Crowley
Milwaukee County Board of Supervisors
Milwaukee County Clerk George Christenson
Milwaukee County Elections Director Juliette Henry
Milwaukee County Election Commissioners
Wisconsin Elections Commission Director Meagan Wolfe
City of Milwaukee Elections Executive Director Claire Woodall-Vogg

SUBPOENA

THE STATE OF WISCONSIN

TO GEORGE L. CHRISTENSON

MILWAUKEE COUNTY CLERK

COUNTY COURTHOUSE – ROOM 105

901 NORTH 9TH STREET

MILWAUKEE, WI 53233

PURSUANT TO WIS. STATS. 885.01 (4) AND 2021 ENROLLED ASSEMBLY RESOLUTION 15 DATED MARCH 23, 2021, YOU ARE HEREBY ORDERED TO APPEAR BEFORE THE ASSEMBLY CAMPAIGNS AND ELECTIONS COMMITTEE AT A COUNTY FACILITY OF YOUR CHOOSING ON THE 7TH DAY OF SEPTEMBER, 2021 AT NOON OF THAT DAY, TO GIVE EVIDENCE IN THE MATTER OF THE 2020 PRESIDENTIAL GENERAL ELECTION THEN AND THERE TO BE HEARD. FAILURE TO APPEAR MAY RESULT IN PUNISHMENT FOR CONTEMPT, WHICH MAY INCLUDE MONETARY PENALTIES, IMPRISONMENT AND OTHER SANCTIONS.

YOU ARE FURTHER REQUIRED TO BRING WITH YOU THE FOLLOWING DOCUMENTATION AND ITEMS DETAILED IN THE ATTACHED EXHIBIT A.

GIVEN UNDER MY HAND THIS 6TH DAY AUGUST, 2021.

JANEL BRANDTJEN, CHAIR

ASSEMBLY CAMPAIGNS & ELECTIONS COMMITTEE

EXHIBIT A

Exhibit A – Cyber Forensic Audit

Pertaining to the November 2020 General Election, the Assembly's Campaigns & Elections Committee requests access to the following books, letters, or other documentary evidence from your county for the purpose of forensic analysis:

1. The physical ballots in the November 2020 election, 100% of the mail-in ballots, provisional ballots, and physical ballots cast in person the day of the election.

2. All ballot production, processing, and tabulation equipment from satellite election offices and any other location used to count votes.

3. The software and bootable media, hardware tokens (security keys) for the equipment described in item #1, and the election management system that was used.

4. Forensic images of all election equipment:

- Servers – Election management server, file servers, network servers, dial-up servers, or any other server utilized for the processing or storage of election results or data required to run an election.
- Tabulators – high speed and normal speed
- Ballot marking devices – including accessibility, or for normal voting
- Desktops & laptops – Utilized within the Election Management System for any purpose including but not limited to: EMS Client, adjudication, registration, creation of ballots or designs, processing results, uploading results or anything similar
- Signature matching and ballot sorting equipment
- Switches, routers or other network equipment – This includes normal networking equipment as well as any specialized systems such as Intrusion Detection Systems, Firewalls, Intrusion Prevention Systems or similar

5. Forensic images of all removable media (including, but not limited to USB thumb drives, external hard drives, backup tape cassettes, memory cards, PCMIA cards, Compact Flash, CD/DVD or similar) used as part of the election process or to load software, configuration, or programming.

6. Forensics images of the firmware of any device associated with the election that does not have a hard drive; including any tooling required to extract that firmware, if applicable.

7. Forensic images of all SIM cards used for wireless 3G/4G LTE/5G communications.

8. Forensics on all machines utilized for absentee ballot processing to include:

- All logs from the system
- Backups of the system
- Offsite cloud storage associated with the system
- Media used to transfer data (USB drives, compact flash, external hard drives)

9. Logs from all routers, switches, firewalls, IDS, IPS or similar devices. This includes, but is not limited to:

- Netflows (or equivalent)
- DHCP logs
- Access logs
- VPN logs
- PPP logs
- RDP logs
- Splunk logs
- Any remote administration tool logs

10. Logs from all computer systems, servers, desktops, laptops, or similar including but not limited that were used in the design, management, and running of the election:

- Windows Event logs
- Access logs
- Firewall logs
- IDS / IPS / Malware / Virus Scan Logs
- Database logs
- All logs generated from applications associated in any way with the election

11. Logs from all EMS Server(s), EMS Clients, tabulators, ballot marking devices, ballot on demand printers, scanners, voting systems, or other election equipment including, but not limited to:

- Error logs
- Access logs
- Debug output
- Audit logs
- Administrator logs

12. Election Log Files XML, EML, JSON, DVD and XSLT other election files and logs for:

- Tabulators
- Result pair resolution
- Result files
- Provisional votes
- RTM logs
- SQL database files and logs
- Signature checking & sorting machine

13. List of all IP addresses utilized at any location where election equipment was utilized during the entire election period. This includes the time from when the election equipment was ready to receive a cast ballot to when the certified results were officially published. This shall include, but is not limited to:

- IP addresses of any cellular modems utilized by voting equipment
- IP addresses of any routers utilized at any location where votes were cast, counted, tallied, or reported

- IP addresses of any dial-up connections utilized
- IP addresses of any computers utilized to process, send or upload election results

14. Access or control of ALL routers, tabulators or combinations thereof (some routers are inside the tabulator case) in order to gain access to all the system logs.

