The Lawmaker's Manual for Legislative Oversight

by

the Hon. Daniel Kelly

Senior Fellow in Constitutional Governance
Institute for Reforming Government

INSTITUTE FOR REFORMING GOVERNMENT

Published by

Institute for Reforming Government
Madison, Wisconsin

Acknowledgments

In preparing this Manual, I have relied upon materials published by the Congressional Research Service, which has done yeoman's work in documenting both the theory and praxis of congressional oversight authority.

I have also borrowed heavily from the language of a subpoena drafted by the Committee on Financial Services of the U.S. House of Representatives for the Instructions and Definitions included in the appendices at the end of this Manual. The Committee's very capable work was both instructive and time-saving.

Introduction 01
I. The Importance of Conducting Legislative Oversight 06
A. Is The Executive Doing It Correctly? 08
B. Societies Are Fluid. Laws Are Not. 09
C. Are We Done Here? 10
D. No Trespassing! 12
E. Inefficiency, Waste, Fraud, and Abuse 21
II. Authority For Oversight Functions 24
A. The Constitutional Structure 24
1. Scope: Subject-Matter 26
2. Scope: Personal 29
B. The Administrative State 30
C. Limitations 33
1. The Functional Limitation 34
2. The Governmental Portfolio Limitation 35
3. The Individual Rights Limitation 36
D. Proposed Rules 43
III. The Tao of Oversight 44
A. Methodology 45
B. Story 47
C. The Resolution 50
1. The "Whereas" Clauses 51
2. The "Resolved" Clauses 57
D. The Investigation 59
1. The Plan 60
2. Informal Beginnings 63
3. Formal Investigatory Phase 66
a. Subpoena Duces Tecum (document subpoena) 69
i. Subpoena Duces Tecum 70
ii. Description of Items to Produce 74
iii. Instructions 75
iv. Definitions 76
v. Authorizing Resolution 77
vi. Legislative Rules 78
b. Testimonial Subpoenas 78
i. Deposition of a Named Individual 81
ii. PMK Deposition 83

c. How to Subpoena Documents and Witnesses 86
i. Authorization 86
ii. Drafting 86
iii. Issuance 90
iv. Service 91
d. Enforcing Subpoenas 91
i. Summary Enforcement 92
ii. Legislative Punishment 93
iii. Criminal Prosecution 96
E. The Contemplative Pause 96
F. The Hearing 99
1. Theme 100
2. Selecting Witnesses and Documents 101
a. Documents 101
b. Witnesses 102
3. Plan of Presentation 104
a. Witness Order 104
b. Exhibit Packages 106
4. Preparing for the Presentation 107
a. Arranging Witness Appearances 107
i. Informal invitation 107
ii. Subpoenaed invitation 108
b. Briefing Books and Exhibit Copies 110
i. Briefing Books 110
ii. Exhibit Copies 110
c. Stenographer/Videographer 111
d. Press Relations 111
5. Presenting the Story 111
a. Quorum 111
b. Opening statements 112
c. Witnesses 113
i. Witness Testimony and Examination 113
ii. Closed Session 114
d. Order and Decorum 114
e. Concluding the Hearing 115
G. Post-Hearing Activity 115
Conclusion 116

INTRODUCTION

This Manual exists for a very specific purpose—to assist legislators in exercising their duty to oversee the execution of the law, as well as their responsibility to remain fully informed about the world around them so that they may recognize when to make, amend, or repeal a law. It is a tool for those who believe the legislature is the proper creator and custodian of our state's public policy, and who believe this authority must remain within the legislative branch. And it is based on the premise that this "separation of powers" between the governmental branches is "not merely to assure effective government but to preserve individual freedom."[1]

Careful observers understand this oversight authority is a precondition to wise public policy, as well as an essential ingredient in securing that authority within the legislative branch of government. Recent events suggest more oversight would not go amiss, as illustrated by the recent clashes between governmental branches. The immediate cause of that conflict, however, was not here in Wisconsin (although it has been percolating beneath the surface for many years). It was, instead, in a land on the other side of the world, in a sprawling metropolis where the Han River joins the Yangtze. There, a microscopic intruder multiplied in secret, readying its mission to visit havoc on the world. A full accounting of the loss and disruption attributable to COVID-19 will be a long time coming. But most of its effects are obvious, including how it stoked into sharp conflict the long-simmering tension between our branches of government.

The pandemic renewed for the present generation an evergreen question: Which of the three branches is supposed to lead the development of public policy in our state? History and the structure of our constitution give the legislature the lead role, but that doesn't necessarily mean reality will obediently follow their instruction. The other branches are nothing if not ambitious, and will quickly expropriate any authority they find inadequately defended. The executive branch, in particular, has spent the last year making a concerted push into the legislature's bailiwick. This behavior, however, has been remarkable primarily for its boldness, not for the fact that it occurs. In reality, this period has been just a particularly aggressive lurch in a long-term leadership migration from the legislature to the executive branch.

1 *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, ¶ 45, 382 Wis. 2d 496, 538, 914 N.W.2d 21, 41–42 (quoting *Morrison v. Olson*, 487 U.S. 654, 727, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988) (Scalia, J., dissenting)).

Two developments are primarily responsible for this transition. The first is the rise of the administrative state, which empowered the governor's appointees and employees to actually make the law, rather than just execute it. The second—and the one most relevant here—is the legislature's reticence to robustly exercise its oversight authority. The result has been a governor who occasionally ignores the legislature's lawmaking prerogatives, and sometimes directly opposes the legislature's chosen policies. A few examples of the executive's recent encroachments on legislative turf crystalize how important it is for the legislature to defend its leadership role and its constitutionally-prescribed territory—a defense that must begin, if it is to be successful, with a muscular application of its native oversight authority.

The pandemic made landfall in the United States in mid-January 2020. Less than a month later it was here in Wisconsin. Within six weeks thereafter the secretary-designee of the Department of Health Services had issued her "Safer at Home" order. With this order, an unelected executive-branch bureaucrat claimed the power to commandeer the legislature's authority and use it to unilaterally write laws controlling the private and business affairs of everyone in the state. The secretary wasn't making mere suggestions, either. The order said imprisonment and fines awaited those who violated her personally-prescribed laws—laws the legislature did not enact and on which it was not even consulted.

The legislature swiftly, and properly, asked the Wisconsin Supreme Court to strike down the secretary's order as beyond her authority to issue. The court largely agreed, concluding that the secretary should have implemented her proposed order through the rule-making process. Two of the justices, however, wrote concurring opinions that identified a structural problem: the statute on which the secretary based her order represented an essentially wholesale transfer of the legislature's lawmaking authority to the secretary in the event of a pandemic.[2]

The executive branch's assertion of such broad control over the creation of public policy was—or should have been taken as—an invitation for the legislature to contest the intrusion into its exclusive territory. Specifically, this should have prompted an inquiry into how a public health emergency could reduce the lawmaking branch of government to a mere spectator in the lawmaking process. But the legislature conducted no studies to determine why a statute should grant such comprehensive lawmaking authority to an unelected bureaucrat. It did not investigate the practical effects of the executive's commandeering of the legislature's lawmaking authority, or the science on which the Secretary relied in formulating the order. And it has held no hearings to explore how the executive

2 *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶ 66 (Rebecca Grassl Bradley, J., concurring); *id*. at ¶ 87 (Daniel Kelly, J., concurring).

might choose to use the legislature's power in the future. So, although the Wisconsin Supreme Court clipped the executive's wings with respect to one bureaucrat's use of the legislature's authority, the statute remains as it was. That is to say, it stands ready to accommodate the executive's next adventure on the legislature's turf.

The DHS Secretary was not the only one probing how far the executive branch could reach into the legislature's authority. The governor himself was testing the limits of a statute that temporarily loans him additional power in emergency situations. The limited exercise of oversight authority may explain, at least in part, why the governor seemed so confident in ignoring statutory boundaries on that legislatively-loaned authority. Human experience teaches us that an unanswered trespass is an invitation for more. And the past many months are full of such invitations.

The governor declared a state of emergency related to the pandemic in March 2020. The statute giving him authority to declare the emergency also says it automatically expires in 60 days. And it reserves to the legislature the exclusive authority to either extend the state of emergency or cancel it at any time. The initial declaration duly expired in May 2020 because the legislature did not extend it. But the governor declared a second state of emergency based on the same exigencies. This was, in essence, an unauthorized extension of the first declaration. But the legislature did not respond to this trespass, so when the extension was about to expire the governor immediately declared a third. Still the legislature did not respond. So the governor declared a fourth. And when time was running low on that unauthorized extension, he issued a fifth.

That, apparently, was one too many for the legislature. It quickly adopted a joint resolution detailing the governor's serial disregard for the limits on his emergency-declaring authority, explaining the legislature's pre-eminent role in matters of public policy, and canceling the state of emergency. The governor's reaction to the resolution is likely the most contemptuous slap-down of a coordinate branch of government in our state's history. Within a matter of hours, he reinstated the state of emergency the legislature had just canceled.

The governor's action was an unusually bold assertion that he cannot be controlled by our statutes, and that he is not answerable for the exercise of authority on loan to him from the legislature. A more definitive declaration of executive supremacy and independence from the lawmaking branch of government would be hard to imagine. And yet the legislature has apparently been content to watch the executive branch absorb its leadership role and policy-making prerogatives. It did not immediately cancel the governor's declaration, as it could have. It did not demand that members

of the executive branch appear before the legislature to explain why the statute did not bind the governor. It convened no hearings where witnesses could testify about the executive's subversion of the legislature's authority. It acted, instead, as though the executive branch really is the preeminent branch of government.

The legislature must be wary of how the other branches of government interpret its response, or lack thereof. Habitually choosing to accept the executive's overreach can, over time, calcify that posture into a legally enforceable subservience. The historical contest between the legislative and executive branches regarding the partial veto power provides a sobering object lesson. A few decades ago, the Wisconsin Supreme Court searched for a rationale by which to determine whether the governor had overstepped his constitutional boundaries in partially vetoing an appropriations bill. It settled on "the longstanding practical and administrative interpretation or *modus vivendi* between governors and legislatures."[3] That is to say, the court turned a gubernatorial and legislative habit into a legal standard of constitutional significance. According to the court, a pattern of retreat and neglect can effectively alter the balance of powers between the branches of government — an alteration that can become permanent and judicially enforceable if allowed to continue for too long.

If the Assembly and Senate wish to preserve their pride of place as the proper creators and custodians of the state's public policy, they must engage the full spectrum of their authority—and soon. Adopting legislation is, of course, one aspect of that power, and the houses are currently considering a number of bills that would curb some of the governor's recent overreaches. But when different parties control the legislative and executive branches, an attempt by the former to limit the ambitions of the latter through the adoption of a bill will likely founder on the veto power.

What's needed in such circumstances is the vigorous exercise of the legislature's oversight authority, an authority that does not depend on the executive branch's concurrence. This oversight authority is at least as critical as the legislature's power to create new laws. The power to launch investigations, compel the production of documents, obtain testimony from knowledgeable individuals, and conduct hearings to inquire into any matter within the legislature's purview has been part of the legislature's domain for as long as it has existed. The judicious but energetic use of this authority can hold the executive accountable to his duties, educate the public on matters needing legislative or gubernatorial attention, and build support for necessary initiatives.

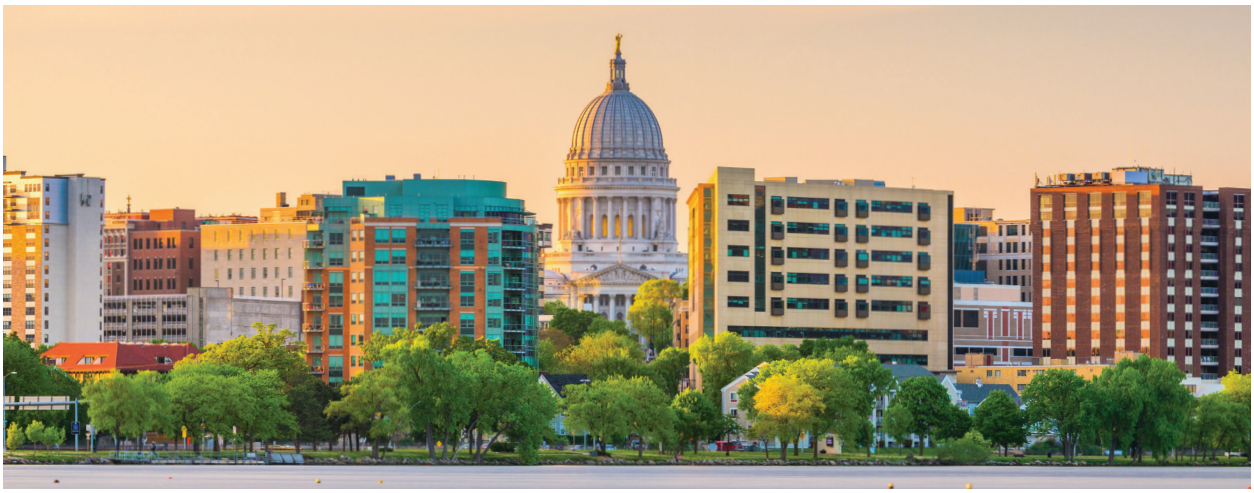
This Manual comprises three distinct but related parts. The first describes why it is so important that the legislature exercise its oversight authority and surveys the extent of this power. The second part describes the historical purpose and source of the authority, as well as some examples of its use. The third, and hopefully the most useful part of the Manual, provides practical advice and assistance with conceptualizing, organizing, and carrying out the legislature's oversight duties.

---

3 *Wisconsin Senate v. Thompson*, 144 Wis. 2d 429, 437, 424 N.W.2d 385, 388 (1988).

A note on what this Manual is not. First, it is not a legal reference. Although it assumes a constitutional textualist's understanding of how the different branches of government function, it does not necessarily evaluate whether any specific statutory provision complies with that structure (although it does contain some commentary to that effect), nor does it contain any legal prescriptions. In that regard, the Manual largely describes, in our view, the current state of play on the issues we cover, and notes some areas where the law appears to be less than clear. Second, the materials in this manual do not constitute legal advice. To the extent the manual addresses questions of law, it is necessarily summary and general in nature, and as such it is not capable of specifically answering how a court would view any particular course of action the legislature might take in the exercise of its oversight responsibilities.

We have dedicated this Manual to the propositions that governments derive "their just powers from the consent of the governed,"[4] that all people are "created equal,"[5] that they are "endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness,"[6] and that "to secure these rights, governments are instituted."[7] It embodies the hard-won lesson that when "the supreme magistracy, or the right both of making and of enforcing the laws, is vested in one and the same man, or one and the same body of men . . . , there can be no public liberty."[8] Securing our liberties, and preserving the separation between law-makers and law-enforcers, will only be possible if the legislature conscientiously fulfills its duty to oversee the execution of the laws it makes. Good luck and good hunting!



4 Wis. Const. Art. I § 1.
5 U.S. Declaration of Independence.
6 *Id.*
7 Wis. Const. Art. I § 1.
8 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 9th ed., book 1, chapter 2, p. 146 (1783, reprinted 1978).

I. The Importance of Conducting Legislative Oversight

There can be no doubt that the legislature pipes the tune to which the other two branches dance. It alone, according to our constitution, has the legislative power[9] — that is, the power "to declare whether or not there shall be a law; to determine the general purpose or policy to be achieved by the law; [and] to fix the limits within which the law shall operate."[10] If that's not a sufficiently comprehensive description, a United States Supreme Court Justice recently outlined it as "the power to adopt generally applicable rules of conduct governing future actions by private persons—the power to prescrib[e] the rules by which the duties and rights of every citizen are to be regulated, or the power to prescribe general rules for the government of society."[11]

The authority to make the state's laws—all of them—belongs to the legislature. The constitution is unambiguous and categorical on this point. It says "[t]he legislative power [is] vested in a senate and assembly." Because the grant of lawmaking power to the legislature is so complete, it necessarily follows that the other two branches of government act in response to, and in the context of, the legislature's work.

The governor, for example, is entrusted by the constitution only with the power to execute the law, not make it.[12] The difference between legislative and executive authority has been described as the difference between the power to prescribe and the power to implement:

> "In 1792, Jacques Necker, the famous French statesman, neatly summed up the function and significance of the executive power. Of the function: "[I]f by a fiction we were for a moment to personify the legislative and the executive powers, the latter in speaking of the former might… say: All that this man has talked of, I will perform." Of the significance: The laws would in effect be nothing more than counsels, than so many maxims more or less sage, without this active and vigilant authority, which assures their empire and transmits to the administration the motion of which it stands in need."[13]

9 Wis. Const. Art. IV § 1.
10 *Koschkee v. Taylor*, 2019 WI 76, ¶11, 387 Wis. 2d 552, 929 N.W.2d 600 (alteration in original).
11 *Gundy v. United States*, ___ U.S. ____, 139 S. Ct. 2116, 2133, 204 L.Ed.2d 522, *reh'g denied*, ___ U.S. ____, 140 S. Ct. 579, 205 L.Ed.2d 378 (2019) (Gorsuch, J., dissenting) (citations and internal marks omitted).
12 Wis. Const. Art. V § 1.
13 *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶ 91, 391 Wis. 2d 497, 559–60, 942 N.W.2d 900, 931–32 (quoting Saikrishna Prakash, The Essential Meaning of Executive Power, 2003 U. Ill. L. Rev. 701, 819 (2003) (alteration in original; quoted source omitted)).

In other words, "someone vested with the executive power and christened as the chief executive enjoyed the power to control the execution of law."[14] But not to make it.