15. Election Settings:

- Ranked profiles and entire change history of audit trail logs
- Ranked contests and entire change history audit trail logs
- Rejected ballots report by reason code
- All configuration files utilized to control the election

16. Accounts and Tokens:

- Username & Passwords (Applications, Operation Systems, Routers, Switches, Firewalls, etc)
- File and/or Hardrive Encryption Passwords or keys (Bitlocker, Veracrypt, Etc)
- Security Tokens (iButton, Yubikey, SmartCard, Etc)

17. ES&S Express VoteXL Specific:

- All Paper Vote Summary Cards
- All USB Flash Drives

18. Voter Rolls:

- Database of voter rolls
- Forensic Image of computer/device used to work with voter rolls
- Copy of media device used to transfer voter rolls

19. Records required from the voting system- Daily and cumulative voter records for those who voted with sufficient definition to determine:

- Voter's name and Registered Voting address
- Address for correspondence (mailing address)
- D.O.B.
- Voter ID number
- How Voted (mail, in-person early, in person Election Day)
- Where Voted (if applicable)
- Date voted (if applicable)
- Ballot by mail Request Date
- Ballot by mail sent date
- Ballot by mail voted date (if applicable)
- Ballet cancelled date (if applicable)
- RAW, HTML, XHTML and SVG files (Ballot Images)

20. Access needed to physically and forensically examine all date and time-stamped paper ballots as required:

- Voter Tally Paper Rolls, Test Ballots, Ballot Test Matrix

21. Paper samples from all ballot paper utilized during the 2020 election cycle.

22. All physical ballots cast or attempted to cast during the 2020 General Election. This includes, but is not limited to:

- Mail in and absentee ballots
- Provisional Ballots
- Early Voting Ballots
- Accessibility Ballots
- Spoiled Ballots
- UOCAVA ballots
- Election Day Ballots

23. All request forms for mail ballots and absentee ballots.

24. All envelopes for mail in and absentee ballots.

25. All reports detailing all ballots that were rejected prior to election day and the process to contact the voter to cure the ballot.

26. All cartridges from all voting machines and scanners.

27. All affidavits for assistance.

28. All envelopes of requested ballots that were returned as undeliverable.

29. All training materials used to train County Employees including temporary employees, Judges of Election, Inspectors, Clerks, and all persons who staffed the satellite voting offices.

30. All duplicated ballots and all logs that would allow the duplicate to be compared to the original.

31. Chain of custody records and procedures for all ballots from the start of the election through the current date.

32. All pollbooks from all wards and divisions.

33. All supplemental pollbooks from all wards and divisions.

34. A list of all voters who cast an absentee or mail ballot and voted on the machines at the polls on Election Day.

35. All contracts and agreements between the Milwaukee County, including all departments under the direction of the mayor, and election vendors.

36. All contracts and agreements between any vendor or contractor that supplies voting equipment of any type, software utilized in the election process, ballot paper, election design support, election equipment support, or election support. This includes, but is not limited to contracts dealing with:

- Ballot Marking Devices, Tabulators, Election Management Systems, or similar
- Election Design Software, Tabulation Software, Voting Registration Software, Duplication Software, Adjudication Software, Signature Verification Software, or anything similar related to the election
- Ballot Paper, Printing Services, Mailing Services, Scanning Services, Address Validation Services
- Election Design Services, Election Equipment Repair, Election Equipment Service, Election Processing, or other Election support services
- Internet service provider, cellular service provider

37. Timeline (1 month prior to the election to 1 month after the election) for each location that utilized a piece of election equipment that includes:

- Who accessed the equipment (the organization they represent and their position in the organization), on what date, for what purpose, what electronic media was used, and what records were kept
- Any tests that were performed during the access of the equipment (voters on election day are not to be included)

38. A complete end-to-end election setup for use:

- This would include all the equipment necessary to simulate an election and recreate the precise scenarios of election day in 2020
- Central Server, tabulators (high speed and normal), poll pads, etc.
    - This specifically includes all of the passwords, security tokens, physical keys, key fobs, etc., needed to use each piece of equipment
- Instruction manuals on how to use the end-to-end setup
- Duplicate copy of election tabulator bootable media for multiple selected locations
- Ballots used in the locations selected

39. All wards return sheets with the paper tapes:

- Any return sheets that were unusable, needed to be recreated, or fixed in somehow should also be included with their notes (front and back)

40. Dates/times of the technicians/people of LAT testing that had access to election equipment.

41. Dates/times of software updates on election computers and servers.

42. Dates/times of certification of the equipment (servers, election computers, election hardware devices).

43. Details of all CTCL related activities, included but not limited to:

- Equipment purchased by CTCL
- Number and locations of drop boxes installed
- List of resources CTCL had access to, including voter rolls or other data

44. Details and data surrounding the WisVote/ERIC system including:

- A full copy of the database holding all records and change records in the WisVote/ERIC system
- A copy of all logs showing all changes to the voter rolls as well as the username, name, IP address, or other details of the individual making the change
- A list of individuals and organizations with access to the WisVote/ERIC system and any of its Application Programming Interfaces
- Manuals and programmer documentation for interfacing with the WisVote/ERIC system

45. List of where the clerk stores all election equipment and data along with list of individuals that have access to these areas.