The judiciary's role is even more limited than that of the executive—but it necessarily responds to the legislature's chosen tune just as surely. Courts neither make the law nor execute it. They merely apply pre-existing law to resolve the specific disputes brought to them by contesting parties. From the earliest days of our country, the Supreme Court has said that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[15] "Saying" is in an entirely different world from the power to make the law or carry it into effect. "Saying" describes, it does not create. Which is why the Framers said "[t]he judiciary … has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society and can take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgment . . . ."[16] "Will" is what the legislature exercises in making the law, while the executive uses "force" to execute it. The judiciary uses "judgment" in determining how the law applies to the case before it.

From these descriptions, it should be apparent that the legislature necessarily plays the lead role in our form of government. The executive branch's authority is framed as something derivative of what the legislature does — his authority is "the executive power." And what is he to execute, if not the law? Consequently, to carry out his constitutionally-vested authority he must necessarily bow to the legislature's decisions on what he is to execute. Similarly, the judiciary's work is also almost entirely derivative of what the legislature has done. With exceptions for the common law and constitutional provisions, the judiciary must look to the legislature for the law it uses to resolve its cases.

This "first amongst equals" status necessarily calls into existence the legislature's oversight responsibility. Legislators cannot simply cast their bread on the water and walk away. Although the law belongs to the public as well as the other branches of government once enacted, the legislature remains its custodian. And a responsible custodian will continually make sure the law is effective, respected, up-to-date, and retired when no longer needed. The balance of this part of the Manual explores some of the more important reasons for doing so.

14 *Id.*
15 *Marbury v. Madison*, 5 U.S. 137, 177, 2 L. Ed. 60 (1803).
16 The Federalist No. 78, at 523 (Alexander Hamilton) (Jacob Cooke ed., 1961).

A. IS THE EXECUTIVE DOING IT CORRECTLY?

The first rationale for conducting legislative oversight is probably also one of the most obvious — determining whether the executive is executing the law as the legislature intended.[17] Legislation, labyrinthine as the process might be, is always pursued for some specific purpose. There is an objective to achieve — a right in need of protection, a behavior in need of banning, a sum of money in need of appropriating, a program in need of creation. Presumably, each piece of legislation represents a real-life goal the legislators believed the bill would advance.

But sometimes even the noblest legislative intent doesn't successfully make the transition to reality. When a bill fails to achieve the desired effect it's usually due to one of three dynamics. The first is the bane of judiciaries across the country: ambiguity. The English language is incredibly versatile, and in the right hands beautifully poetic. With those attributes, however, comes the ever-present risk of imprecision. This is such a common problem that the late Justice Antonin Scalia could co-write an entire book focused on 57 canons of construction that courts use to discern what statutes mean.[18] If jurists, steeped as they are in the discipline of rigorously discerning the meaning of written texts, sometimes find it difficult to discover a statute's proper operation, it should come as no surprise that the executive might encounter similar difficulties.

The second dynamic that might stand between legislative intent and real-world application is motivated reasoning. The governor's (or administrator's) agenda may not always exactly square with what the legislature has tried to accomplish. A creative member of the executive branch may "discover" an alternative reading of the law that is more conformable to his desired outcome. Or, in enforcement matters, the law might just drop so far down in the executive's priority structure that it may as well not exist at all.

The third major dynamic that may prevent realization of legislative intent is the law of unintended consequences. Every input into a system as complex as human society will, without fail, produce some consequences that no one expected. That is especially true when the Wisconsin legislature is not the only governmental entity making inputs. This is not a commentary on legislators' capabilities. It is, instead, a function of the knowledge problem — the unavoidable reality that a smallish

17 The legislature expresses its intent, of course, through the words of its bills. *State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 662, 681 N.W.2d 110, 124 ("We assume that the legislature's intent is expressed in the statutory language."). *See also Wisconsin Carry, Inc. v. City of Madison*, 2017 WI 19, 373 Wis. 2d 543, 568, 892 N.W.2d 233, 244 ("We find the legislature's intent in the words it adopts, not the expressed (or unexpressed) subjective reasons the 132 legislators had for adopting those words.").

18 ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012).

group of people (132 legislators, let's say) cannot possibly identify and account for how all 6 million people in our state will respond to any given input. Those unexpected consequences, when their magnitude grows sufficiently great, can overwhelm the input to such an extent that it fails to achieve its purpose. That is to say, sometimes a piece of legislation just misses the mark.

These dynamics demonstrate why a responsible legislature—a legislature that truly directs the state's public policy—cannot be content as a disinterested spectator once it introduces its law to the public arena. It must vigorously exercise its oversight authority to ensure execution of the law really does follow the course set by the legislature. Anything less will surrender the legislature's leadership position to one of the other governmental branches.

B. SOCIETIES ARE FLUID. LAWS ARE NOT.

Wisconsin is dynamic—not just in one dimension, but in a multitude of dimensions. Our population changes constantly as we mint new Wisconsinites (and lose others). Our economy grows and changes, incorporating new sectors that couldn't have been imagined a generation ago, while leaving behind others we thought were permanent institutions. In an unending feedback loop, we adapt technology to our way of life, which in turn influences our lives in unexpected ways. We move from urban centers to the suburbs and exurbs, and then back downtown. Social interactions and relationships—whether familial, religious, fraternal, recreational—grow, adjust, mature, or dissolve in ways that are sometimes predictable, sometimes not.

In the midst of that turbulent landscape, the legislature is responsible for peering into the uncertain future and determining what laws to adopt, amend, or abolish. But laws, unlike our state, are not dynamic. Once adopted, they remain static, impervious to the changes swirling around them. Which makes the task of legislating akin to painting a portrait of a subject who insists on wandering about the studio instead of quietly maintaining a pose.

This means some of our laws will have a limited shelf-life. Not all of them, of course. After all, we aren't dynamic in every possible way. Basic human nature, which we can only partially tame and direct, never really changes. That's why our laws forbidding such behavior as homicide, sexual assault, theft, and all the others that reflect human nature gone awry are evergreen; they rarely need more than touch-ups.

But a significant slice of Wisconsin's laws addresses matters that are much more volatile than human nature. Some laws need constant attention. Every biennium, for example, the legislature must adopt a new appropriations bill. Given the scope

and reach of state government, that document represents a mind-bogglingly complex balancing act between competing priorities and innumerable demands on Wisconsinites' resources. Other laws need less frequent attention, but cannot be set on autopilot (like much of the criminal code). Laws governing new technologies, with their attendant privacy concerns and impact on safety, fall into this category. So do laws regarding infrastructure development, food and drug safety, employment relations, tax structures designed to incentivize certain types of behavior and discourage others, and on and on throughout our collection of statutes.

The interaction of static laws and a dynamic society makes oversight authority an essential tool for a responsible and responsive legislature. In this context, oversight is all about foresight and preparation. The truly unexpected will almost always put the legislature in an unfortunately reactive mode. But most subjects in need of legislative treatment do not develop overnight. Regular investigations and hearings are the legislature's antennae, keeping them abreast of subjects that may require revisiting existing laws, or contemplating fresh legislation. They will also reduce the chance of getting caught behind the curve of new developments.

C. ARE WE DONE HERE?

"Nothing is so permanent as a temporary government program."[19] We chuckle when we hear that, but only because it's so often true. Institutional inertia makes it really difficult to end a program once it rolls into action. And even when there is a continuing justification for the program, it may drift off target over time without periodic attention to the course it is taking.

There are several components to program-related institutional inertia. One is that beneficiaries obviously want the state's assistance and will be reluctant to let it go when the circumstances giving rise to the program no longer obtain. Continued program revenue is frequently easier to obtain, and more predictable, than income from the marketplace (with respect to private beneficiaries) or revenue streams within the local government's own jurisdiction. Money speaks. And it says it wants to be spent.

Another component contributing to institutional inertia is the unremarkable fact that programs require employees to implement them. This is inertia-friendly for both the employing agency and the employees. The latter develop subject-matter expertise as they carry out the program's functions, which may or may not be transportable to different jobs should the program end. And with the exception of

19 M. Friedman, "TYRANNY OF THE STATUS QUO" 115 (1984).

hard-core entrepreneurs, most employees prefer the certainty of remaining in their current positions. For the agency, FTEs are gold. Once authorized and funded, they are stewarded with zeal. Ending a program could mean losing the FTEs, which means diminished flexibility and capacity for staffing other activities within the agency's portfolio.

A third inertia-friendly component is the near-invisibility of the vast majority of programs. Most folks are aware of the larger ones—BadgerCare, Wisconsin Works, FoodShare, WIC (Women, Infants, and Children). These address needs and issues that aren't likely to abate, and so the programs are permanent. But once we get past the top tier of programs, they drop pretty quickly from public view. How many people know about, much less keep tabs on, programs like TEACH (Technology for Educational Achievement), or the Wisconsin Home Energy Assistance Program (WHEAP)? Even deeper in the weeds, a peek at some of the Department of Transportations' programs illustrate how obscure they can be. The following fall under the category of "Road and Bridge Assistance Programs," one of many categories administered by just one of the many administrative agencies:

- Connecting Highway Aids
- County Forest Road Aids
- Disaster Damage Aids
- Emergency Relief
- Expressway Policing Aids
- Facilities Repeatedly Requiring Repair and Reconstruction (F4R)
- General Transportation Aids (GTA)
- Highway Safety Improvement Program (HSIP)
- Lift Bridge Aids
- Local Bridge Improvement Assistance
- Local Roads Improvement Program (LRIP)
- Signals and ITS Standalone Program (SISP)
- Statewide Transportation Improvement Program (STIP)
- Surface Transportation Program - Rural (STP-R)
- Surface Transportation Program - Urban (STP-U)

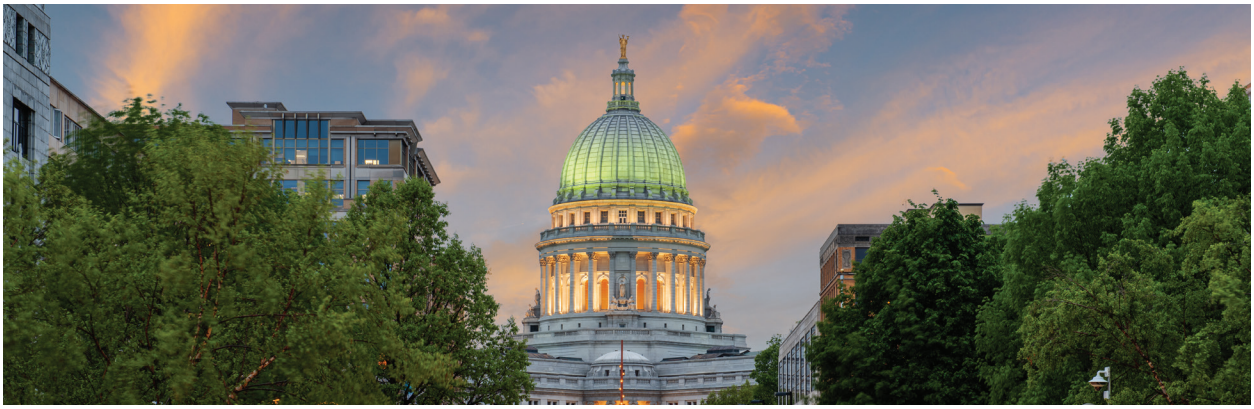
This is just a small sampling of programs administered by the DOT. A complete listing of all state programs would numb the mind and completely lose the thread of this conversation.

Programs that fly so far under the radar that the average Wisconsinite has never heard of them will find little to no public resistance to continued funding—even if the program is not achieving its objective or there is no further need for its existence. It is entirely possible that these DOT programs, as well as the teeming multitudes of other state programs, are effectively and efficiently carrying out their intended purposes. But even if they aren't, institutional inertia can keep them rolling forward.

Perhaps one of the greatest sources of cynicism and disconnect between the people of Wisconsin and their state government is tied up in this institutional inertia. They see (and feel) the enormous amounts the government charges them, yet they have very little idea where the money goes or how it's used. People instinctively know that a comparable lack of information about their own finances would quickly lead to utter ruin. As a result, they inevitably suffer from a gnawing nervousness that the government might be wasting their money or, worse, just giving it to people more highly favored by officeholders. The result is a growing and corrosive distrust of those to whom they lent their authority.

The most transformative exercise of oversight authority can occur in this field. Notwithstanding all of the factors contributing to institutional inertia, programs really must wrap up when they accomplish their objectives. And they really must be modified when it becomes apparent they aren't having the intended effect. But the program-ending or-amending cues will never come to light unless the legislature exercises its oversight authority to ensure the program is moving towards its goal, or at least that there is a continuing fit between the program and the need it was created to address. Without that oversight, the justification for any given program can become as empty as the Animal House fraternity, the chief virtue of which was that it had "a long-standing tradition of existence to its members and to the community at large."[20]

Just *doing* this work, however, is not enough—Wisconsinites must *see* the legislature doing this work. Checking up on the innumerable programs that consume their tax payments must be a high-visibility project. Oversight hearings that regularly require program administrators to publicly justify the resources they consume can start the long trek towards rebuilding trust between the people who create value and the people who tax and spend it.



20 *Animal House* (Universal Pictures 1978).

D. NO TRESPASSING!

As we all know, the Wisconsin constitution is the document by which our state government came into existence. It is the grand charter by which the people lent, and continue to lend, some of their native authority to government officials. But they didn't lend the authority as an undifferentiated mass to be allocated and traded amongst government officials as they might deem expedient. Instead, they definitively compartmentalized it so that each branch would exercise only the type of authority corresponding to its function (lawmaking for the legislature; carrying the law into effect for the executive; dispute resolution for the judiciary). Our status as free people served by their state government, as opposed to a government served by its people, depends on fidelity to this arrangement.

And yet, in a vitally important sense, the constitution is completely inert. It is a memorialization of a foundational agreement, not an agent of volitional action. It has no motive power, no ability to defend itself. Its structure, function, and promises come to life only through the work of officers periodically chosen by the people who lend their authority to it.

This reality has sobering consequences. It means that, should one of our chosen officers opt to poach on a coordinate branch's authority, no automatic corrective will chase him away. There is a popular misconception that the supreme court will referee any border disputes and ensure trespassers are sent back to their proper constitutional territory. But the courts do not have a free-floating mandate to track down and remedy constitutional violations. Their authority is simply to resolve cases brought to them in the ordinary course of litigation. Consequently, the first line of defense must be the officers manning the governmental branch suffering the trespass.

Adventures on the legislature's constitutionally-vested authority can come from many quarters, so legislators and their staff must keep a weather eye on the boundaries. Over the last couple of years some of those intrusions have received substantial attention. They usefully illustrate how varied, and surprisingly bold, they can be. Consider the following:

The Governor's Laws

Everyone who grew up with Schoolhouse Rock knows how the legislature creates a law. But they might be surprised to learn that there are statutes here in Wisconsin that the legislature did not write, or consider, or vote on, or approve. They were written by the governor, and the governor alone, through the creative use of his partial veto power. And yet they have been given the same force and effect as laws

created through the process actually provided by the constitution. To understand how much of the legislature's power the governor poaches when he creatively exercises his partial veto, a brief reprisal of Schoolhouse Rock's "I'm Just A Bill" is in order.

Let's start here: A law is an idea that successfully made its way through the legislative process. The idea arises because someone thought something within the government's jurisdiction ought to be required, or prohibited, or changed. That "someone" could be virtually anyone—either inside or outside the legislative houses. But before that idea can become law, it needs a doorway into the legislative process.

That doorway is a bill. The law, so the constitution says, *must* begin as a bill: "No law shall be enacted except by bill."[21] There is only one place a bill may begin its journey, and that place is the legislature: "Any bill may originate in either house of the legislature . . . ."[22] Note that it says the bill originates in a *legislative* house, not the governor's mansion. The bill must make an appearance in both legislative houses, and each of the houses has the authority to change the idea comprised by the bill because "a bill passed by one house may be amended by the other."[23] Finally, before a bill may become law, it must be agreed upon and presented to the governor for approval or veto.[24]

Each step in that process reinforces the fact that the legislature is the branch of government that makes the law. But over the years, the governor has used his partial veto authority to amend appropriation bills in a way that introduces brand new ideas—ideas that were not in the bill presented to him.[25] By creatively striking out individual words, numerical digits, parts of sentences, or entire provisions, he can turn an idea into a law without it ever darkening the door of a legislative house. And sometimes he can make a law that directly contradicts the bill presented to him. In the latest attempt on the legislature's authority, the governor used his partial veto power "to change a school bus modernization fund into an alternative fuel fund."[26] The Wisconsin Supreme Court rebuffed that attempt, but it

21 Wis. Const. Art. IV, §17(2).
22 Wis. Const. Art. IV, § 19 (the "origination clause").
23 Wis. Const. Art. IV, § 19 (the "amendment clause").
24 "Every bill which shall have passed the legislature shall, before it becomes a law, be presented to the governor." Wis. Const. Art. V, § 10(1)(a) (the first clause is the "legislative passage clause," and the second is the "presentment clause").
25 In one instance, the legislature adopted a bill allowing an individual to increase his tax liability by $1, with the extra dollar going into an account used to finance political campaigns. The governor vetoed the provision regarding the increase in the individual's tax liability. The result was a law requiring all Wisconsinites to finance political campaigns, even against their wishes. So, by using his partial veto, the governor turned an individual's voluntary decision to finance political campaigns out of his own funds into a state-wide mandate that everyone finance political campaigns. *State ex rel. Kleczka v. Conta*, 82 Wis. 2d 679, 682, 264 N.W.2d 539, 540 (1978).
26 *Bartlett v. Evers*, 2020 WI 68, ¶ 13, 393 Wis. 2d 172, 178, 945 N.W.2d 685, 689 (Roggensack, C.J.).

identified no standards that would prevent something equally egregious from happening again.

So notwithstanding the constitution's unqualified mandate that the legislature is the exclusive branch of government to turn ideas into laws, some ideas have become law without going through the legislative process. These are the governor's laws, and they represent the will of the governor and the governor alone.