46. Information related to voting system design, architecture, and configuration.

47. Information pertaining to cybersecurity protocols and settings put into place.

Wisconsin Legislative Council

Anne Sappenfield
Director

TO: REPRESENTATIVE MARK SPREITZER

FROM: Peggy Hurley, Staff Attorney

RE: Legislative Subpoena Authority

DATE: August 10, 2021

You asked for an analysis of ss. 13.31 and 885.01 (4), Stats., relating to issuing subpoenas, and a determination of whether s. 13.31, Stats., establishes the exclusive means by which a witness may be compelled to appear before a legislative committee. Although s. 885.01 (4), Stats., provides that a committee member may issue a subpoena, it appears that s. 13.31, Stats., is the sole means for issuing a subpoena to appear before a duly authorized legislative committee.

LEGISLATIVE SUBPOENAS

Sections 13.31 to 13.36, Stats., establish the procedures for compelling a witness to appear before a legislative committee or either house of the Legislature and produce documents and records before the committee.[1] The statutes set forth specific provisions relating to service of process, summary process to take custody of a witness, consequences for refusal to testify, use immunity for testimony procured by subpoena, and witness fees for testifying before a legislative committee or house of the Legislature.

Under these statutes, the authority to issue a subpoena to appear before a legislative committee or house is limited to the presiding officer and the chief clerk of the house he or she serves; however, any member of a legislative committee may administer an oath to a person appearing before the committee. [s. 13.45 (6), Stats.]

[1] Under s. 13.31, Stats. "The attendance of witnesses before any committee of the legislature, or of either house thereof, appointed to investigate any subject matter, may be procured by subpoenas signed by the presiding officer and chief clerk of the senate or assembly. Such subpoenas shall state when and where, and before whom, the witness is required to appear, and may require such attendance forthwith or on a future day named and the production of books, records, documents and papers therein to be designated, and may also require any officer of any corporation or limited liability company, or other person having the custody of the keys, books, records, documents or papers of any such business entity, to produce the same before such committee. Such subpoenas may be served by any person and shall be returned to the chief clerk of the house which issued the same as subpoenas from the circuit court are served and returned."

EXHIBIT
B

GENERAL SUBPOENA AUTHORITY UNDER S. 885.01, STATS.

Section 885.01, Stats., sets forth broadly who may issue a subpoena:

> ...any arbitrator, coroner, medical examiner, board, commission, commissioner, examiner, committee or other person authorized to take testimony, or ... **any member of a board, commission, authority or committee which is authorized to take testimony**, within their jurisdictions, to require the attendance of witnesses, and their production of documentary evidence before them, respectively, in any matter, proceeding or examination authorized by law; and likewise by the secretary of revenue and by any agent of the department of agriculture, trade and consumer protection. [Emphasis added.]

In some cases, this broad authority is further defined by other statutory sections. For example, while s. 885.01 (4), Stats., confers subpoena authority to any member of a committee that is authorized to take testimony, s. 885.01 (3), Stats., limits that authority as it relates to municipal and county boards to the "chairperson of any committee of any county board, town board, common council or village board to investigate the affairs of the county, town, city or village, or the official conduct or affairs of any officer thereof." In addition, although s. 895.01 (4), Stats., provides that any agent of the Department of Agriculture, Trade and Consumer Protection may issue a subpoena, s. 93.14, Stats., limits that authority to "authorized agents...in relation to any matter within the department's power."

ANALYSIS

Principles of statutory construction and relevant case law demonstrate that when ss. 885.01 and 13.31, Stats., are read together, s. 13.31 provides the sole means for issuing a subpoena to appear before a legislative committee or house. First, a longstanding principle of statutory construction holds that when a more general statute (s. 885.01 (4)) and a specific statute (s. 13.31) address the same topic, the more specific statute controls in the event of a conflict. [*Lornson v. Siddiqui*, 2007 WI 92, ¶ 65, 302 Wis.2d 519, 735 N.W.2d 55.] Second, statutes are to be read, whenever possible, to avoid making any statute superfluous. [*Hutson v. State pers. Comm'n*, 2003 WI 97, ¶ 49, 263 Wis.2d 612, 665 N.W.2d 212.] If s. 885.01 (4), Stats., governs issuance of subpoenas by legislative committee members, a specific statute relating to legislative committees' authority to issue subpoenas is arguably superfluous.