This is significant to a manual addressing legislative oversight because of the reason the supreme court gave for not interfering with the transfer of lawmaking power to the governor. It said it was merely applying "the longstanding practical and administrative interpretation or modus vivendi between governors and legislatures."[27] That is to say, because the legislature seemed content with the governor's filching of the lawmaking power, the court was not going to upset the boat.

If the legislature itself isn't willing to patrol the borders of its constitutionally-vested authority, it should be aware that, as a practical matter, the line will shift in the governor's favor over time. The legislature must engage its oversight powers to push back against the encroachments of an enterprising executive branch.

Give'm An Inch, They'll Take A Mile

That an executive branch agency may adopt any rules at all is solely a matter of legislative grace. Because a rule carries with it the force of law, the agency must borrow the legislature's authority to create them.[28] And because the authority is merely borrowed, the legislature could choose to rescind it entirely.[29] Justice Rebecca Bradley has made a persuasive argument that the legislature should do that very thing by moving the rule(law)-making authority back inside the legislative branch where it belongs.[30] Until that day should arrive, the executive branch continues making law at a stupendous rate.[31]

The executive branch has gotten so accustomed to making the law that it now thinks it has a right to do so, and that it may brush back the legislature when it tries to change the terms of the original loan. Two recent cases illustrate the executive's resistance to legislative

27 *Wisconsin Senate v. Thompson*, 144 Wis. 2d 429, 437, 424 N.W.2d 385, 388 (1988).
28 "[W]hen administrative agencies promulgate rules, they are exercising legislative power that the legislature has chosen to delegate to them by statute." *Koschkee v. Taylor*, 2019 WI 76, ¶ 12, 387 Wis. 2d 552, 563, 929 N.W.2d 600, 605.
29 "[T]he legislature has the authority to take away an administrative agency's rulemaking authority completely." *Id.* at 566.
30 *Id.*, 2019 WI 76, ¶ 42 (Rebecca Bradley, J., concurring).
31 "The Wisconsin Administrative Code is more than 11,000 pages long with just under 1,800 chapters of regulations . . . ." Jodi E. Jensen, *Regulatory Reform: Moving Policymaking from State Agencies to the Legislature*, Wis. Lawyer, Oct. 2018, at 9.

primacy in setting public policy. The important lesson is not in the specific adjustments the legislature sought to implement, but is instead in how hard the executive branch fought against the legislature's exercise of its own constitutionally-vested power to dial back or amend the executive's access to that power.

The first illustrative case addressed whether the legislature could insert the governor into the rule-making process, specifically as it relates to rules created by the Superintendent of Public Instruction. Although it may not be immediately apparent from the details of the case, the underlying controversy was about whether the legislature loses control of its authority once it loans it out to a member of the executive branch. Here's what happened.

The legislative act known as 2011 Act 21 granted the governor the power to stop the promulgation of a rule at two discrete points in the process. At the front end, Act 21 requires the sponsoring agency to obtain the governor's approval of the proposed rule's scope statement. And at the back end, the Act requires the agency to obtain the governor's approval of the proposed rule's final draft. Failure to obtain either of the approvals means the rule may not be promulgated.

This process came to the court's attention when certain individuals grew concerned that the Superintendent of Public Instruction (who was Tony Evers at the time) wasn't complying with the new rule-making requirements.[32] The Superintendent argued that he had a constitutionally-conferred right to create law through the promulgation of rules, and that the legislature had no authority to involve the governor in that process. Warming to his theme, the Superintendent argued that no one, not even the legislature, has the "unqualified or unchecked power to reject a rule."[33]

A moment's reflection reveals how stunning this assertion of power is. In the ordinary course of lawmaking, the legislature unquestionably has the unqualified and unchecked power to reject a proposed law—all it need do is choose not to introduce a potential bill, decide not to bring it to the floor, or defeat it in a vote. But according to the Superintendent, once the legislature loans rule-making authority to the executive branch, an agency's power to make the law exceeds the legislature's authority to stop it. No longer does the legislature have the unqualified power to prevent a law from being promulgated. Indeed, in this telling of the relationship between the branches, the executive's power to legislate through rule-making is implacable, and may be checked by the legislature only through "specific standards and procedures" (which the Superintendent did not identify).

32 *Koschkee*, 2019 WI 76. This was the second lawsuit addressing this issue. The first failed to produce a majority opinion, and was overruled by *Koschkee*. *See Coyne v. Walker*, 2016 WI 38, 368 Wis. 2d 444, 879 N.W.2d 520.
33 Respondent's Brief at 24, *Koschkee v. Taylor*, 2019 WI 76.

The Superintendent's attempted poaching of the legislature's authority did not survive contact with the Supreme Court (at least, not this time). With a few, tightly-reasoned sentences, the court explained why the executive branch cannot dictate to the legislature the terms on which it exercises its borrowed power:

> "Because the legislature has the authority to take away an administrative agency's rulemaking authority completely, it follows that the legislature may place limitations and conditions on an agency's exercise of rulemaking authority, including establishing the procedures by which agencies may promulgate rules. The legislature may therefore retract or limit any delegation of rulemaking authority, determine the methods by which agencies must promulgate rules, and review rules prior to implementation."[34]

What the legislature gives, it may take away. And if it can entirely rescind a power, it necessarily follows that it may impose conditions on the exercise of that power when it is on loan to the executive branch (of which the SPI is a part).

The *Koschkee* case demonstrates that the executive understood the legislature's delegation of rule-making power as more of a grant than a loan; once given, it may not be recaptured. As the legislature learned in *Wisconsin Senate v. Thompson*, the Supreme Court has allowed long-standing habits to harden into constitutional standards. The legislature can reduce this risk by patrolling the boundary between it and the executive. This may be the only practical way of preventing the Supreme Court from validating a shift in authority from one branch to another.

The second case illustrating the executive's tenacious grip on the legislature's authority involved another slight adjustment to the legislature's role in the rule-making process. Up until a few years ago, the legislature could suspend a rule promulgated by an executive agency for a short period of time, and it could only suspend the rule once. The legislature decided this gave it insufficient control over the power it had lent to the executive, so it reserved to itself the right to suspend a rule multiple times.

The inevitable lawsuit followed, in which the governor acknowledged that a single suspension was an acceptable level of legislative interference with the executive's lawmaking power, but he asserted that more would be intolerable. He was concerned that the legislature could effectively repeal a rule through repeated suspensions. Rules promulgated by the executive branch, he argued, cannot be undone except through the legislative process.[35]

34 *Koschkee*, 2019 WI 76, ¶ 20, 387 Wis. 2d at 566.
35 Response Brief of Defendant-Respondent/Defendant Tony Evers, in his Official Capacity as Governor of the State of Wisconsin, *Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35.

He believed this was a crucial principal because it was the only process that allowed him to stop the legislature from changing laws created in his branch of the government. He understood that if it took a legislative act to repeal an executive agency's rule, he could protect the rule simply by vetoing the bill proposing its elimination. The legislature's only recourse would be to muster a sufficiently large majority to override the veto. The net result of this position would be a reversal in legislative and executive functions. It would give the executive branch the primary role in drafting and adopting public policy through the promulgation of rules (which carry the force of law). And the legislature would be powerless to stop the law from going into effect unless it could muster a veto-proof majority in support of a bill to repeal the rule—in essence, a legislative veto.

The Wisconsin Supreme Court rejected this inter-branch power-swapping proposition—at least for now. The court ruled that suspending a rule twice is acceptable, but left open the possibility that more might be too much. Although the court ruled against the governor's position, it did so ambivalently while leaving the door open for future challenges to the manner in which the legislature chooses to lend out its authority to the executive branch. This should remind the legislature that the primary guardian of its prerogatives is the legislative branch itself.

We're Just Actin' Here

They say that stress reveals a person's character in a way nothing else can. If that is so, and surely it is, then it must be true of institutions as well, populated as they are by people. The recent pandemic will undoubtedly be remembered as one of the greatest stressors on our institutions, including state government, in the last seventy-five years. So we can reasonably expect to learn a little something about our government's nature from its response to pandemic-related challenges. As it turns out, those challenges taught us a great deal about the executive branch's understanding of its relationship to the legislature.

The most relevant lesson to draw from the pandemic-induced emergency (for purposes of oversight considerations) is that the executive branch views the legislature as an unaffordable luxury when stress levels rise. Instead of responding to the pandemic within the confines of our constitution and existing statutes, it acted as though emergencies license the executive branch to act in any way it sees fit. It creatively read the law as having transferred the legislature's authority to an unelected executive bureaucrat so that she could unilaterally rewrite the state's laws without regard to the separation of powers or individuals' constitutionally-protected rights. And so the (acting) secretary of the Department of Human Services issued her shockingly comprehensive "Safer at Home" order that, amongst its more ambitious mandates:

- confined people to their homes, unless allowed to leave by the Secretary;
- closed all businesses except those the secretary deemed (in her sole judgment) essential;
- prohibited even essential businesses from operating except to the extent they complied with the secretary's directives on how to conduct their activities;
- banned private gatherings, unless allowed by the Secretary;
- banned travel, unless allowed by the Secretary;
- required everyone engaging in activities permitted by the Secretary to comply with her department's guidelines; and
- demanded that everyone cough or sneeze, wash their hands, and greet one another only in compliance with her directives.

The significance of these mandates (for purposes of this Manual) is not whether they would help control the pandemic, but whether the executive branch may exercise such pervasive control over the lives of all Wisconsin residents. Because the constitution contains no "emergency" clause allowing one branch to confiscate another's authority, the answer must necessarily be the same as when there is no pandemic. That makes the Safer At Home order problematic because there is no law granting the executive branch the ability to confine innocent people to their homes. Nor is there any law giving it power to forbid gathering with friends or family, ban travel, close businesses, or compel individuals to use a particular method when they wash their hands. If she wishes that power, she must either seek it from the legislature, or engage the rule-making machinery.

When called upon to explain why the Secretary thought she could commandeer the lives of everyone in the state, her attorney offered what amounts to a declaration of independence from the legislature. Keep in mind that executive branch authority is to carry the law into effect, which presupposes there is an existing law authorizing or requiring the executive's actions. The Secretary's attorney admitted, however, that the Safer At Home order was not enforcing or administering any statute, rule, or any other pre-existing source of law.[36] Instead, he asserted that the Secretary may simply "act."[37] When asked whether there are any constitutional or statutory limits on what the Secretary may require of Wisconsinites in the effort to control the pandemic, her attorney said the agency's "actions are limited by what is

36 *Palm*, 2020 WI 42, ¶ 89.
37 *Id*.

necessary to combat the infectious disease that's presented at the time."[38] And he said the authority to determine what is "necessary" belongs solely to the Secretary and the agency she leads.[39]

It should be obvious that a self-imposed limit is not really a limit at all. What the Secretary was *really* telling the Wisconsin Supreme Court is that, in the event of health emergencies, we have a government in which a single person can make all the laws she believes are appropriate to address the emergency. That's uncomfortably close to the definition of an autocracy.[40] If the executive branch has the power to just "act," even when there is no existing legislative or regulatory authorization, then the legislature is an option, not a necessity. And according to the Secretary, it's an option too costly to indulge when there is an emergency. This is a sterling illustration of the executive branch's expeditionary tendencies taken to their logical end.

The executive branch doubled down on this dismissiveness when the governor flat-out rejected the legislature's authority to rescind a state of emergency. The governor has the power to declare an emergency only because a statute says he does.[41] The same statute granting him that authority says the legislature may rescind the state of emergency at any time through a simple joint resolution to that effect.[42] But after almost an entire year of using powers available only during a state of emergency, the governor was not in a mood to let them go. A few hours after the legislature rescinded the declaration of emergency, the governor simply issued another.[43] The contempt for the legislature's authority was palpable, and it did not end until the Wisconsin Supreme Court stopped it. There is no telling how long the executive branch would have continued usurping the legislature's authority had the matter not come to the court. But the legislature should keep in mind that the court has not always been interested in enforcing the separation of powers, and it may once again be lapsing into a period of disinterest.

***

This brief recitation of recent border disputes illustrates that, even though our state is over 170 years old, the boundary between the executive and legislative departments of government is still a contested question. Whether the executive branch is writing its own laws through the creative use of the partial veto power, rejecting the legislature's "interference" with its borrowed rule-making power,

38 *Id*. at ¶ 81.
39 *Id.*
40 "Autocracy," Merriam-Webster Dictionary ("government in which one person possesses unlimited power").
41 Wis. Stat. § 323.10.
42 *Id.*
43 *Fabick v. Evers*, 2021 WI 28.

or freeing itself entirely from the need for laws by taking for itself the unlimited authority to just "act," its incursions into the legislature's constitutionally-vested authority have been bold and persistent.

Exercising oversight authority is necessary to prevent the acquisitive gleam in the executive's eye from resulting in the loss of legislative authority. The executive is always on the prowl, ready to snatch up any lightly defended legislative powers it might find. For the last few years, the Wisconsin Supreme Court has been willing to rebuff the executive's poaching, but almost all the cases were decided by the slimmest of margins, and the composition of the court has recently changed.[44] It would be unwise for the legislature to become dependent on the third branch to bail it out when the executive gets adventurous. Well-conceived and executed oversight hearings and investigations can serve as a regular reminder that the executive branch's role is derivative of the legislature's work, and that the legislature is the primary steward of public policy, not the executive.

E. INEFFICIENCY, WASTE, FRAUD, AND ABUSE

Even if the legislature makes itself perfectly clear about what the law requires, there is no certainty that this will lead to a respectful, efficient, responsive, and fraud-resistant execution of those requirements. Securing that goal can be a challenge. In the private sector, economic forces provide the primary impetus to root out inefficiencies, cut waste, and protect against fraud and abuse. Healthy competition ensures that if a company's attention to these factors falters, the consequences will almost inevitably show up in its earnings report as the competition scoops up market share. But that's the private sector.

Generally speaking, there is no market capable of disciplining state governments with bloated budgets, wasted resources, sclerotic service delivery, or fraud-susceptible programs. In some instances, governmental mismanagement has played a role in individual and corporate relocation decisions, and sometimes those relocations have occurred in relatively large numbers. But the discipline the economic consequences of such moves might impose can be blunted, at least in the

44 There was no majority opinion in *Bartlett v. Evers* regarding the governor's partial veto power, although four of the justices endorsed at least some limitations on it. The Wisconsin Legislature v. Palm decision, which addressed the Safer At Home order, was a 4-3 opinion. The court's *Koschkee v. Taylor* decision with respect to the legislature's authority to change the rule-making process was a 4-2 opinion (Justice Abrahamson did not participate). The *SEIU v. Vos* case, which ruled on the legislature's right to suspend a rule multiple times, was a 5-2 decision, but the majority's defense of the legislature's prerogative was so weak that it may not survive another challenge. In each of these cases, the majority included a justice who was later replaced by someone who has not demonstrated an interest in enforcing the separation of powers. So, relying on the third branch to protect the legislature against executive incursions may not be a good long-term strategy inasmuch as the court's two newest members (Jill Karofsky and Brian Hagedorn) do not appear to be particularly interested in what the constitution says about these border skirmishes.

short term, by the state's ability to make up lost revenue through increased taxes or borrowing. If state government is to avoid the debilitating effects of waste, fraud, and abuse, it cannot rely on an external mechanism. It must discipline itself if there is to be any discipline at all.

Governor Walker demonstrated the proactivity and energy needed to address these matters when, in 2011, he charged a new commission with the task of "finding efficiencies and eliminating some of the waste, fraud and abuse in Wisconsin government." The resulting report concluded that attention to these considerations could yield over $455 million in yearly savings. It found those savings in several discrete, but widely scattered aspects of governmental operations, including:

- Fraud and errors in public assistance programs ($177 million);
- Unnecessary overtime payments to state employees ($5.2 million);
- Consolidating and sharing services across municipal government boundaries ($45 million);
- Collective procurement amongst governmental entities ($35 million);
- Improved tax collection ($10 million);
- Reducing unemployment insurance fraud ($27 million);
- Wellness programs for state employees ($9 million);
- State agency office leases ($5 million);
- Improved state court debt collection ($5 million);
- Moving veterans from state to federal public assistance programs ($2.5 million);
- Improving effectiveness of grant programs ($16 million);
- Implementing agency-provided efficiency proposals ($38 million).[45]

Some of the Commission's observations are just as relevant today as they were then. "Grants, subsidies and other assistance," it said, "should be subject to more oversight."[46] And when the government goes to the private sector, oversight needs to follow the money: "Service organizations and other agencies outside of the direct state umbrella need to be financially accountable and subject to more oversight and quality control."[47]

But perhaps the Commission's most insightful recommendation relates to the conceptual approach that makes it possible to successfully minimize waste, fraud, and abuse. It began with a recognition that, all too often, efforts at catching these problems takes place in an entirely reactive posture:

45 Final Report, Governor's Commission on Waste, Fraud, and Abuse (2012) (available at https://www.innovations.harvard.edu/sites/default/files/opex/documents/Waste%20Fraud%20Abuse%20Commission%20Final%20Report%2C%20Wisconsin%2C%202012.pdf).
46 *Id*. at 9.
47 *Id*.

> "It appears that most of the attention is placed on program integrity ***after*** fraud or abuse is uncovered by a reporter or more commonly by the Legislative Audit Bureau. These are the most common triggers to ***reactive*** solutions by the agencies. Although these solutions may end up being effective they are of course too late as cash has already been released."[48]

The conclusion, and the lesson to take from the Commission's work, is that "[s]ystems with regard to protecting the integrity of all [state] programs should be designed to be proactive not reactive."[49] This is the posture without which success in this aspect of oversight is not possible.

Although Governor Walker took the initiative in 2011 to address these matters, the onus to do so was not solely, nor even primarily, on him. His efforts were certainly welcome, but the responsibility to address these matters belongs primarily to the branch with the power to make appropriations. That, of course, would be the legislative branch: "No money shall be paid out of the treasury except in pursuance of an appropriation by law."[50] In Spiderman-lingo, it might be said that with great appropriating power comes great oversight responsibility.

There are still plenty of opportunities to squeeze more waste, fraud, abuse, and inefficiency out of state operations. Wisconsin's last budget was north of $42 billion, so the Commission's work suggests a potential savings in the categories it identified of about 1%. The chance that the remaining 99% is nothing but lean meat is, let's be honest, slim.

The Commission's work was a snapshot in time, and it was a snapshot of specific, relatively narrow slices of the state's operations. The examination it started needs to march through the entirety of the state's work. And when it's done, it needs to start over. This is anevergreen project because there is no such thing as a governmental program or operation that remains at peak efficiency without regular oversight. This is a target-rich environment for those who are willing to look.

48 *Id*. at 10 (emphasis supplied).
49 *Id*. at 9 (emphasis supplied).
50 Wis. Const. Art. VIII § 2.

II. Authority For Oversight Functions

It is not enough, of course, that the legislature *needs* to engage in oversight activities—it must, as a matter of first principles, have the *authority* to do so. This part of the Manual will briefly explain where in the constitution one may find permission to conduct oversight, how the existence of the administrative state illustrates the extent of oversight power, and where the limitations on that power are to be found.

A. THE CONSTITUTIONAL STRUCTURE

Of the three branches, the constitution gives the legislature the most difficult task to accomplish. This is true, in part, because the legislature is entrusted with leadership in matters of public policy, and true leadership is hard. But the legislature's leadership role just hints at the real source of the difficulty. The most significant challenge arises from the question of time—specifically, the part of the temporal spectrum for which the legislature is responsible.

There is a strong correlation between each branch's primary responsibility and a piece of the temporal continuum, whether past, present, or future. The judiciary, for example, is responsible for matters of the past. Cases that come before the court address themselves to matters that have already occurred: a law was broken, a contract was breached, a dispute developed over the meaning of a statute. In each case, the court surveys pre-existing facts and law, and then applies the latter to the former to arrive at its judgment. The executive branch, on the other hand, is associated most strongly with the present. The governor's primary responsibility is to execute the law; that is, he faithfully carries into effect, today and each day as it arrives, the laws adopted by the legislature.

The constitution gives to the legislature the future, the most opaque part of the temporal continuum. The future is a conundrum in part because of the knowledge problem. We can imagine an impressive array of possible developments, but we don't know which will occur. The one thing we do know with certainty is that tomorrow will bring something we never could have contemplated. It's impossible to imagine all of the decisions, processes, values, trade-offs, risks, rewards, and preferences that result in a nice cup of coffee. Trying to figure out what six million Wisconsinites might do or want in each aspect of their lives is . . . well, let's just say the permutations are incalculable. As Thomas Sowell has said "[i]t takes considerable knowledge just to realize the extent of our own ignorance."

And yet this is the palette with which the legislature works. Members of this branch must peer into the murky unknown and, using as much discernment as they can muster, determine what laws will most likely contribute to human flourishing. "Discernment," however, is not the same thing as "gut instinct." It is, instead, a wisdom that comes from a thorough knowledge of the field the legislature seeks to affect, an appreciation of the proper role of incentives and sanctions, and an acknowledgement that human nature is not infinitely malleable, an understanding that not every problem has a legislative solution. Perhaps most importantly, it comes from an acknowledgement of how little it is truly possible to know about how a new law will affect the richly complex and decentralized network of relationships that is Wisconsin.

Although the legislature's work is geared towards the future, that work must have a solid grounding in information available to it today, as well as a keen grasp of what has come before. No one, of course, arrives in our state capitol as a newly-minted legislator already armed with all of that information. Not even pooling the existing knowledge of all the legislature's members will yield a knowledge base sufficient to intelligently and wisely legislate over the ensuing biennium:

> "A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information — which not infrequently is true — recourse must be had to others who do possess it."[51]

What's needed is a mechanism capable of providing relevant, timely, precise information specific to matters in need of the legislature's attention. That mechanism is oversight. In a very real sense, oversight is the legislature's institutional expression of curiosity. Whether through hearings, investigations, or other means, this is how the legislature learns what it needs to know to perform its duties. And that "need to know" points directly to the legal basis for the exercise of oversight authority.

This authority comes from Wisconsin's constitution, and yet one may search that document from beginning to end without ever finding the word "oversight" or any description of activities encompassed by that concept. The legislature's oversight authority is, instead, entirely bound up with what it means to legislate. The authors of the constitution were obviously aware that legislators would not arrive in chambers already possessed of all the information needed to discharge their duties. And they were undoubtedly desirous that the legislature would perform its duties well. Consequently, when they conferred on the legislature the power to legislate, they understood themselves to be simultaneously granting it the power necessary to inform itself sufficiently to carry out that function.

51 *McGrain v. Daugherty*, 273 U.S. 135, 175, 47 S. Ct. 319, 329, 71 L. Ed. 580 (1927).

As such, the legislature's authority to perform oversight functions has been considered to be simply one attribute of the constitutionally-conferred power to legislate. The United States Supreme Court traced the origins and nature of this authority back to colonial days:

> "In actual legislative practice power to secure needed information by such means [through investigations and compelled testimony] has long been treated as an attribute of the power to legislate. It was so regarded in the British Parliament and in the Colonial legislatures before the American R evolution; and a like view has prevailed and been carried into effect in both houses of Congress and in most of the state legislatures.
>
> ***
>
> In that period the power of inquiry — with enforcing process — was regarded and employed as a necessary and appropriate attribute of the power to legislate — indeed, was treated as inhering in it. Thus there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may be effectively exercised."[52]

So this "power of inquiry" (as oversight is sometimes known) is "auxiliary" to the legislative power: "We are of opinion that the power of inquiry — with process to enforce it — is an essential and appropriate auxiliary to the legislative function."[53] To that end, the legislature may commence and conduct investigations,[54] hold hearings, and require citizens to provide testimony and documents.[55]

The legislature's oversight authority is best understood as two-dimensional, covering both "what" it may reach and "who." We can refer to the first as "subject matter," the dimension that describes the breadth of the legislature's oversight responsibility. The second is "personal" and refers to those who are answerable to the legislature as it exercises this authority.

1. SCOPE: SUBJECT-MATTER

Because oversight is derivative of the authority to make the law, it naturally follows that oversight can go anywhere the power to legislate may legitimately travel. In the federal context, the United States Supreme Court has described oversight's subject-matter dimension in very expansive terms:

---

52 *Id.* at 161.
53 *Watkins v. United States*, 354 U.S. 178, 187, 77 S. Ct. 1173, 1179, 1 L. Ed. 2d 1273 (1957).
54 "The power of the Congress to conduct investigations is inherent in the legislative process." *Id.*
55 "It is their [citizens] unremitting obligation to respond to subpoenas, to respect the dignity of the Congress and its committees and to testify fully with respect to matters within the province of proper investigation." *Id.*

> "The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste."[56]

Our supreme court recognized a similarly broad oversight authority over 100 years ago: "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 . . . ."[57]

Because the legislature's oversight authority is, in its scope, coextensive with the lawmaking authority vested in it by the constitution, a review of that document provides a good road map of its vasty reaches. Amongst those legislative responsibilities requiring especially extensive stores of available knowledge are the following:

- *Creating the space in which the other branches operate*: One of the most significant proofs that the legislature ranks first amongst the otherwise equal branches of government is that it largely defines what the other branches do. Thus, for example, although the governor has authority over certain matters specifically granted to him by the constitution, the vast bulk of his authority derives from the directive that he faithfully execute the laws passed by the legislature. And the judiciary's duty, except when it is applying constitutional provisions or the common law, lies almost entirely in applying the legislature's handiwork to the cases it considers. Other state officers, such as the Attorney General, have only those powers that the legislature confers on them.[58]

56 *Id.*
57 *State v. Frear,* 138 Wis. 173, 119 N.W. 894, 895 (1909).
58 ***Governor:*** "He shall expedite all such measures as may be resolved upon by the legislature, and shall take care that the laws be faithfully executed." Wis. Const. Art. V § 4. ***Judiciary:*** "The judicial power of this state shall be vested in a unified court system . . . ." Wis. Const. Art. VII § 3. ***Attorney General and Treasurer:*** "The powers, duties and compensation of the treasurer and attorney general shall be prescribed by law." Wis. Const. Art. VI § 3. ***Superintendent of Public Instruction:*** "The supervision of public instruction shall be vested in a state superintendent and such other officers as the legislature shall direct; and their qualifications, powers, duties and compensation shall be prescribed by law." Wis. Const. Art. X § 1. ***Secretary of State:*** "The secretary of state . . . shall perform such other duties as shall be assigned him by law." Wis. Const. Art. § 2.

- *Monitoring performance of elected officials:* Not only may the legislature assign the other branches their duties, it may remove their officers when their performance falls below certain standards. This responsibility requires that the legislature have continuing and comprehensive knowledge of the conduct of those officers so that it may determine whether removal is necessary.[59]

- *Finances of the state:* The whole of the financial affairs of state government lie within the jurisdiction of the legislature. Not a penny may leave the treasury without the legislature first appropriating it to a particular task. And after the money leaves the treasury, the legislature's auditing eye follows it until it is properly spent on the intended purpose. So, the legislature's financial stewardship requires an on-going and detailed understanding of all matters affecting the state's financial health.[60]

- *Local governments:* The legislature's authority extends broadly both horizontally and vertically. The horizontal dimension describes its interactions with the other branches of government on the state level. Vertically, it organizes forms of local government and in some circumstances determines the type of authority they may exercise. Accurately discerning between those matters that must be left to local government and those requiring statewide uniformity requires a continually-updated working knowledge of current and prospective issues that may differentially impact Wisconsin's 1,925 towns, villages, cities, and counties.[61]

---

59 ***Impeachment:*** "The court for the trial of impeachments shall be composed of the senate. The assembly shall have the power of impeaching all civil officers of this state for corrupt conduct in office, or for crimes and misdemeanors . . . ." Wis. Const. Art. VII § 1. ***Interpellation and removal of state officers:*** "Any appointive state officer after being examined under ss. 13.28 and 13.29 [interpellation] may be removed by the legislature by joint resolution adopted in each house by a majority of the members elected to such house." Wis. Stat. § 13.30. ***Removing jurists by address:*** "Any justice or judge may be removed from office by address of both houses of the legislature, if two–thirds of all the members elected to each house concur therein . . . ." Wis. Const. Art. VII § 13.
60 ***Appropriations:*** "No money shall be paid out of the treasury except in pursuance of an appropriation by law." Wis. Const. Art. VIII § 2. ***Audits:*** "The legislature shall provide for the auditing of state accounts and may establish such offices and prescribe such duties for the same as it shall deem necessary." Wis. Const. Art. IV § 33.
61 "The legislature may confer upon the boards of supervisors of the several counties of the state such powers of a local, legislative and administrative character as they shall from time to time prescribe." Wis. Const. Art. IV § 22. "The legislature shall establish but one system of town government, which shall be as nearly uniform as practicable; but the legislature may provide for the election at large once in every 4 years of a chief executive officer in any county with such powers of an administrative character as they may from time to time prescribe in accordance with this section and shall establish one or more systems of county government." Wis. Const. Art. IV § 23. "Cities and villages organized pursuant to state law may determine their local affairs and government, subject only to this constitution and to such enactments of the legislature of statewide concern as with uniformity shall affect every city or every village." Wis. Const. Art.
XI § 3.

- *Education:* The legislature's responsibility to know becomes "meta" when considering the educational element of its portfolio. The constitution makes the legislature responsible for establishing public schools from primary through university levels. So it must know about knowing and what is necessary to transmit it to the next generation.[62]

- *The general power to make laws:* While the foregoing categories of authority require substantial stores of knowledge to act with wisdom and care, this one dwarfs them all. The legislature's largest deposit of authority comes from a single sentence in our state constitution: "The legislative power shall be vested in a senate and assembly."[63] The legislative power is, at its most basic, the power to make the law. This provision confers on the legislature the authority to act on any matter suitable and appropriate for a state government to address. Although adequately defining the outer boundaries of that concept is beyond the scope of this Manual, the constitution says they encompass the authority to protect our "inherent rights," amongst which are "life, liberty and the pursuit of happiness,"[64] and to "secure [freedom's] blessings, form a more perfect government, insure domestic tranquility and promote the general welfare . . . ."[65]

Although this is not a comprehensive review of all power conferred on the legislative branch, it is sufficient to give a sense of how far its lawmaking authority reaches. Because oversight is derivative of vested authority, and knowledge is the raw material of oversight, it inevitably follows that our constitution intentionally created the legislature with a voracious appetite for knowledge.

2. SCOPE: PERSONAL

Having surveyed the broad subjects into which the legislature may legitimately inquire, there remains the question of the sources from which it may properly withdraw the needed knowledge. An extended analysis is not necessary because a brief reflection will show that the source of the authority to inquire is also the source of the information that is the object of the inquiry.

---

62 "The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of 4 and 20 years . . . ." Wis. Const. Art. X § 3. "Provision shall be made by law for the establishment of a state university at or near the seat of state government, and for connecting with the same, from time to time, such colleges in different parts of the state as the interests of education may require." Wis. Const. Art. X § 6.
63 Wis. Const. Art. IV § 1.
64 Wis. Const. Art. I § 1.
65 Wis. Const. preamble.

By conferring on the legislature the authority to make law, the people of Wisconsin also necessarily conferred on their representatives the incidental authority to obtain all the knowledge necessary to make the laws both wise and effective (as described above). That knowledge exists either in individuals or the repositories they fashion for its storage. So the knowledge belongs to the very individuals who commissioned the legislators to search out the knowledge needed to perform the legislative task.

The grant of authority to acquire knowledge, therefore, reflexively identifies those who are responsible for providing it: "We, the people of Wisconsin,"[66] the grantors of the legislature's oversight authority. Because the repositories of knowledge are the same as the grantors of the authority, and the grantors are the citizens of Wisconsin, no one is exempt from the obligation to provide the information the legislature needs to fulfill its duties. And, indeed, the United States Supreme Court recognized this truth with respect to Congress's investigatory power:

> "It is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action. It is their unremitting obligation to respond to subpoenas, to respect the dignity of the Congress and its committees and to testify fully with respect to matters within the province of proper investigation."[67]

What the United States Supreme Court said with respect to Congress is no less true of the relationship between our legislature and the people of Wisconsin.

B. THE ADMINISTRATIVE STATE

Because the legislature's oversight authority derives from our constitution, no statute can either expand or contract it. But that constitutionally-vested authority is "potential"—it is a reservoir, inert and inactive. By itself, it has no object on which to act. This is so because, as described above, oversight authority is an attribute of legislative authority; it does not exist independently of the legislative act. Consequently, there is no occasion on which to exercise oversight until the legislature either acts or contemplates acting. Once the legislature engages, however, the "potential" authority to conduct oversight becomes "kinetic"—it naturally and necessarily follows in the wake of the actual or potential legislative initiative. The legislative act provides both the occasion and the subject on which the oversight function operates.

66 Wis. Const. preamble.
67 *Watkins*, 354 U.S. at 187-88.

The more active the legislature is, therefore, the broader its practical opportunity to engage in oversight becomes. With the power to create the law comes the responsibility to ensure it is executed as intended. And that means there is a direct relationship between legislative output and the duty to oversee the executive branch's execution of that output. So, while the legislature was operationalizing a world of practical applications for its oversight authority when it created the state's administrative apparatus, it was simultaneously imposing on itself a concomitant amount of responsibility to oversee the executive branch's use of that apparatus.

The administrative state is, in a sense, the Rosetta Stone for fully appreciating the extensive reach of the legislature's authority to oversee the executive's work. It is here that we are reminded that the vast bulk of what is considered the executive branch is, in reality, an entirely legislative creation. That is to say, the constitution did not bring into existence the sprawling mélange of agencies, divisions, bureaus, sections, units, boards, councils, commissions, committees, or any of the other apparatus that has come to be known as the "administrative state." The legislature created them all and made them part of the executive branch.[68] And these statutory enactments brought in their train the kinetic authority to oversee their implementation and use.[69]

Of course, what the legislature has authority to create, it also has authority to uncreate (even though such an occurrence might be unlikely). This is significant because it means the entirety of the administrative apparatus of the state remains subject to the legislature's continued supervision and stewardship. The legislature is responsible for keeping tabs on whether the administrative apparatus is performing the intended functions in the intended manner, whether parts of it have outlived their usefulness, and whether it is in need of restructuring or supplementation.

68 "Although agencies have sometimes been criticized as a 'headless fourth branch of government,' they are not—we have only three. Agencies must belong to one of them, and we have said before that they are one manifestation of the executive." *Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, ¶ 97, 393 Wis. 2d 38, 96, 946 N.W.2d 35, 64 (quoting Peter L. Strauss Agencies' Place in Government, 84 Colum. L. Rev. 573, 578 (1984) (internal marks and quoted source omitted)). *See also Koschkee*, 2019 WI 76, ¶ 14 ("Agencies are considered part of the executive branch.").