General Versus Specific Provisions

Section 885.01 (4), Stats., confers general subpoena authority to any member of any committee that is authorized to take testimony; s. 13.31, Stats., confers specific subpoena authority for summoning a witness to appear before a legislative committee or house. Moreover, ss. 13.32 to 13.36, Stats., establish procedures, rights, and requirements that are specific and unique to witnesses who are subpoenaed to appear before a legislative committee or house.

A legislative subpoena, unlike a subpoena issued under the more general authority of s. 885.01, may procure the attendance of witnesses only if the committee is authorized and "appointed to investigate" the particular subject matter. [s. 13.31, Stats.]

In *Goldman v. Olson*, a federal district court considered a challenge to a legislative subpoena issued by a Wisconsin Senate resolution to anti-war demonstrators in the 1960s. The court held that a resolution authorizing an investigation must satisfy the following requirements to be constitutionally valid:

- Define the subject matter of an investigation with sufficient explicitness and clarity to afford the witness a reasonable basis for judgment as to whether a particular question is pertinent to the subject matter under investigation.
- If the investigation impinges First Amendment freedoms, establish the state's interest in making such an investigation by showing a substantial relationship between the information sought and a comprehensive, compelling state interest or concern.

[*Goldman*, 286 F. Supp. at 43.]

The more general subpoena power requires only that a committee be "authorized to take testimony" and that the proceedings be "authorized by law." Additionally, subpoenas issued pursuant to general authority under ch. 885, Stats., are subject to different witness fees and different liabilities for refusal to appear. [ss. 13.36, 13.35, 885.05, and 885.11, Stats.]

In *Hipp v. Circuit Court for Milwaukee County*, 2008 WI 67, 310 Wis. 2d 342, 750 N.W.2d 873, 07-0230, the Wisconsin Supreme Court considered whether the general provisions of s. 885.01 allowed a party to a John Doe case to ask a clerk of court to issue a subpoena to procure the attendance of witnesses on his behalf, where a separate statute conferred subpoena authority to a judge in a John Doe case. The Court concluded that the more specific statute granting judges subpoena authority in a John Doe case precluded the application of the more general subpoena authority statute and that the more specific statute gave the judge "the exclusive authority to subpoena witnesses for a John Doe hearing." [*Hipp,* ¶2.]

In the *Hipp* case, a party to a John Doe case acknowledged that s. 968.26, Stats. (2005-06),[2] authorized a judge in a John Doe proceeding to subpoena a witness but argued that statute did not provide exclusive authority to do so. Section 968.26, Stats., provided, in relevant part:

> If a person complains to a judge that he or she has reason to believe that a crime has been committed within his or her jurisdiction, the judge shall examine the complainant under oath and any witnesses produced by him or her and may, and at the request of the district attorney shall, subpoena and examine other witnesses to ascertain whether a crime has been committed and by whom committed....

Section 885.01 (1), Stats., on the other hand, provided that a clerk of court could issue a subpoena in any action, matter or proceeding pending or to be examined into before any court.

The Court found that, although s. 968.26, Stats., did not specifically notwithstand s. 885.01 (1), it was intended to confer subpoena authority exclusively to judges in John Doe proceedings. The *Hipp* Court noted that "applying the § 885.01 subpoena provisions to the proceedings here would require applying a more general statute regarding subpoenas where there is a more specific statute controlling subpoenas within the context of John Doe proceedings. This would be contrary to the principle of statutory construction that where two statutes applying to the same subject conflict, the more specific statute is controlling." [*Hipp* at ¶41, citing *Lornson*.]

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[2] All references to s. 968.26, Stats., refer to the 2005-06 version.

In the case of issuance of subpoenas by a legislative committee, the statutes in ch. 13, Stats., impose specific requirements. These specific requirements include the purpose for which a legislative subpoena may be issued, the manner in which it must be served, and the authority for signing the subpoena, which is vested solely in the presiding officer and chief clerk of each house of the Legislature. It would contradict the rule of statutory interpretation to apply a more general statute where a specific statute exists.

Avoidance of Making a Statute Superfluous

In *Hipp*, the Court also noted that a broad reading of s. 885.01, Stats., would render the specific subpoena authority relating to John Doe cases superfluous:

> Section 968.26 provides John Doe judges shall examine witnesses produced by the complainant and "may, and at the request of the district attorney shall, subpoena and examine other witnesses." Section 885.01 (1) provides judges and clerks of court with the authority to issue subpoenas, and § 885.01 (2) provides district attorneys with subpoena power. However, if clerks of court and district attorneys have the power under § 885.01 to subpoena witnesses in John Doe proceedings, then the language in § 968.26 regarding subpoenas is superfluous. Construction of statutes should avoid whenever possible interpretations that render language superfluous. [*Hipp,* at ¶38, citing *Hutson.*]

The same argument holds if any member of a legislative committee is authorized to issue a subpoena pursuant to s. 885.01 (4), Stats. Such a finding would render the procedures and authority established in ss. 13.31 to 13.36, Stats., superfluous.