69 An accounting of all the statutes creating each piece of the administrative state would consume an unreasonably large amount of space. Just listing the statutes that created the top-line agencies is daunting, and includes the following: Wis. Stat. § 15.10 (creating the Department of Administration); Wis. Stat. § 15.13 (creating the Department of agriculture, trade and consumer protection); Wis. Stat. § 15.14 (creating the Department of Corrections); Wis. Stat. § 15.16 (creating Department of Employee Trust Funds); Wis. Stat. § 15.18 (creating the Department of Financial Institutions); Wis. Stat. § 15.19 (creating the Department of Health Services); Wis. Stat. § 15.20 (creating the Department of Children and Families); Wis. Stat. § 15.22 (creating the Department of Workforce Development); Wis. Stat. § 15.25 (creating the Department of Justice); Wis. Stat. § 15.31 (creating the Department of Military Affairs); Wis. Stat. § 15.34 (creating the Department of Natural Resources); Wis. Stat. § 15.37 (creating the Department of Public Instruction); Wis. Stat. § 15.40 (creating the Department of Safety and Professional Services); Wis. Stat. § 15.43 (creating the Department of Revenue); Wis. Stat. § 15.44 (creating the Department of Tourism); Wis. Stat. § 15.46 (creating the Department of Transportation); Wis. Stat. § 15.49 (creating the Department of Veterans Affairs).

When the legislature brought these administrative entities into existence, it depended on a great sea of information about the nature, duties, and conduct of the executive branch to guide their design. Its continuing responsibility for the effective function of that apparatus necessarily carries with it the continued authority to keep abreast of that same sea of information. Some of this authority is expressed through the requirement that administrative entities regularly report on their activities to the legislature. So, for example, the governor must regularly provide to the legislature "the reports of all state officers, commissions, boards, and departments required by law to report to the governor . . . ."[70] And the legislature may require by law that any "office, department, agency, institution of higher education, association, society, or other body in state government created or authorized to be created by the constitution or any law" provide regular reports on its activities to the legislature.[71] But those are just examples. The full reach of the legislature's authority covers every source of information within the administrative apparatus.

The legislature's continued intimate connection to the administrative agencies goes beyond their creation and maintenance. In some of their most consequential work—promulgating rules—the agencies aren't using authority native to the executive branch at all. An agency's rule-making power is the power to make the law,[72] and it bears all the hallmarks of legislative authority.[73] This is so because an agency's ability to promulgate a rule comes from an express loan of legislative power.[74] As such, it "may be limited, conditioned, or taken away by the legislature."[75] Fully cognizant of its constitutional ownership of this authority, the legislature has retained for itself a substantive role in the executive agencies' exercise of its borrowed powers, including the power to insert itself into the rule-making process,[76] and the right to suspend a rule's operation after promulgation.[77] And because oversight authority becomes operational in the wake of legislation, the whole of the executive's rule-making activity—whether procedural or substantive—is subject to the legislature's oversight.

70 Wis. Stat. § 14.04.
71 Wis. Stat. § 13.172.
72 "Administrative rules enacted pursuant to statutory rulemaking authority have the force and effect of law in Wisconsin." *State ex rel. Staples v. Dep't of Health & Soc. Servs., Div. of Corr.*, 115 Wis. 2d 363, 367, 340 N.W.2d 194, 196 (1983).
73 "We have recognized before that when an agency promulgates a rule, it is exercising "a legislative power[.]" *Koschkee*, 2019 WI 76, ¶39.
74 Rule-making power "comes solely through express delegation from the legislature." *Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, ¶ 98, 393 Wis. 2d 38, 98, 946 N.W.2d 35, 65.
75 *Koschkee*, 2019 WI 76, ¶33.
76 *See, e.g.*, Wis. Stat. § 227.19 (legislative review of proposed rules prior to promulgation).
77 Wis. Stat. § 227.26(2)(d) ("The [joint] committee [for review of administrative rules] may suspend any rule by a majority vote of a quorum of the committee.") & (2)(im) ("[T]he committee may act to suspend a rule as provided under this subsection multiple times.").

Finally, the legislature not only created the administrative entities and invested them with some of its own power, it also regularly participates in selecting those who will be responsible for their day-to-day operations. The senate has the power of advice and consent with respect to any secretary nominated by the governor to direct and supervise an agency.[78] The same is true of commissioners, board members, and other leaders throughout the executive branch.[79] The responsibility to provide advice and consent carries with it the responsibility to remain fully informed of the doings and performance of the parts of the administrative apparatus the nominee proposes to lead. This provides an additional window of oversight authority with respect to the executive's conduct in its administrative agencies.

The legislature's creation of the administrative state, its investment of the apparatus with some of its own power to make the law, and its regular involvement in decisions regarding who shall lead the administrative entities, together give the legislature a comprehensive view of the executive branch's activity. That view ranges from a birds-eye structural perspective all the way down to an atomic-level scrutiny of day-to-day operations. The administrative state does not, of course, represent an exhaustive description of the legislature's oversight reach. But it provides a useful illustration of how "potential" oversight authority becomes "kinetic," as well as an example of how far this authority can penetrate into the executive branch.

C. LIMITATIONS

These illustrations should give some sense of the immense depth and breadth of the legislature's oversight authority. It is not, however, unlimited. There are three broadly applicable qualifications on the legislature's oversight authority. Two of the three address the subjects the legislature may pursue, while the third limitation relates to the people from whom the information may be obtained. The first limitation reflects the functional connection between oversight and the legislature's lawmaking authority (the "Functional Limitation"). The second recognizes that, in a free society, governments have a limited portfolio of responsibilities and, hence, authority (the "Governmental Portfolio Limitation"). And the third respects the constitution's explicit protection of certain individual rights that limit the legislature's investigatory reach (the "Individual Rights Limitation").

78 Wis. Stat. § 15.05(1)(a) ("If a department is under the direction and supervision of a secretary, the secretary shall be nominated by the governor, and with the advice and consent of the senate appointed, to serve at the pleasure of the governor.").
79 *See, e.g.*, Wis. Stat. § 15.06 (appointment of commissioners); Wis. Stat. § 15.07 (appointment of board members); Wis. Stat. § 15.08 (appointment of members of examining boards and councils); Wis. Stat. § 15.085 (appointment of members of affiliated credentialing boards).

1. THE FUNCTIONAL LIMITATION

The first limitation is really a restatement of the principle from which the legislature obtains its oversight authority. If the basis for engaging in oversight activities is the need for information to assist the legislature in intelligently carrying out its lawmaking function, then it must necessarily follow that legislators may deploy it for that purpose only and no other. That is to say, oversight is not a license to indulge in generalized curiosity. It must, instead, have a legitimate and substantive connection to its lawmaking function. "No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress. Investigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible."[80]

It is also indefensible for the legislature to use its oversight authority to intrude on functions committed to other branches of the government. The case of *Kilbourn v. Thompson*, 103 U.S. 168, 26 L.Ed. 377 (1880), describes an instance in which the legislature used its oversight authority to accomplish what was, in essence, a judicial function. The House was investigating the bankruptcy of a company in which the United States had a financial interest. But the court found that the nature of the inquiry (as described by the authorizing resolution) was incapable of uncovering information relevant to deciding whether a law needed making, unmaking, or amending:

> "The resolution adopted . . . contains no hint of any intention of final action by Congress on the subject. In all the argument of the case no suggestion has been made of what the House of Representatives or the Congress could have done in the way of remedying the wrong or securing the creditors of Jay Cooke & Co., or even the United States. Was it to be simply a fruitless investigation into the personal affairs of individuals? If so, the House of Representatives had no power or authority in the matter more than any other equal number of gentlemen interested for the government of their country. By 'fruitless' we mean that it could result in no valid legislation on the subject to which the inquiry referred." [81]

The court concluded that "the investigation which the committee was directed to make was judicial in its character, and could only be properly and successfully made by a court of justice . . . ."[82] That led to the inevitable conclusion "that the resolution of the House of Representatives authorizing the investigation was in excess of the power conferred on that body by the Constitution . . . ."[83]

---

80 *Watkins*, 354 U.S. at 187.
81 *Kilbourn v. Thompson*, 103 U.S. 168, 194–95, 26 L. Ed. 377 (1880).
82 *Id.* at 193.
83 *Id.* at 196.

The examples of improper use of oversight authority provided by the *Watkins* and *Kilbourn* courts are just that—examples. It would be unduly cumbersome to attempt to catalogue all the many improper potential uses of the legislature's oversight authority. And any attempted catalogue would undoubtedly be incomplete. Therefore, framing the limitation in its positive formulation will more accurately (and helpfully) describe the permissible objectives of this authority: The only legitimate purpose of oversight activities is the acquisition of information that will assist the legislature in wisely and effectively implementing its lawmaking function.

2. THE GOVERNMENTAL PORTFOLIO LIMITATION

The second limitation is more difficult to define with bright lines, but it is no less real for that. This limit is rooted in the understanding that ours is not a totalitarian state; it may legitimately speak to only those subjects appropriate for a civil government to address. In the context of oversight, it's important for the legislature to have at least a working understanding of the legitimate scope of governmental activity, because that scope simultaneously provides a limit on allowable subjects of inquiry.

Our constitution is a good starting place for understanding the basic contours of this authority. The preamble says our goal in adopting that document was to secure the blessings of freedom, "form a more perfect government, insure domestic tranquility and promote the general welfare . . . ."[84] The very next provision gets a little more specific about what that entails. After observing that "[a]ll people are born equally free and independent, and have certain inherent rights," and that among these rights "are life, liberty and the pursuit of happiness," the constitution declares that "governments are instituted" to "secure these rights . . . ."[85]

84 Wis. Const. preamble.
85 Wis. Const. Art. § 1.

The primary purpose of a civil government, therefore, is preserving rights that pre-exist government, thereby securing the blessings of freedom and a life in peaceful society with others. John Locke's Second Treatise of Government is a useful source for further exploring the fundamental principles that direct and limit governmental authority.[86] Understanding these principles is not an exercise just for those who are philosophically minded—the framers of our constitution understood that this is a necessary part of responsible self-government: "The blessings of a free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality and virtue, *and by frequent recurrence to fundamental principles.*"[87] One of the most important of those "fundamental principles" is that a government created by a free people has a limited portfolio of subjects it may rightfully address.

3. THE INDIVIDUAL RIGHTS LIMITATION

Even when a *subject* might be within the state's legitimate oversight purview, it is possible that the legislature may not be able to obtain the information it seeks from a specific *person*. This is so because our state and federal constitutions recognize and protect a spectrum of individual rights. Although everyone has a duty to provide information to the legislature, that duty "assumes that the constitutional rights of witnesses will be respected by the Congress as they are in a court of justice. The Bill of Rights is applicable to investigations as to all forms of governmental action."[88] This is just as true of state legislatures as it is of Congress.

The contours of the Individual Rights Limitation have not been extensively explored by the judiciary. One reason for the paucity of such guidance is that the judiciary only gets involved when a witness refuses to testify in a legislative hearing, and that just doesn't happen very often. To the contrary, the overwhelming majority of witnesses testify voluntarily.[89] Additionally, because the legislature and judicial

86 Some prominent jurists have had recourse to Locke's work to explain the contours of this authority under the United States Constitution. *See, e.g., Dep't of Transp. v. Ass'n of Am. Railroads*, 575 U.S. 43, 72–73, 135 S. Ct. 1225, 1243, 191 L. Ed. 2d 153 (2015) (Thomas, J., concurring) (quoting J. Locke, Second Treatise of Civil Government § 22, p. 13 (J. Gough ed. 1947) ("[F]reedom of men under government," [Locke] wrote, "is to have a standing rule to live by, common to every one of that society, and made by the legislative power erected in it … and not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man."). *C.f. Gundy v. United States*, 139 S. Ct. 2116, 2133, 204 L. Ed. 2d 522, *reh'g denied*, 140 S. Ct. 579, 205 L. Ed. 2d 378 (2019) (Gorsuch, J., dissenting) ("[A]s John Locke, one of the thinkers who most influenced the framers' understanding of the separation of powers, described it: "The legislative cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others.").

87 Wis. Const. Art. I § 22 (emphasis supplied).

88 *Watkins*, 354 U.S. at 187-88.

89 "It is not surprising, from the fact that the Houses of Congress so sparingly employed the power to conduct investigations, that there have been few cases requiring judicial review of the power. The Nation was almost one hundred years old before the first case reached this Court to challenge the use of compulsory process as a legislative device, rather than in inquiries concerning the elections or privileges of Congressmen." *Watkins*, 354 U.S. at 194–95.

branches are co-equal in dignity, the latter has traditionally been reluctant to second-guess the former's questioning of witnesses in such hearings.

Although we do not have comprehensive guidance on the interaction between our constitutions and the conduct of oversight functions, the general rule is that "[w]itnesses 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."[90]

Self-incrimination

Of these proscriptions, the one receiving the most attention is the right to be free from self-incrimination. The Fifth Amendment to the U.S. Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself."[91] The protection afforded by the Amendment is not, however, limited to criminal prosecutions. "It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it."[92] As a consequence, "[t]he privilege . . . extends to witnesses before any committee or subcommittee of the Congress of the United States" because compelled testimony before the legislature could potentially be used to institute or prosecute a criminal case against the witness.[93] The same reasoning applies with respect to testimony before the Wisconsin legislature.

That, however, does not necessarily mean the witness may refuse to testify. The constitutionally-protected right is not a right to silence, but is instead a right not to implicate oneself in a criminal prosecution. If there is no threat of prosecution, there is no right to withhold the requested testimony. To ensure it has the broadest access to the information it needs, Wisconsin has proactively immunized all witnesses who are required to testify before the legislature from prosecution in state courts based on the testimony they give.[94] With no threat of prosecution,

90 *Id.* 354 U.S. at 187-88.
91 U.S. Const. Amd. V. The Wisconsin Constitution provides the same protection. Wis. Const. Art. I § 8(1) (No person "may be compelled in any criminal case to be a witness against himself or herself.").
92 *Lefkowitz v. Turley*, 414 U.S. 70, 77, 94 S.Ct. 316, 322, 38 L.Ed.2d 274 (1973).
93 *Id.*
94 "No person who is required to testify before either house of the legislature or a committee thereof, or joint committee of the 2 houses, and is examined and so testifies, shall be held to answer criminally in any court or be subject to any penalty or forfeiture for any fact or act touching which the person is required to testify and as to which the person has been examined and has testified, and no testimony so given nor any paper, document or record produced by any such person before either house of the legislature or any such committee shall be competent testimony or be used in any trial or criminal proceeding against such person in any court, except upon a prosecution for perjury committed in giving such testimony . . . ." Wis. Stat. § 13.35.
This immunity applies to both the testimony itself as well as any evidence derived from it. Wis. Stat. § 972.085. That means the "privilege protects against any disclosure that the witness reasonably believes could be used, or could lead to other evidence that could be used, in a criminal prosecution. *State v. Hall*, 207 Wis. 2d 54, 78, 557 N.W.2d 778, 787 (1997).

there is no Fifth Amendment right to invoke. Therefore, no subpoenaed witness may refuse to give testimony to the legislature out of fear of prosecution in a Wisconsin court.[95]

But Wisconsin is not the only jurisdiction that can institute criminal proceedings against a witness. That authority belongs to each of our sister states as well as the federal government. A witness's testimony could potentially serve as evidence (or lead to evidence) of a federal crime, or a crime subject to another state's jurisdiction. This is significant because Wisconsin's statutory immunity for testimony before the legislature applies only to Wisconsin's courts. Our state has no ability to immunize a witness from prosecution in federal court or the courts of other states. And that means the witness might be at risk of criminal prosecution notwithstanding the immunity statute. Consequently, if the witness has a reasonable basis for believing his testimony might subject him to criminal prosecution in federal court or in another state's courts, he may invoke the Fifth Amendment and thereafter refuse to answer the question posing the risk of potential prosecution.[96]

Other Bill of Rights Protections

In contrast to treatment of the Fifth Amendment, courts have been skittish about making categorical statements regarding what the remainder of the Bill of Rights has to say about a witness's duty to provide compelled testimony. The trepidation with which they approach the subject provides some indication of the knottiness of the issue: "A far more difficult task evolved from the claim by witnesses that the committees' interrogations were infringements upon the freedoms of the First Amendment."[97] The same is true of the right to privacy:

> "Accommodation of the congressional need for particular information with the individual and personal interest in privacy is an arduous and delicate task

95 The statutory immunity is automatic, and so the witness need not invoke the constitution's protections or the statute's immunity provision. In construing a substantially identical federal statute, the United States Supreme Court explained that the legislature

> evidently intended to afford Government officials the choice of subpoenaing a witness and putting him under oath, with the knowledge that he would have complete immunity from prosecution respecting any matter substantially connected with the transactions in respect of which he testified, or retaining the right to prosecute by foregoing the opportunity to examine him. That Congress did not intend, or by the statutes in issue provide, that, in addition, the witness must claim his privilege, seems clear.

United States v. Monia, 317 U.S. 424, 430, 63 S. Ct. 409, 412, 87 L. Ed. 376 (1943). However, if the witness is concerned about potential prosecution in federal court or the courts of another state, he must affirmatively invoke his constitutional right not to incriminate himself or risk having it considered waived.

96 The statutory immunity "language is most broad and comprehensive, and furnishes a full protection to a witness against a criminal prosecution in the courts of this State, for any offense he may have committed, and about which he might be called upon to testify. If the answer would tend to criminate or expose the witness to a criminal prosecution in the courts of another State, or in the courts of the United States, he might not be compelled to answer." *In re Falvey*, 7 Wis. 630, 640–41 (1859).

> for any court. We do not underestimate the difficulties that would attend such an undertaking. It is manifest that despite the adverse effects which follow upon compelled disclosure of private matters, not all such inquiries are barred."[98]

Sometimes the complexity is so great it leads courts to resolve cases on non-constitutional grounds so that they don't have to wrestle with what the Bill of Rights has to say about the relationship between compelled testimony and constitutionally-protected rights. So, for example, the U.S. Supreme Court observed that it "recognized the restraints of the Bill of Rights upon congressional investigations in *United States v. Rumely*," but "[t]he magnitude and complexity of the problem of applying the First Amendment to that case led the Court to construe narrowly the resolution describing the committee's authority" so that it could avoid the constitutional question.[99] "Clearly," the court said, "an investigation is subject to the command that the Congress shall make no law abridging freedom of speech or press or assembly," and because oversight is derivative of the authority to make the law, "[t]he First Amendment may be invoked against infringement of the protected freedoms" in an oversight hearing.[100]

Courts will not, however, protect these rights in the categorical way in which they preserve an individual's Fifth Amendment right to be free from self-incrimination. Instead, they balance the legislature's need for information against the protections provided by the Bill of Rights. So, for example, the U.S. Supreme Court has recognized that compelled testimony before the legislature can adversely affect the witness's (and others') constitutionally-protected right to the freedom of speech, religion, and association:

> "Abuses of the investigative process may imperceptibly lead to abridgment of protected freedoms. The mere summoning of a witness and compelling him to testify, against his will, about his beliefs, expressions or associations is a measure of governmental interference. And when those forced revelations concern matters that are unorthodox, unpopular, or even hateful to the general public, the reaction in the life of the witness may be disastrous. This effect is even more harsh when it is past beliefs, expressions or associations that are disclosed and judged by current standards rather than those contemporary with the matters exposed. Nor does the witness alone suffer the consequences. Those who are identified by witnesses and thereby placed in the same glare of publicity are equally subject to public stigma, scorn and obloquy. Beyond that, there is the more subtle and immeasurable effect

97 *Watkins*, 354 U.S. at 196–97.
98 *Id.* at 198.
99 *Id.* at 197–98.
100 *Id.*

> upon those who tend to adhere to the most orthodox and uncontroversial views and associations in order to avoid a similar fate at some future time. That this impact is partly the result of non-governmental activity by private persons cannot relieve the investigators of their responsibility for initiating the reaction."[101]

Notwithstanding these legitimate interests, the legislature may still compel testimony. Although courts understand that "[a]ccommodation of the congressional need for particular information with the individual and personal interest in privacy is an arduous and delicate task for any court," it is nonetheless true that "despite the adverse effects which follow upon compelled disclosure of private matters, not all such inquiries are barred."[102] "The critical element" in determining whether the legislature may compel testimony protected by the Bill of Rights "is the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosures from an unwilling witness."[103] The legislature bears the burden of proving its need for the information is sufficiently weighty because the court "cannot simply assume . . . that every congressional investigation is justified by a public need that overbalances any private rights affected." [104]

When a witness asserts a constitutional right not to testify (other than on grounds of self-incrimination), a court will balance the gravity of the constitutionally-protected right against the legislature's need for the information. That need must be "compelling" to overbear the assertion of constitutional rights:

> "Undeniably, the First Amendment in some circumstances protects an individual from being compelled to disclose his associational relationships. However, the protections of the First Amendment, unlike a proper claim of the privilege against self-incrimination under the Fifth Amendment, do not afford a witness the right to resist inquiry in all circumstances. Where First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown . . . . . More recently in *National Association for Advancement of Colored People v. State of Alabama*[105], we applied the same principles in judging state action claimed to infringe rights of association assured by the Due Process Clause of the Fourteenth Amendment, and stated that the

101 *Id.*
102 *Id*. at 198.
103 *Id.*
104 *Id.*
105 357 U.S. 449, 462, 78 S. Ct. 1163, 1172, 2 L. Ed. 2d 1488 (1958).

> "subordinating interest of the State must be compelling" in order to overcome the individual constitutional rights at stake."[106]

Even this qualified protection of constitutional rights has been called into question. In the case of *Eastland v. U. S. Servicemen's Fund*,[107] the Supreme Court considered whether a Congressional subpoena could be enjoined on grounds that it invaded First Amendment rights. Using a questionable line of reasoning, the Court declared that the issuance of a Congressional subpoena is immune from judicial consideration. It explained that because the resolution authorizing the subpoena was accomplished under the protection of the Speech and Debate Clause of the U.S. Constitution, the product of the legislature's deliberations (the subpoena) is beyond questioning.[108] The Court said the "theory seems to be that once it is alleged that First Amendment rights may be infringed by congressional action the Judiciary may intervene to protect those rights; the Court of Appeals seems to have subscribed to that theory. That approach, however, ignores the absolute nature of the speech or debate protection . . . ." [109]

The *Eastland* Court's reasoning is suspect because investigative subpoenas are not the only devices adopted under the protection of the Speech and Debate Clause. Bills, which become laws, are also adopted under the auspices of that provision. If the *Eastland* Court's reasoning were sound, it would mean that no law could be challenged on constitutional grounds, which would be . . . anomalous. The *Watkins* Court, writing 18 years before *Eastland*, more properly expressed the need to account for constitutional rights in determining whether a witness must submit to a subpoena. The failure to do so, the Court said, "would be to abdicate the responsibility placed by the Constitution upon the judiciary to insure that the Congress does not unjustifiably encroach upon an individual's right to privacy nor abridge his liberty of speech, press, religion or assembly.[110] No legislature has the authority to violate constitutionally-protected rights while in the process of lawmaking because the legislature is not above the law:

> "The house of representatives is not the final judge of its own power and privileges in cases in which the rights and liberties of the subject are concerned, but the legality of its action may be examined and determined by this court. That house is not the legislature, but only a part of it, and is therefore subject in its action to the laws, in common with all other bodies,

106 *Barenblatt v. United States*, 360 U.S. 109, 126, 79 S. Ct. 1081, 1092, 3 L. Ed. 2d 1115 (1959) (citations and internal marks omitted).
107 *Eastland v. U. S. Servicemen's Fund*, 421 U.S. 491, 95 S. Ct. 1813, 44 L. Ed. 2d 324 (1975).73 "We have recognized before that when an agency promulgates a rule, it is exercising "a legislative power[.]" *Koschkee*, 2019 WI 76, ¶39.
108 The Speech and Debate Clause provides that "for any speech or debate in either house, they [the senators and representatives] shall not be questioned in any other place." U.S. Cont. Art. I § 6.
109 *Eastland*, 421 U.S. at 509.
110 *Watkins*, 354 U.S. at 198–99.

> officers, and tribunals within the Commonwealth. Especially is it competent and proper for this court to consider whether its proceedings are in conformity with the Constitution and laws, because, living under a written constitution, no branch or department of the government is supreme; and it is the province and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of the government, and even those of the legislature in the enactment of laws, have been exercised in conformity to the Constitution; and if they have not, to treat their acts as null and void."[111]

Although *Eastland* hasn't been overruled, it does not currently appear to affect the Supreme Court's analysis of individual rights in the context of legislative subpoenas. In a recent case, it hearkened back to Watkins' explanation of individual rights while ignoring *Eastland's* categorical rejection of judicial authority to protect those rights. The court acknowledged that "recipients of legislative subpoenas retain their constitutional rights throughout the course of an investigation" and that they "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."[112]

The uncertainty with which courts have approached this issue over the years suggests that the boundaries may still be in flux. The legislature should, therefore, take seriously a witness's assertion of a constitutionally-protected right, and seek legal counsel on the implications of such a claim.

***

In sum, the legislature's oversight authority, while vast, is not unlimited. It may only be deployed in aid of the legislature's lawmaking function (the Functional Limitation), it must have as its object a subject within the legitimate purview of a government serving the interests of a free people (the Government Portfolio Limitation), and it must respect the witness's constitutionally-protected rights (the Individual Rights Limitation).

111 *Kilbourn v. Thompson*, 103 U.S. 168, 26 L. Ed. 377 (1880) (quoting *Burnham v. Morrissey*, 14 Gray 226).
112 *Trump v. Mazars USA, LLP,* 140 S. Ct. 2019, 2032, 207 L. Ed. 2d 951 (2020).

D. PROPOSED RULES

The legislature's inherent authority to conduct oversight carries with it the concomitant authority to decide on the type of process to use in carrying out its responsibilities: "We are of opinion that the power of inquiry—*with process to enforce it*—is an essential and appropriate auxiliary to the legislative function."[113] The nature, type, and scope of the process used to effectuate its oversight duties is "a matter peculiarly within the realm of the legislature,"[114] and is limited only by "the constitutionally protected rights of individuals[.]" [115]

Of course, before the legislature may exercise that process, it must adopt rules authorizing the specifics. Appendix B contains a short collection of suggested rules to authorize and regularize the processes necessary to the effective exercise of the legislature's oversight authority. They were adapted from U.S. House Rule XI and U.S. Senate Rule XXVI, and are designed to function as independent additions to existing rules. They are drafted so that they may be adopted by the legislative houses independently, but they could easily be adopted as joint rules with just a few adjustments. In their present form, all references to the Assembly or Senate are bracketed and highlighted for ease of customization.

If either house of the legislature should so desire, the provisions could be absorbed into existing rules such that their provisions would apply to all committee meetings and hearings conducted for any authorized purpose. However, this is not recommended. The Proposed Rules are optimized for oversight hearings conducted according to the methodology described in the following part of the Manual. As such, they are not necessarily suitable for other types of legislative proceedings.

Finally, the committees conducting oversight activities could adopt the proposed rules ad hoc such that they would exist only so long as the authorizing resolution was in effect. This, however, would be the most cumbersome amongst the options. We suggest that the proposed rules be adopted as permanent additions. The balance of the Manual assumes the legislature will adopt the proposed rules, and will cite them as "Proposed Rule ___."

113 *McGrain v. Daugherty*, 273 U.S. 135, 174, 47 S. Ct. 319, 328, 71 L. Ed. 580 (1927) (emphasis supplied).
114 *Watkins*, 354 U.S. at 205.
115 *Id.*

III. The Tao of Oversight

From one perspective, there is nothing especially complex about conducting oversight. It's simply a process by which the legislature gathers information about matters within its purview, and then presents it to the public. Peeking behind the curtain, however, reveals the depth of intellectual spadework, strategizing, planning, and judgment necessary to make oversight successful. This part of the Manual covers both the mechanical aspects of oversight (the tools used to obtain and present information) as well as a methodology for conducting oversight that begins with an intelligent design and ends with a hearing that can actually accomplish the legislature's oversight goals.

Although the process of conducting oversight proceeds in a stepwise fashion from the initiating concern through to the end of a hearing, planning is done in reverse. It starts with deciding on the purpose of the oversight activities. This is an imagining, at a bird's-eye level, of what the committee wants to accomplish when the oversight activities are completed. A committee might decide, for example, that oversight is necessary to:

- Explore whether circumstances indicate the need for a new law, or an amendment or repeal of an existing law;
- Compare a potentially wayward administrator's conduct to the requirements of the law;
- Assess the effectiveness of a program administered by the executive branch;
- Determine whether the executive branch is impinging on the legislature's constitutionally-vested authority;
- Assess some aspect of governmental operations for the existence of waste, fraud, or abuse; or
- Obtain information necessary to accomplish any other legitimate legislative objective.

These are, of course, just broad categories that describe the types of circumstances that might cause the legislature to believe an investigation or hearing is necessary. They certainly do not comprehensively describe the objectives that might inspire a committee to conduct oversight.

Whatever the committee's inspiration for the oversight activities might be, it must be clear about its goal. This is not just an intellectual exercise—the goal it identifies will reverberate throughout the committee's oversight activities from start to finish. It will inform the contents of the Authorizing Resolution, and serve as the rough draft of the eventual hearing's theme. Only after the committee decides on its goal is it possible to develop a comprehensive strategy by reverse engineering each step necessary to reach that objective. Those steps include:

- Settling on a methodology for conducting oversight activities;
- Understanding the role of "story" in both investigations and hearings;
- Adopting a practical and legally sufficient Authorizing Resolution;
- Developing and executing a well-designed investigation;
- Determining whether the investigation's conclusion indicates a hearing is necessary; and
- Designing and conducting a hearing capable of achieving the committee's objectives.

Following these steps will result in an intelligent, thoughtful, and responsible approach to fulfilling the committee's oversight duties. The Manual will address each step in the order it should be considered.

A. METHODOLOGY

The methodology this Manual offers is designed to maximize the chance of successfully addressing the concern that gave rise to the legislature's decision to engage the oversight mechanism. That is not to say, however, that it is the only conceivable methodology. Subjects addressed by the legislature differ in complexity, so the process can be simplified when circumstances warrant. The methodology presented here, however, is sufficiently robust to handle even the most complex subjects. This approach rests on the foundational premise that investigations and hearings are functionally distinct, but inextricably linked. They are separate phases in the oversight project, but in the vast majority of circumstances both are essential if the undertaking is to succeed.

An investigation, in this construct, will always precede a hearing. It goes first because this is the phase that produces the raw material on which the hearings will act. It is an institution-facing process, as opposed to public-facing. It is in this phase that interested legislators inform themselves about the world around them

in relation to the subject in need of oversight. The tools of an investigation are wholly inquisitive—they are designed to do nothing more than seek out and obtain relevant material. At the conclusion of this phase, legislators should have all the information they need for a thorough understanding of the oversight subject. But at this point nothing of consequence has, well, *happened*.

This is really quite important, inasmuch as it allows for a contemplative lacuna between the investigatory and hearing phases of oversight. Oversight starts as a concern that something isn't as it ought to be—perhaps circumstances suggest a new law is needed, or a program doesn't seem to be accomplishing its motivating purpose, or a bureaucrat appears to be administering a law inconsistently with its meaning. Once the investigation is complete, the committee should have enough information to determine whether the initiating concern has been allayed or, instead, substantiated. If it is the former, then the oversight exercise can conclude without a hearing. But if it is the latter, then the hearing must follow.

That pause is important because a hearing should not occur unless it has a point. Oversight hearings—proper oversight hearings—are purposeful; they drive towards a particular conclusion. There is a place for hearings without any specific objective, in which witnesses have their say but no one expects any consequence to follow. That, however, should never characterize an oversight hearing. If the investigatory phase reveals that the initiating concern has a basis, the entire purpose of the hearing is to advance towards a resolution of that concern. If that's not the objective, then the hearing shouldn't happen at all.

The hearing is where matters of consequence happen. A hearing is a public-facing event, an event in which the committee can take action on what it learned in the investigation phase. It is about *presenting*, not *finding*. But it is not an aimless or disinterested presentation. The purposeful nature of the hearing colors the entire complexion of the proceeding. It occurs only because the investigation convinced the committee that something needed to be done about the initiating concern. If you smell smoke, you investigate to determine whether something is burning. And if the investigation reveals a fire, the proper reaction is not simply a public announcement of what you found. The proper reaction is to put it out. Similarly, a hearing should not be a bland laying out of investigatory findings. It should advocate for a solution to the problem. It should persuade. It should call to action. If done properly, it will achieve the purpose that motivated the committee to commence the oversight project in the first place. It can build support for a new bill, or convince an administrator to comply with statutory requirements, or reveal a program in need of reform, or identify waste in need of elimination, or it may accomplish any of the myriad other legitimate purposes that undergird the legislature's oversight authority.

It is important to treat these two phases as distinct but linked because a hearing that is not preceded by a robust investigation is likely to be disorganized, unfocused, and unlikely to achieve any objective. This is no reflection on legislators' native talent, but is instead a reflection of a number of realities involved in oversight activities. Treating the investigation and hearing as a single proceeding degrades the effectiveness of both phases. For example, if the committee's first encounter with documents or testimony comes during the hearing, it will be exceedingly difficult for members to digest the information while simultaneously operationalizing it as questions for the witnesses. And the committee won't know if it has received all of the requested information if it sees it for the first time at the hearing. Finally, without the contemplative pause between investigation and hearing, it is possible that the proceeding's only result will be the conclusion that the hearing wasn't necessary in the first place. These difficulties may not arise if the oversight subject is simple, the facts are few and uncontested, and the witnesses' proposed testimony is already known. But consequential oversight will rarely be straightforward enough to condense the phases into one.

On a more conceptual level, this methodology is based on the foundational premise that oversight is an intensely *homo sapien*-centric endeavor. It is an activity engaged in by humans who are looking into the doings of other humans for the purpose of telling a story to an audience of yet other humans. Its genesis lies in human curiosity about human activities and decisions. Its conduct relies on human insight and judgment. Even oversight's product is uniquely human. It creates nothing more than the effects it leaves in the minds of its audience—enlightenment, persuasion, a decision.

The design and execution of effective oversight activities, therefore, must account for the humanity of the process, the subject, and the participants. Although one can never know too much about human nature for these purposes, there is one aspect that everyone engaged in oversight must assuredly understand. And that is the concept of story.

B. STORY

The seed that can potentially grow into oversight is a story encountered by, or told to, a legislator. Or, more accurately, it is a fragment of a story, because the legislator never comes upon it in its entirety. The story fragment might inspire curiosity, a wondering about whether something within the government's purview can, or ought to be, better. Or just different. The story fragment could suggest, for example, that a new law might be beneficial, or it might be a sense that the executive is not executing an existing law as the legislature had intended, or a suspicion that a program is not achieving its goal, or any one of nearly limitless other possibilities.

And this means that oversight is always all about story, regardless of the subject it addresses. Oversight germinates when the legislator decides the fragment is sufficiently interesting to seek out the rest of the story.

"Story," however, is not just the genesis of oversight activities. It is also the environment in which the legislature conducts investigations and hearings. Story is how people interact with and process the enormous amount of information they encounter every day. This is about more than how we understand reports, research papers, newspaper articles, graphs and tables, and similar data compilations. This is about how we process *all* the information that comes at us throughout the day—domestic and international political and economic developments, the sights we see on the morning commute, our conversations with family and colleagues, the work we do, the books we read, etc. All of it. Story is what allows people to comprehend that deluge of information without being overwhelmed by it.

We live story like we breathe—naturally, persistently, without ceasing. Stories are not just what we tell or hear, not just accounts of the past or musings about the future. They are creators of order. We are hard-wired to seek out patterns, to find relationships in even random data. This is why we instinctively look for recognizable images even where there is no intentional design, like a castle in the clouds, or a face in a Rorschach inkblot.[116] Our minds refuse to merely crunch numbers and categorize data like a computer. We insist that there must be more to the information we encounter than the bare impersonal facts.