History and Intended Use of Legislative Subpoena Authority

In the *Hipp* case, the Court also considered the history and intended use of the John Doe statute vesting the judge with subpoena powers and concluded that "John Doe proceedings are conducted through the authority of the presiding judge" and that allowing another party to issue a subpoena because of the general authority to do so would "in essence dilute the John Doe judge's power." [*Hipp* at ¶35]

For legislative committees, the legislative rules anticipate that legislative subpoenas will be issued pursuant to s. 13.31, Stats. Assembly Rule 3 (1) (o) states that the Speaker of the Assembly shall "[i]ssue subpoenas, with the countersignature of the chief clerk, for the attendance of witnesses before any assembly committee, and issue summary process for the arrest of any witness disobeying the mandate of the subpoena." Assembly Rule 5 (1) (j) assigns the Chief Clerk of the Assembly the duty to "[c]ountersign with the speaker documents that, by law or rule, require the personal signature of the chief clerk." Senate Rule 44 states that "[t]he original of all enrolled acts and joint resolutions, all engrossed resolutions, and all writs, warrants, and subpoenas issued by order of the senate shall be signed by the president, and attested by the chief clerk."

The statutory and administrative rule language reinforce the intent and current practice of vesting in the presiding legislative officer the exclusive duty and authority to issue subpoenas to appear before a legislative committee. Statutory language allows any committee member to administer an oath to a person appearing before the committee, but reserves the authority to issue a subpoena for each house's presiding officer.

In *Hipp*, the court noted: "Although district attorneys, clerks of court, and judges have subpoena powers under s. 885.01, s. 968.26 precludes district attorneys and clerks from issuing subpoenas in

John Doe proceedings. Instead, the statute allows that only judges retain their subpoena power." [*Hipp,* ¶ 40.] Similarly, while s. 885.01 (4), Stats., confers subpoena powers on any member of any committee authorized to hear testimony, s. 13.31, Stats., precludes the application of the general authority in the specific context of subpoenaing a witness to appear before a legislative committee.

Please let me know if I can provide any further assistance.

PH:ksm

Wisconsin Legislative Council

Anne Sappenfield
Director

TO: REPRESENTATIVE MARK SPREITZER

FROM: Peggy Hurley, Staff Attorney

RE: Subpoena Powers and Investigative Authority of a Legislative Committee

DATE: June 10, 2021

You asked whether the investigators whose hiring was authorized by the Committee on Assembly Organization Ballot 21-03 may subpoena witnesses and, if they may, whether the subpoenaed witnesses must appear before the Assembly Committee on Campaigns and Elections. State law and case law establish that a witness may be compelled to appear before a legislative committee charged with investigatory authority. 2021 Assembly Resolution 15, which the Assembly adopted earlier this year, 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; the ballot authorizes the investigators to assist the Assembly Committee on Campaigns and Elections. Under the relevant statutes and case law, this authorization is sufficient to compel the attendance, before the committee, of any witness subpoenaed.

LEGISLATIVE OVERSIGHT AND GENERAL INVESTIGATION AUTHORITY

A committee of the Legislature has inherent authority to investigate and oversee state agency activity. In a 1909 case, the Wisconsin Supreme Court explained that:

> The legislature has very 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, and to proceed, with that end in view, by a duly authorized committee of one or both branches of the legislature and to incur reasonably necessary expenses, payable out of the public funds. [*State ex rel. Rosenhein v. Frear*, 138 Wis. 173, 176-77 (1909).]

The U.S. Supreme Court has similarly stated that the power to investigate is inherent in the power to make laws because "a legislative body cannot legislate wisely or effectively in the absence of information respecting conditions which the legislation is intended to affect or change." [*McGrain v. Daugherty*, 263 U.S. 135, 175 (1927).]

The Legislature's authority to investigate is not absolute, however, and is generally viewed as limited to obtaining information on matters that fall within the proper field of legislative action, such as the administration of existing laws or need for new laws. Likewise, a committee's authority to investigate is

EXHIBIT
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generally viewed as limited to obtaining information on matters that customarily fall within the committee's jurisdiction.

Primary examples of ways in which a legislative committee may exercise its inherent authority to oversee and investigate state agency activities include: (1) holding committee meetings and informational hearings; (2) appointing subcommittees to perform studies and investigations by subcommittees; (3) submitting information requests under s. 13.45 (7), Stats.;[1] (4) conducting studies and investigations under Joint Rule 84 (3);[2] or (5) issuing a subpoena under s. 13.31, Stats. [See Assembly Rules 11 (2) and 14 (1).]

PARTICULAR AUTHORITY TO INVESTIGATE

State law provides that the attendance of witnesses before any committee of the Legislature may be procured by subpoena only if the committee is authorized and "appointed to investigate" the particular subject matter. [s. 13.31, Stats.] State statutes do not specify the means by which such an authorization is provided. In the past, such authorization has been given by resolution or joint resolution. However, with little practical and judicial precedent in Wisconsin on the method of authorization, it is possible that other methods could suffice, such as a motion passed by the organizing committee of the body or an investigation initiated under Joint Rule 84 (3). [*Goldman v. Olson*, 286 F. Supp. 35 (W.D. Wis. 1968).]