The "more" we insist on finding is *meaning*, and stories are how we discover it. Stories are the pattern-makers by which we comprehend what the world shows us. They reveal relationships between disparate items, highlight some facts and play down others, and organize input into a cohesive whole. Some are short stories, some are epics, some are still being written while others are unfinished and cast aside. They are not optional; without them we could not understand ourselves or others, and the world would be an incomprehensible and unnavigable sea of facts and data. Stories, quite literally, are the life of a rational mind.

We are all natural story-tellers, conveyors of meaning. Consider, for example, the response to the question "How was your day?". It's not a recitation of calendar entries, an accounting of each job duty performed, or a calculation of value created. It's a story. It starts with a negotiation over how detailed it will be. The interlocutor might taciturnly respond with "Good," which is both a one-word

116 These impulses (known as "pareidolia" or "apophenia") have been the subject of study in many branches of biology. "Pareidolia" is "the tendency to perceive a specific, often meaningful image in a random or ambiguous visual pattern." *Pareidolia*, Merriam-Webster Dictionary. "Apophenia" describes that phenomenon in a more general sense. It is "the tendency to perceive a connection or meaningful pattern between unrelated or random things (such as objects or ideas)." *Apophenia*, Merriam-Webster Dictionary.

summary of the day's story as well as an unspoken suggestion that there is more to tell. A simple "How so?" will draw it out. Before the person commences, he stares into the middle-distance for a moment, collecting his thoughts. This is where the story starts to assemble. He sorts through the facts and events of the day, identifying which contributed to it being "good" while instinctively discarding an immense amount of information (the inconsequential phone calls, the indifferent lunch, the minor interruptions, etc.) because it's not relevant to the story he is about to tell. He weighs the remaining pieces of information, valuing some of it more than others. And then he places the information in a particular context and orders it into a comprehensible narrative suitable for relating to his audience.

All of this takes place within the span of a few heartbeats because that's how we are wired to think. And because we do it naturally, it comes to us easily. But that's telling one's own story. Oversight, on the other hand, is about searching out and telling someone else's story. And that doesn't come naturally or easily.

Oversight investigations, of course, are about obtaining information. But more fundamentally, they are about gathering stories. Witnesses are not just repositories of data. They are people in the midst of living their stories who are interrupted by a legislator's search for information. The information they provide must be understood within that context. So questioning witnesses becomes an exercise in learning their stories as much as a search for facts. The type and quality of that information will differ depending on whether witnesses are treated as a computer's hard drive or, instead, as storytellers who experience the world through story. The same holds true for documents and other sources of information that one might be tempted to treat as independently significant. Although such sources contain discrete pieces of information, their significance is rarely apparent outside of the story within which they were created and curated.

The centrality of story becomes especially clear when the investigation reveals a story that the public needs to hear. Hearings are not, and must never be allowed to become, simple expositions of facts and data. A proper hearing has a specific purpose—developing public support for new legislation, pressuring the executive to enforce the law as intended, reformulating a program to better achieve its objectives, etc. This is the legislature's opportunity to actually move the needle. A hearing is the culmination of the legislature's oversight activities, and if it is to bear any fruit, it will happen here. And that will happen only if the hearing presents to the public a relevant, compelling, and true story woven from all the stories it learned during the investigation. A story that demands action. A story that a responsible legislature must complete. A story, in other words, that has the power to bend the arc of future stories.

It is that last part, the bending, that makes stories the *ne plus ultra* of of effective oversight. Stories stick with us, while discrete data points and isolated facts are evanescent. As Rudyard Kipling observed, "[i]f history were taught in the form of stories, it would never be forgotten." And even more to the point, stories persuade, while facts (at best) simply inform. Reciting a ream of facts to an audience will glaze the eyes of even the most attentive listener. Stories, however, get reactions:

> I could a tale unfold whose lightest word
> Would harrow up thy soul, freeze thy young blood,
> Make thy two eyes, like stars, start from their spheres,
> Thy knotted and combined locks to part,
> And each particular hair to stand on end,
> Like quills upon the fretful porpentine.[117]

A true story, a fact-filled story that produces a reaction that people will remember, can influence decisions and actions. Such a story, told well, can bend future stories in the direction they ought to go.

***

For all these reasons, effective oversight must begin with a foundational methodology and an appreciation for how "story" suffuses every aspect of the process. The former conceptually organizes the different phases of oversight, while the latter defines the goal, describes the environment within which investigations get the raw material legislators need, and provides the theme for the eventual hearing.

C. THE RESOLUTION

The authorizing resolution "is the controlling charter of the committee's powers."[118] So, for both practical and legal reasons, this document must precede any oversight activities. On the practical side, the authorizing resolution organizes the framework within which the oversight activities will occur, and it lays the foundation on which the overall strategy will be built. Investigations and hearings may not be especially complex, but they do require intentional planning and preparation if they are to have any chance of success. If the object of an oversight activity is important enough to demand the production of information, impose on potential witnesses, spend taxpayers' dollars, and command the public's attention, then it's important enough to carefully design and execute.

117 W. SHAKESPEARE, HAMLET, Act I, scene v.
118 *United States v. Rumely*, 345 U.S. 41, 44, 73 S. Ct. 543, 545, 97 L. Ed. 770 (1953).

On the legal side, the authorizing resolution contains the elements that establish the parameters within which the oversight activities may take place. Should the committee's activities ever be called into question, courts will look to both the preamble and the specific resolutions to determine whether it stayed within its proper limits.[119] Although the legislature's oversight authority is extremely broad, there are legal principles (as described in Part II of this Manual) that channel its exercise with respect to both subject-matter and the protection of individual rights. Carefully drafting (and following) the authorizing resolution decreases the risk that some aspect of an investigation or hearing might be vulnerable to a court challenge.

None of this should be taken to suggest that an authorizing resolution needs to be complicated—only that it should be thoughtfully and intentionally constructed. As with any other resolution, it will contain both "whereas" and "resolved" clauses, the former of which lay the foundation for the latter. What follows is a suggested anatomy of an authorizing resolution that describes the elements that will provide both practical organization and some insulation against legal challenges.

1. THE "WHEREAS" CLAUSES

The "Whereas" portion of the authorizing resolution should contain, at a minimum, the following three types of information: story, legislative purpose, and committee jurisdiction. This section of the resolution should be drafted with the goal of explaining to a disinterested observer why the oversight activities are taking place and the authority for conducting them.

Whereas: Story

Because people encounter life as a story (as discussed above), the "whereas" clauses should describe the story fragment that convinced the legislature it was worthwhile to discover the rest of it. The five journalistic questions (who, what, when, where, and why) are useful in framing how the resolution tells the story fragment. Not every fragment will have answers to all of those questions, and quite frequently the investigation is necessary precisely because the legislature needs to discover them. To the extent that is true, the "whereas" clauses should explain why the answers are important. The story fragment need not be told in deep detail, but it should convey enough information that a reasonable reader would be convinced that it logically justifies the actions authorized in the "resolved" clauses.

Recounting the story fragment in the resolution is operationally significant because it helps describe the parameters of the investigation and hearing. This takes on legal significance should someone challenge the committee's attempt to obtain

119 *Kilbourn v. Thompson*, 103 U.S. 168, 192, 26 L. Ed. 377 (1880).

information relevant to the investigation or hearing. The United States Supreme Court, for example, has said that witnesses brought up on contempt charges have a due process right to know whether the questions they were asked legitimately fell within the subject the legislative committee was authorized to investigate:

> It is obvious that a person compelled to make this choice [viz., whether to answer a question] is entitled to have knowledge of the subject to which the interrogation is deemed pertinent. That knowledge must be available with the same degree of explicitness and clarity that the Due Process Clause requires in the expression of any element of a criminal offense. The *'vice of vagueness' must be avoided here as in all other crimes.*[120]

There is nothing to suggest this reasoning applies exclusively to questions posed during a hearing. Indeed, the court's rationale would likely apply equally to requests for production of documents and all other fact-gathering mechanisms. The basic principle is that those who are called upon to provide information must have advance notice of the scope of the investigation or hearing authorized by the appropriate legislative body. Without those boundaries, a court may not enforce the committee's request for information: "If the 'question under inquiry' were stated with such sweeping and uncertain scope, we doubt that it would withstand an attack on the ground of vagueness."[121]

The authorizing resolution is the first place the court will look to determine whether the requested information is within the scope of investigation: "The first possibility is that the authorizing resolution itself will so clearly declare the 'question under inquiry' that a witness can understand the pertinency of questions asked him."[122] The court may also look to other sources, such as "the remarks of the chairman or members of the committee, or even the nature of the proceedings themselves" to establish the investigation or hearing's scope. However, it is better practice to ensure the story told in the resolution is sufficient to establish those parameters because that is the only source entirely within the committee's discretion and power.

Finally, the authorizing resolution is also the organizational north star, the reference point by which to measure whether the committee's work remains headed in the right direction. Distractions and rabbit trails can sometimes lead an investigation into areas not comprehended by the original resolution. Such deviations can impede the effectiveness of oversight, and even threaten the enforceability of information requests, as described above. Recurring reference to the authorizing resolution will either bring the investigation back into focus or

120 *Watkins*, 354 U.S. at 208-09 (emphasis supplied).
121 *Id.* at 209.
122 *Id.*

indicate that events on the ground have outpaced the original story fragment. Should that occur, the authorizing resolution should be amended to reflect the new direction.

So the "story" clauses accomplish several goals. They inform the public of the subject matter under investigation, they describe the legally enforceable scope and purpose of the oversight activities, and they keep the committee focused on the agreed-upon goal.

Whereas: Legislative Purpose

Stating the legislative purpose for the investigation or hearing is important for two reasons. First, as an entirely practical matter, it is a useful discipline in ensuring the oversight process has been thought through. While the "story" clauses illustrate what the oversight activities will address, this clause speaks to *why* the oversight is necessary. It provides the heartbeat and focus for all of the authorized activities in which the committee will engage.

As a legal matter, the legislative purpose clause is absolutely essential. This is the provision that bears witness to the fact that the committee is engaged in a lawful activity. As the *Watkins* Court stated, "[n]o inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress."[123] Without a "whereas" clause describing the legislative purpose of the oversight activities described in the "resolved" clauses, all of the investigatory work and hearings authorized by the resolution are subject to judicial challenge. Aside from an appropriate reference to the constitutional provision encompassing the legitimate legislative purpose of the oversight activities, the clause needs no magic words. Courts will consider this clause functionally, inquiring not into the form of the provision, but only into the connection between the "story" and the oversight activities to ensure constitutional rights are being respected:

> It is, of course, not the function of this Court to prescribe rigid rules for the Congress to follow in drafting resolutions establishing investigating committees. That is a matter peculiarly within the realm of the legislature, and its decisions will be accepted by the courts up to the point where their own duty to enforce the constitutionally protected rights of individuals is affected.[124]

The breadth with which the "legislative purpose" clause is stated will largely control the breadth of the inquiry.[125] So, much like Goldilocks' choice of beds, there is a

123 *Id*. at 187.
124 *Id*. at 205.
125 The other clause that affects the scope of the inquiry is the "subject" clause in the "Resolved" section of the resolution, which is addressed below.

happy medium for which a drafter must aim. If the provision is drafted too n arrowly, the committee could find itself hamstrung when information leads it outside the provision's confines. But a provision drafted too broadly could suggest the committee really didn't have a legitimate legislative purpose in mind, and was just fishing for information:

> An excessively broad charter, like that of the House Un-American Activities Committee, places the courts in an untenable position if they are to strike a balance between the public need for a particular interrogation and the right of citizens to carry on their affairs free from unnecessary governmental interference. It is impossible in such a situation to ascertain whether any legislative purpose justifies the disclosures sought and, if so, the importance of that information to the Congress in furtherance of its legislative function. The reason no court can make this critical judgment is that the House of Representatives itself has never made it. Only the legislative assembly initiating an investigation can assay the relative necessity of specific disclosures.[126]

Like a trail of breadcrumbs, therefore, this clause must create a connection between the "story" clauses and one or more recognized legislative purposes. Connecting the story to some repository of authority the constitution specifically commits to the legislature will ensure the ensuing investigation and hearings have an unimpeachable legal foundation. Examples include the following:

- *The legislative power:* If the story contemplates the need to create, amend, or abolish a law, the obvious reference point is the provision vesting legislative power in the legislature: "The legislative power shall be vested in a senate and assembly."[127] Inasmuch as this is the authority from which oversight responsibilities derive, it is also the surest foundation when some form of lawmaking effort (or amending or abolishing) is a reasonably foreseeable result of the oversight activities.

- *Managing the State's financial affairs:* It is the legislature's duty to manage the state's financial affairs, beginning with the appropriation of funds to a legitimate purpose and continuing all the way to a confirmation that the appropriated funds were spent as the legislature intended. This is a sufficient source of authority to encompass virtually any question relating to finances.[128]

- *Assigning, amending, or revoking executive duties:* The legislature is responsible for determining the duties of many of the state's constitutional officers, and all of the administrative officers. Hardly any

126 *Watkins*, 354 U.S. at 205-06.
127 Wis. Const. Art. IV § 1.
128 Wis. Const. Art. VIII § 2 (Appropriations); Wis. Const. Art. IV § 33 (Audits).

executive action takes place without the involvement of one of these officers, which means the legislature's oversight authority covers all of their responsibilities. [129]

- *Supervision of the other branches:* The power to remove from office implies the responsibility for overseeing the conduct of the government's officers.[130]

- *Supervision of local government entities:* The legislature determines the types of powers political subdivisions of the state may exercise, which means I may oversee the exercise of that authority to ensure that matters requiring uniformity across the state are not impinged upon by local governments.[131]

- *Education:* The constitution specifically entrusts the creation of public schools to the legislature. The conduct and maintenance of those schools is, therefore, within the legislature's continuing purview.[132]

The "legislative purpose" clause may refer to statutes as well, if that will help explain how the "story" clauses connect to a legitimate legislative purpose. However, in no circumstance may statutory references substitute for a reference to a relevant constitutional provision. The legislature is a creature of the constitution, and as such it cannot expand its authority through statutory enactments. If the authorizing resolution relies solely on statutory material to establish the legislative purpose, the authority for the oversight activities could fail if a court were to find the statutory material on which it relied constitutionally unsound.

Whereas: Committee Jurisdiction

If an existing committee will be conducting the oversight activities, the resolution should describe its jurisdiction in terms that make it clear the legislative purpose identified in the previous "whereas" clauses falls within its boundaries. If the resolution creates an ad hoc committee, sub-committee, or some other entity for the purpose of carrying out the activities identified in the "resolved" clauses, the "whereas" clauses should describe the legislature's authority to create the

129 *See, e.g.*, Wis. Const. Art. VI § 3 (duties of Attorney General and Treasurer); Wis. Const. Art. X § 1 (duties of Superintendent of Public Instruction); Wis. Const. Art. § 2 (duties of Secretary of State).
130 *See, e.g.*, Wis. Const. Art. VII § 1 (Impeachment of executive and judicial branch officers); Wis. Const. Art. VII § 13 (Removing jurists by address).
131 Wis. Const. Art. IV § 22 (Legislature determines authority of county boards of supervisors); Wis. Const. Art. IV § 23 (Legislature determines the system of town government); Wis. Const. Art. XI § 3 (Cities and villages may determine own affairs except when statewide concerns require uniformity).
132 Wis. Const. Art. X § 3 (establishment of district schools); Wis. Const. Art. X § 6 (establishment of state university).

committee (or sub-committee or other entity) in a manner sufficient to establish it has jurisdiction over the legislative purpose supporting the exercise of oversight activities.

This is important for more than organizational purposes. The Wisconsin Constitution appears to make the issue of which committee has jurisdiction over specific oversight activities a matter strictly within the legislature's purview. In relevant part, it says "[e]ach house may determine the rules of its own proceedings[.]"[133] The constitutional separation of powers should place those rules beyond judicial reach. However, three justices of the Wisconsin Supreme Court (that is, just one short of a majority) recently stated they believe the legislature's compliance with its internal rules are susceptible to judicial scrutiny.

In the case *League of Women Voters of Wisconsin v. Evers*,[134] the plaintiffs complained that the legislature had improperly converted committee work periods into a floor period for the purpose of adopting a handful of bills. The majority determined that the legislature's joint resolution establishing its work schedule was purely a matter of internal legislative organization, and therefore beyond the court's authority to address:

> "The judicial department has no jurisdiction or right to interfere with the legislative process. That is something committed by the constitution entirely to the legislature itself. It makes its own rules, prescribes its own procedure, subject only to the provisions of the constitution. No court may intermeddle in purely internal legislative proceedings."[135]

The three dissenting justices, however, believed it was within the court's authority to adjudicate the legislature's compliance with the work schedule it had adopted at the beginning of the legislative biennium. The dissenters would have invalidated all of the bills adopted during the converted floor period because they believed the work schedule did not allow for a floor period during the time the bills were considered. The membership of the court has changed since that opinion, and it is no longer clear whether a majority would respect the traditional separation of powers on questions of internal legislative organization and process.[136]

---

133 Wis. Const. Art. IV § 8.
134 2019 WI 75, 387 Wis. 2d 511, 929 N.W.2d 209.
135 *Id*. at ¶ 37 (internal marks and citations omitted).
136 The three dissenting justices in *League of Women Voters of Wisconsin v. Evers* were Shirley Abrahamson, Ann Walsh Bradley, and Rebecca Dallett. Since the release of that opinion, Brian Hagedorn succeeded Justice Abrahamson on the court, and Jill Karofsky succeeded Justice Daniel Kelly. Justice Karofsky's understanding of the separation of powers has not yet found expression in a court opinion. Justice Hagedorn, however, has condemned the policing of that separation, at least in some circumstances, as an exercise in constitutional "free-wheeling." *See Wisconsin Legislature v. Palm*, 2020 WI 42, ¶ 168 et seq. (Brian Hagedorn, J., dissenting). Consequently, it is possible that a current majority of the court would entertain an action challenging a committee's jurisdiction to conduct certain oversight activities.