The appointment and authorization to investigate a matter should precisely define the area of investigation. In *Goldman v. Olson*, a legislative subpoena issued by a Wisconsin Senate resolution to anti-war demonstrators in the 1960s was challenged under the First Amendment and Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

The federal district court held that a resolution authorizing an investigation must satisfy the following requirements to be constitutionally valid:

- Define the subject matter of an investigation with sufficient explicitness and clarity to afford the witness a reasonable basis for judgment as to whether a particular question is pertinent to the subject matter under investigation.
- If the investigation impinges First Amendment freedoms, establish the state's interest in making such an investigation by showing a substantial relationship between the information sought and a comprehensive, compelling state interest or concern.

[*Goldman*, 286 F. Supp. at 43.]

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[1] In addition to an information request that may be submitted by a committee, any legislator or chairperson of a committee may submit a public records request to a state agency. [ss. 19.31 to 19.39, Stats.]

[2] Recognizing committees' inherent authority to investigate, Joint Rule 84 (3) provides that standing committees may conduct studies, investigations, and reviews that are "within the subject matter area customarily within the purview of the respective committee, regarding any matter that may then be appropriate to legislative inquiry." This may be done on instruction by the appropriate house or on motion of the chairperson with majority vote approval by the committee. In the case of duplication or overlapping areas of original inquiry, the subject matter area assigned to each committee and scope of each committee's inquiry is defined and delimited as follows: (a) in the case of a Senate committee, by the Committee on Senate Organization; (b) in the case of an Assembly committee, by the Assembly Speaker; and (c) in the case of a joint committee, by the Joint Committee on Legislative Organization.

However, the *Goldman* court recognized that it would be impossible for an authorizing resolution to perfectly define its parameters from the outset. The court said "It is not reasonable to require the legislature, even before its investigatory function has been commenced, to define the subject or subjects of investigation with that degree of specificity and clarity which must mark its ultimate articulation of a criminal prohibition." The court added that "in its investigative function, the Legislature must enjoy more leeway." [*Goldman,* 286 F. Supp. at 48-49.] The precise boundaries of the "leeway" in identifying the subject matter for investigation have not been reexamined.

The powers to issue a subpoena are subject to the requirements articulated in *Goldman* before the Assembly may enforce compliance with a subpoena and find a subpoenaed witness in contempt for refusing to attend or testify. [s. 13.31, Stats.; and *Goldman,* 286 F. Supp. at 43.] It appears that the *Goldman* requirements were met when the Assembly passed 2021 Assembly Resolution 15.

ISSUANCE OF A SUBPOENA TO APPEAR BEFORE THE COMMITTEE

A subpoena may be used to compel testimony or produce records and documents desired by a committee engaged in an authorized investigation. Under the statutes, only the Speaker has the authority both to issue a subpoena for the attendance of witnesses before any Assembly committee, and to issue summary process for the arrest of any witness disobeying the subpoena. Therefore, while the Assembly committee and the investigators hired are authorized to investigate elections, only the Speaker may issue a subpoena.

A subpoena must:

- Refer to the authorization of the committee to investigate.
- State the nature of the investigation.
- State where, when, and before whom the witness is required to appear and, if applicable, produce records and documents.
- Be signed by the Speaker and the Chief Clerk of the Assembly.

[ss. 13.31 to 13.33, Stats.; and Assembly Rules 3 (1) (o) and 5 (1) (j).]

As discussed above, state law provides that the attendance of witnesses before any committee of the Legislature may be procured by subpoena only if *the committee* is authorized and "appointed to investigate" the particular subject matter. Presuming that Assembly Resolution 15 creates a proper appointment for the Assembly Committee on Campaigns and Elections to investigate the recent administration of elections in the state, the resolution allows the Speaker to issue a subpoena for the attendance of witnesses before the committee.

The ballot approved by the Committee on Assembly Organization authorized investigators to assist with the Assembly Committee on Campaigns and Elections investigation. A subpoena issued pursuant to the resolution may compel a witness to appear before the Assembly Committee on Campaign and Elections. However, because current law permits investigations only by committees, a subpoena issued pursuant to the resolution may not compel testimony except to the Assembly Committee on Campaigns and Elections.

Please let me know if I can provide any further assistance.

PH:ksm

U.S. Department of Justice

Federal Law Constraints on Post-Election "Audits"

Published July 28, 2021

EXHIBIT
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The U.S. Department of Justice is committed to ensuring full compliance with all federal laws regarding elections. This includes those provisions of federal law that govern the retention and preservation of election records or that prohibit intimidation of, or interference with, any person's right to vote or to serve as an election official.

The Department is also committed to ensuring that American elections are secure and reflect the choices made on the ballots cast by eligible citizens. "The November 3rd election was the most secure in American history," according to a Joint Statement issued by federal and state officials and released by the federal Cybersecurity & Infrastructure Security Agency. In many jurisdictions, there were automatic recounts or canvasses pursuant to state law due to the closeness of the election results. None of those state law recounts produced evidence of either wrongdoing or mistakes that casts any doubt on the outcome of the national election results.

In recent months, in a number of jurisdictions around the United States, an unusual second round of examinations have been conducted or proposed. These examinations would look at certain ballots, election records, and election systems used to conduct elections in 2020. These examinations, sometimes referred to as "audits," are governed, in the first instance, by state law. In some circumstances, the proposed examinations may comply with state law; in others, they will not. But regardless of the relevant state law, federal law imposes additional constraints with which every jurisdiction must comply. This document provides information about those federal constraints, which are enforced by the Department of Justice.

Constraints Imposed by the Civil Rights Act of 1960

The Civil Rights Act of 1960, now codified at 52 U.S.C. §§ 20701-20706, governs certain "[f]ederal election records." Section 301 of the Act requires state and local election officials to "retain and preserve" all records relating to any "act requisite to voting" for twenty-two months after the conduct of "any general, special, or primary election" at which citizens vote for "President, Vice President, presidential elector, Member of the Senate, [or] Member of the House of Representatives," 52 U.S.C. § 20701. The materials covered by Section 301 extend beyond "papers" to include other "records." Jurisdictions must therefore also retain and preserve records created in digital or electronic form.

The ultimate purpose of the Civil Rights Act's preservation and retention requirements for federal elections records is to "secure a more effective protection of the right to vote." State of Ala. ex rel. Gallion v. Rogers, 187 F. Supp. 848, 853 (M.D. Ala. 1960) (citing H.R. Rep. 956, 86th Cong., 1st Sess. 7 (1959)), aff'd sub nom. Dinkens v. Attorney General, 285 F.2d 430 (5th Cir. 1961) (per curiam). The Act protects the right to vote by ensuring that federal elections records remain available in a form that allows for the Department to investigate and prosecute both civil and criminal elections matters under federal law. The Federal Prosecution of Election Offenses, Eighth Edition 2017 explains that "[t]he detection, investigation, and proof of election crimes – and in many instances Voting Rights Act violations – often depend[s] on documentation generated during the voter registration, voting, tabulation, and election certification processes." Id. at 75. It provides that "all documents and records that may be relevant to the detection or prosecution of federal civil rights or election crimes must be maintained if the documents or records were generated in connection with an election that included one or more federal candidates." Id. at 78.

The Department interprets the Civil Rights Act to require that covered elections records "be retained either physically by election officials themselves, or under their direct administrative supervision." Federal Prosecution of Elections Offenses at 79. "This is because the document retention requirements of this federal law place the retention and safekeeping duties squarely on the shoulders

of election officers." *Id.* If a state or local election authority designates some other individual or organization to take custody of the election records covered by Section 301, then the Civil Rights Act provides that the "duty to retain and preserve any record or paper so deposited shall devolve upon such custodian." 52 U.S.C. § 20701.

Therefore, if the original election official who has custody of records covered by the Act hands over those election records to other officials (for example, to legislators or other officeholders) or the official turns over the records to private parties (such as companies that offer to conduct "forensic examinations"), the Department interprets the Act to require that "administrative procedures be in place giving election officers ultimate management authority over the retention and security of those election records, including the right to physically access" such records. *Id.* In other words, the obligation to retain and preserve election records remains intact regardless of who has physical possession of those records. Jurisdictions must ensure that if they conduct post-election ballot examinations, they also continue to comply with the retention and preservation requirements of Section 301.

There are federal criminal penalties attached to willful failures to comply with the retention and preservation requirements of the Civil Rights Act. First, Section 301 itself makes it a federal crime for "[a]ny officer of election" or "custodian" of election records to willfully fail to comply with the retention and preservation requirements. 52 U.S.C. § 20701. Second, Section 302 provides that any "person, whether or not an officer of election or custodian, who willfully steals, destroys, conceals, mutilates, or alters any record or paper" covered by Section 301's retention and preservation requirement is subject to federal criminal penalties. *Id.* § 20702. Violators of either section can face fines of up to $1000 and imprisonment of up to one year for each violation.

Election audits are exceedingly rare. But the Department is concerned that some jurisdictions conducting them may be using, or proposing to use, procedures that risk violating the Civil Rights Act. The duty to retain and preserve election records necessarily requires that elections officials maintain the security and integrity of those records and their attendant chain of custody, so that a complete and

uncompromised record of federal elections can be reliably accessed and used in federal law enforcement matters. Where election records leave the control of elections officials, the systems for maintaining the security, integrity and chain of custody of those records can easily be broken. Moreover, where elections records are no longer under the control of elections officials, this can lead to a significant risk of the records being lost, stolen, altered, compromised, or destroyed. This risk is exacerbated if the election records are given to private actors who have neither experience nor expertise in handling such records and who are unfamiliar with the obligations imposed by federal law.

Constraints Imposed by the Federal Laws Prohibiting Intimidation

Federal law prohibits intimidating voters or those attempting to vote. For example, Section 11(b) of the Voting Rights Act of 1965 provides that "No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote...." 52 U.S.C. § 10307(b). Similarly, Section 12 of the National Voter Registration Act of 1993 makes it illegal for any person, "including an election official," to "knowingly and willfully intimidate[], threaten[], or coerce[], or attempt to intimidate, threaten, or coerce, any person for . . . registering to vote, or voting, or attempting to register or vote" in any election for federal office. *Id.* § 20511(1)(A). Likewise, Section 131 of the Civil Rights Act of 1957 provides that "[n]o person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate" for federal office. 52 U.S.C. § 10101(b).

The Attorney General is authorized to file a civil action seeking preventative relief, including a temporary or permanent injunction, against any person who engages in actions that violate these statutes. See 52 U.S.C. §§ 10308(d); 20510(a). And there are criminal penalties as well. *See, e.g., id.* § 10308(a); 18 U.S.C. §§ 241, 242, 594; *see generally* Federal Prosecution of Election Offenses, at 33-38, 49-54, 56-58.

Judicial decisions have established that voter intimidation need not involve physical threats. In certain contexts, suggesting to individuals that they will face adverse social or legal consequences from voting can constitute an impermissible threat. Here are a few examples of the types of acts that may constitute intimidation:

- Sending a letter to foreign-born Latino registered voters warning them that "if they voted in the upcoming election their personal information would be collected … and … could be provided to organizations who are 'against immigration'" was potentially intimidating. *See United States v. Nguyen*, 673 F.3d 1259 (9th Cir. 2012).
- Having police officers take down the license plate numbers of individuals attending voter registration meetings contributed to intimidating prospective voters. *See United States v. McLeod*, 385 F.2d 734 (5th Cir. 1967).
- Sending robocalls telling individuals that if they voted by mail, their personal information would become part of a public database that could be used by police departments to track down old warrants and credit card companies to collect outstanding debts could constitute intimidation. *See Nat'l Coal. on Black Civic Participation v. Wohl*, 498 F. Supp. 3d 457 (S.D.N.Y. 2020).
- Linking individual voters to alleged illegalities in a way that might trigger harassment could constitute intimidation. *See League of United Latin Am. Citizens - Richmond Region Council 4614 v. Pub. Int. Legal Found.*, 2018 WL 3848404, at *4 (E.D. Va. Aug. 13, 2018).
- Conducting a "ballot security" program in which defendants stand near Native American voters discussing Native Americans who had been prosecuted for illegally voting, follow voters out of the polling places, and record their license plate numbers might constitute intimidation. *See Daschle v. Thune*, No. 4:04 Civ. 04177 (D.S.D. Nov. 1, 2004).

See also United States v. North Carolina Republican Party, No. 5:92-cv-00161 (E.D.N.C. Feb. 27, 1992) (approving a consent decree in a case where the United States alleged that it violated Section 11(b) to send postcards to voters in predominantly African American precincts falsely claiming that voters were required to have lived in the same precinct for thirty days prior to the election and stating that it is a "federal crime to knowingly give false information about your name, residence or period of residence to an election official").[1]

[1] While voter intimidation need not involve physical threats, federal law of course prohibits using "force or threat of force" to intimidate or interfere with, or attempt to intimidate or interfere with, any person's "voting or qualifying to vote" or serving "as a poll watcher, or any legally authorized election official, in any primary, special, or general election." 18 U.S.C. § 245(b)(1)(A). The Deputy Attorney General recently issued Guidance Regarding Threats Against Election Workers.

There have been reports, with respect to some of the post-2020 ballot examinations, of proposals to contact individuals face to face to see whether the individuals were qualified voters who had actually voted. *See, e.g.*, Cyber Ninjas Statement of Work ¶ 5.1 (proposing to select three precincts in a large urban county to collect information from individuals through "a combination of phone calls and physical canvassing").

This sort of activity raises concerns regarding potential intimidation of voters. For example, when such investigative efforts are directed, or are perceived to be directed, at minority voters or minority communities, they can have a significant intimidating effect on qualified voters that can deter them from seeking to vote in the future. Jurisdictions that authorize or conduct audits must ensure that the way those reviews are conducted has neither the purpose nor the effect of dissuading qualified citizens from participating in the electoral process. If they do not, the Department will act to ensure that all eligible citizens feel safe in exercising their right to register and cast a ballot in future elections.

If jurisdictions have questions about the constraints federal law places on the kinds of post-election audits they can conduct, they should contact the Voting Section of the Civil Rights Division. If citizens believe a jurisdiction has violated the Civil Rights Act's election record retention and preservation requirements, or believe they have been subjected to intimidation, they can use the Civil Rights Division's online complaint form to report their concerns or call (800) 253-3931.