For this reason, caution suggests that the "whereas" clauses should make it clear that the committee adopting the resolution has jurisdiction over the subject-matter of the intended oversight activities. This need not be more than an explanatory sentence or two, just enough to establish a functional connection between the committee's scope and the subject recounted in the "story" clauses.

2. THE "RESOLVED" CLAUSES

The "resolved" clauses comprise, of course, the operational portion of the authorizing resolution. Because they are the exclusive reference points with respect to what the committee has decided to do, it is important that they capture every aspect of the authority they convey. Here are a few considerations to keep in mind when drafting these clauses.

Resolved: Who Will Do This?

In most instances, the committee adopting the resolution will conduct the authorized oversight activities, and this clause should say so. However, if an ad hoc committee or a commission is being established for these purposes, it should be identified here, along with a reference to the authority to create such a body.

Resolved: What Is The Committee Addressing?

This clause defines the subject matter the oversight activities will cover, and as such it is the second clause that affects the scope of the anticipated inquiry.[137] This is not a repetition of the story clauses in the "whereas" section, but it should follow from and encompass the theme described in that section. Like the "legislative purpose" clause, it should be neither too broad (lest it become nebulous) nor too narrow (which could hobble the inquiry). In conjunction with the "story" clauses, this provision also helps witnesses understand the scope of the subjects on which they can be required to provide information or testimony. Ensuring an adequate framing of the oversight subject could become operationally significant if a need arises to enforce a subpoena or compel answers in a hearing.[138]

Resolved: How May The Committee Proceed?

This is the operational heart of the authorizing resolution. This clause states the committee's authority to act, and describes the nature of activities it may

137 The first is the "legislative purpose" clause in the "Whereas" section of the resolution, which is addressed above.

138 "It is obvious that a person compelled to make this choice [*viz.*, whether to answer a question] is entitled to have knowledge of the subject to which the interrogation is deemed pertinent." *Watkins*, 354 U.S. 178, 208-09, 77 S. Ct. 1173, 1 L. Ed. 2d 1273 (1957).

undertake in the discharge of its oversight responsibilities.[139] Normally, it should recite that the committee is authorized to both investigate *and* hold hearings on the matters described in the "subject" clause. However, if members are reticent to authorize hearings before knowing whether the investigation uncovers something in need of the committee's further attention, this clause can limit oversight activity to the appropriate phase.

If the legislature has not adopted the Proposed Rules, this clause should also identify the tools the committee may use in conducting the investigation and hearing. It should specifically state, for example, that it may interview witnesses, authorize both testimonial subpoenas and document subpoenas, take depositions, and use any other mechanism for obtaining information that may be conducive to the investigation and hearing.

Resolved: When May The Committee Act?

The resolution should define the period of time within which the committee may conduct oversight activities under the authorizing resolution. It may be inferred that such activities may commence immediately upon adoption of the authorizing resolution, but there is no harm in making the commencement date explicit. Further, it is possible that circumstances might warrant a delay between adoption of the resolution and the authorized activities. The end of the legislative biennium, of course, acts as a hard deadline because no resolution may authorize activity after the legislature's adjournment sine die. But if there is to be a deadline for the committee's oversight activities, it should be stated here.

Resolved: Committee Rules

If the legislature has not adopted the Proposed Rules, the committee should consider adopting them on an ad hoc basis. Oversight activities can become contentious when the majority and minority parties disagree on what should be pursued or in what manner. The Proposed Rules are designed to give the minority a meaningful opportunity to participate in oversight while still respecting the majority's position. The existence of objective reference points for the conduct of the committee's work (especially when they are part of the legislature's standing rules) will at least reduce contests over how oversight will proceed. Additionally, if circumstances or the oversight subject suggest that different procedures would make the process more efficient or effective, the committee may adopt original or amended rules as part of the authorizing resolution. Keep in mind, of course, that

139 "This [the authorizing resolution] is the controlling charter of the committee's powers. Its right to exact testimony and to call for the production of documents must be found in this language." *United States v. Rumely*, 345 U.S. 41, 44, 73 S. Ct. 543, 545, 97 L. Ed. 770 (1953).

mandates found in the Assembly, Senate, and Joint rules may not be modified except by the legislative house(s) or committee that adopted them.

Resolved: Consultants

One of the primary justifications for conducting oversight is to give members access to knowledge they do not already have. Sometimes their inquiries will lead them into fields that cannot be properly understood and contextualized without a guide. If the oversight activities are likely to explore such depths, the committee should consider contracting with a subject-matter expert.

The committee should also seriously consider retaining someone with extensive experience conducting investigations, questioning witnesses, and planning and conducting persuasive hearings. These are highly-specific talents that are not commonly found in most of the professions represented by the members of the assembly and senate. Oversight investigations and hearings are not the same as discovery and trials, of course, but they are cousins. Retaining a litigation attorney who is conversant with legislative processes will make for smoother proceedings, fewer missteps, and more bandwidth for the members to concentrate on the prudential aspects of the information they are learning and presenting.

If the committee wishes to secure the option of retaining consultants, it should make provision for that possibility in this part of the authorizing resolution.

Resolved: Oversight Output

Once the oversight activities have concluded, Proposed Rule 1001(2) provides for the preparation and submission of a committee report to the appropriate legislative house. If the Proposed Rules have not been adopted, the authorizing resolution should describe how the committee's oversight work will be memorialized, and the timeframe within which that output should be completed.

***

A resolution containing these provisions will not only properly channel the committee's efforts, it will also let the public know that its legislators are making good use of their borrowed authority.

D. THE INVESTIGATION

The investigation is the oversight phase in which the committee examines the story fragment that launched the authorizing resolution to determine whether the full

story requires a hearing. This phase is both organic and dynamic. It is "organic" because the story develops naturally according to the reality it describes. Exogenous factors, like partisan interests and emotional reactions, should be affirmatively resisted—they may feel satisfying to indulge, but they will ultimately leave the project crippled to the extent they cause the investigation to avoid counter-narratives or uncomfortable aspects of the story it is researching. This phase is "dynamic" because its direction and scope may change on the fly as the story develops and moves in unexpected directions. This is a feature, not a bug. The investigation should go where the story is, not where the investigator wants it to be.

The key to an effective investigation is understanding that its purpose is not simple fact-gathering; its purpose is story-gathering. Although facts are essential to learning the story, by themselves they are incapable of conveying meaning. Removing those facts from the story in which they are embedded presents a serious risk of misunderstanding the significance of those facts. For that reason, the investigation should seek out and preserve the story in which the facts of interest exist. This is the only way one may accurately convey the *meaning* of the facts to the target audience (should the investigation mature into a hearing).

This section of the Manual presents an investigation methodology that offers the best opportunity to gather stories, and not just facts. It involves planning, informal interactions, and formal inquiries, as described below.

1. THE PLAN

Every investigation should have a plan. The best investigations are logically organized, and proceed in a step-wise fashion from a solid foundation of general knowledge to ever greater levels of detail and specificity until the committee has enough information to decide whether the story warrants a hearing. The plan might begin as a brainstorm, but eventually it should be reduced to a writing accessible by everyone participating in the investigation. Just because it's in writing, however, does not mean it cannot change. Indeed, it will be a rare plan that proceeds from ideation to completion without significant modifications along the way. It is a truism in certain circles that no plan survives contact with the opposition.[140] That doesn't mean the plan was wrong, it just means it must adapt to circumstances on the ground as the investigation proceeds.

The investigation plan is not a complicated document. It lists the types of information the committee needs, identifies where the information is most likely to

140 The sentiment is, apparently, derived from Prussian Field Marshall Karl Bernhard Graf von Moltke, who observed that "[o]ne cannot be at all sure that any operational plan will survive the first encounter with the main body of the enemy." K. B. G. Moltke, *On Strategy*, in MILITARY WORKS (1871). Investigations are not battles, of course, but the principle is sound inasmuch as it would be naive not to expect some level of opposition to the investigation.

be found, describes the method it will use to acquire it, and sketches out a preferred order of acquisition.[141] The plan will not remain static because, as the investigation proceeds, the committee's growing base of knowledge will indicate where further investigatory efforts are needed to complete the picture.

There is probably much more art than science to conducting investigations, but the concept of "story" should guide how they proceed. The investigation methodology presented here accounts for the reality that facts cannot easily be separated from the stories in which they are embedded without impairing their ability to convey meaning. It also accounts for the corresponding reality that the manner in which one attempts to obtain that information can influence the quality and usefulness of the story the committee hears. What follows are a few principles that will help bring structure and organization to a plan that discovers the complete story of the subject under investigation.

Plan: Sources of Information

For each type of information the committee needs, it should compile a list of resources where it might be found. The list will likely comprise both people and documents.[142] It should cast a wide net, and the committee should make a conscious effort to include sources that may not look with favor on the investigation. If the committee wants a full picture of the subject under investigation, this broad net is necessary because of the way people encounter and record life's events. Whoever said there are two sides to every story was surely onto something. But it holds true only so long as there are two people telling it. Add a third interlocutor, and there arises a third side, and so on ad infinitum. That does not mean, however, there is no objective truth to be discovered and told. There is. Nor does it mean those who are relating the story are being dishonest. There are different sides to the story because people understand and process events differentially depending on their experience, knowledge, assumptions, preferences, biases, perspectives, and all the other individual characteristics that influence the meaning they derive from facts.

This means that the committee will rarely encounter pristine and self-contained facts, free of any extraneous factors in their creation or maintenance. It will instead find them in their native habitat: a rich ecosystem of lived experience, with an extensive web of connections to other facts, glossed over by layers of implied and deduced meanings, and curated by an imperfect memory. This is why there can be as many sides to a story as there are storytellers without the need for dishonesty to explain the variances.

141 A sample outline of an investigation plan appears at the end of the Manual as Appendix C.
142 The "document" category is broad enough to encompass all repositories of information other than the human mind.

The true story, a story hardy and comprehensive enough to withstand adverse examination, will emerge only when the investigation queries a broad array of individuals and documents. The consistent elements across the various tellings will fluoresce as the foundational elements. The differences can then be resolved either through further investigation or a conclusion that they are inconsequential artifacts of the storytelling process.

Plan: Method of Acquisition

The plan should indicate how the committee intends to acquire the identified types of information. There are several available options, including informal interviews and document requests, depositions, and subpoenas duces tecum.

The selection of method must be done with an appreciation that the act of investigating will influence the amount and quality of information the committee obtains. The information a person is willing to offer is influenced by the circumstances in which he is giving it. So, for example, his recitation will differ depending on whether he is telling his story to a friend at a bar, to his employer, or to someone questioning him under oath. The story at the bar will be fulsome in detail, suffused with meaning, and open to elaboration with the merest of nudges. The story told to his employer might leave out key details that would reveal too much of his inner thoughts, and will be phrased in terms that are safe for work. The same story told in response to a subpoena (especially when the storyteller is accompanied by an attorney!) will provide discrete facts with little connective tissue from which to discern meaning, and will require constant and pointed prodding to keep it unfolding.

Consequently, the plan should select the most informal method that can reasonably be expected to produce the required information. It should only move to more formal methods when operationally necessary.

Plan: Order of Acquisition

As with the selection of methods, the order in which the committee obtains information has the potential for affecting the story it is investigating. The order should focus first on internally available information before looking beyond the legislature, and in scheduling interviews (or depositions) the process should start with individuals who are lower in the organizational chart before moving up the ladder. This step-wise approach has the added benefit of providing a steadily-expanding knowledge base in which each step serves as a foundation for understanding the succeeding tranches of information as the investigation proceeds.

The committee should ordinarily seek out documentary material before interviewing individuals who might have helpful information. Documents provide the committee with a base-line understanding of the subject under investigation, and are an essential prerequisite to effective interviews. Although this is not a hard-and-fast rule, a document-based interview will almost always be more productive because documents focus the questions, refresh memories, and reduce the chance the interviewee will unintentionally (or intentionally) color his story outside the lines.

The committee should start with internal and open-source repositories of information. Internal sources could include any of the myriad mandated reports the administrative agencies regularly make to the legislature, the Legislative Reference Bureau, the Legislative Council, the Legislative Fiscal Bureau, and the Legislative Audit Bureau. Open-source repositories become more comprehensive by the day, so although it may not be strictly true that the internet knows everything, it's getting pretty close. The committee can furnish itself with a basic understanding of a surprising array of subjects with these sources, all without inserting the investigative process into the story under investigation.

Once internal sources have been exhausted, the committee can start acquiring information from the broader world. As discussed above, this should start with informal document requests, and move to formal, compulsive methods only when necessary. The reasons and logic for selecting each of the methods will be discussed in the following sections.

After the committee is comfortable that it has learned as much as it can about the subject under investigation from the documents, it may then start talking with potential witnesses. The interviews should generally begin with the lowest-ranking individual likely to have useful information. When the subject of the investigation is the execution of a policy, for example, the best potential witnesses are the front-line personnel in the relevant agency or political subdivision. On the other hand, if the subject is the development of the policy, the entry point will be higher up in the organizational chart. Of course, if there is a specific individual with information that can be obtained from no other, that is where the investigation must go regardless of rank.

In sum, the logic of ordering is this: Documents before witnesses; internal documents before external; lower ranking witnesses before higher; informal methods before coercive. This procedure will most reliably and accurately develop the information necessary for the committee to determine whether the subject warrants a hearing. It will also minimize the investigation's effect on the story it is investigating.

2. INFORMAL BEGINNINGS

A methodical investigation requires that the committee establish a foundational level of knowledge about the subject under investigation, if it does not already have one. This is information in relatively broad strokes; it is enough to describe the

basic outlines of the subject matter and to give the committee confidence that it can advance to the formal phase of the investigation. A methodical investigation also requires a sense of its scope, an understanding of the parameters bounding the subject under investigation. "Scope," in this sense, has many potential dimensions, including:

- Time — How far back in history must the investigation delve?
- Volume — How large is the universe of information the committee will need?
- Complexity — Is the subject of the investigation sufficiently complex or technical that subject-matter experts will be required?
- Externalities — To what extent will the act of investigation cause undesirable external effects, whether economic, personal, political, or otherwise?
- Sensitivity — How far up the executive or political subdivision organizational chart is the investigation likely to reach?

Informality is the best method of obtaining this foundational information and sense of scope, whether by tapping an individual's knowledge or asking for informative documents. Casual conversations, telephone calls, or e-mails will quickly establish the lay of the land, and begin to create some of the structure within which further inquiries will take place. This is also where a well-developed network of contacts can be especially helpful. An informal inquiry can reach much further than formal methods because contacts are often willing to forward questions to their own networks.

Informal inquiries can also, at times, turn up more information than their formal counterparts. There is a reason that most witnesses in Congressional hearings appear voluntarily. One aspect of our shared humanity is a desire to tell one's story, to affect the arc of another's story, to take part in consequential endeavors. And as described above, a person relating his story in an informal setting, rather than under oath, is much more apt to provide rich detail and share his personal reflections on the meaning of the information.

There is no magic to the informal aspects of an investigation. The reportorial suite of questions, however, are good to keep in mind: Who, What, Where, When, Why. Each represents a fruitful line of inquiry, but the last is particularly suited to informal inquiries and can be the most powerful. The first four questions seek objective information. They were what Sgt. Friday was after with his tagline "All

we want are the facts, ma'am."[143] "Why," however, pursues story. It seeks out the meaning of the objective facts, the ways in which they might fit into the larger picture. "Why" also gives license for speculation in a way that may not be fitting in more formal settings. In this context, speculation is an extrapolation, a hunch about how the objective facts relate to each other. In a way, it can be an exercise in thinking out loud, spitballing. The uninhibited associations allowed by "why" can open new lines of inquiry the committee might never have pursued if it had not elicited and entertained the speculation.

As helpful as the informal methods can be, the committee should be aware of some of their limitations. First, informal requests beget informal responses. Asking someone a question over a cup of coffee is more likely to elicit an off-the-cuff remark, whereas an answer under oath will probably be much more carefully ordered and considered. The same is true with document requests. If you ask someone, by phone or email, to send you specific written material, the package you receive may be less complete than if it had been provided pursuant to a subpoena. This dynamic does not suggest a lack of good faith; it is simply a recognition that people tend to reflect the level of formality with which they are approached. And the subtext to an informal request is that the person does not expect an especially punctilious response.

Responses to informal requests also do not have the same utility as information produced through more formal channels. A spoken answer leaves no trace of its existence except for the memory of those who heard it (and their notes). That's not a problem when the committee intends to use the information for purely internal purposes—e.g., informing itself of the general parameters of a subject, identifying potential sources of information, developing strategy and tactics, etc. But it has very limited utility in other settings. The investigator's memory of someone's answer, for example, is a shaky foundation on which to base a line of questioning in a deposition. It will also carry very little weight in a hearing.

Documents produced in response to an informal request share some of the same limitations as verbal answers. The significance of some documents is apparent from their mere existence. More often, however, it's tied to the person who created them, the reason they were created, the context of the information they contain, and how they were curated.

This type of information is external to the document (often referred to as "meta" information), and as such cannot be communicated through the simple act of producing the documents. Even if their custodian were to describe this information to the investigator, it would then reside only in his memory. In the

143 If I have to tell you this is from the television series "Dragnet," then either I am too old or you are too young.

beginning of an investigation, this isn't much of an issue because its usefulness is primarily as a guide to a general understanding of scope and subject-matter. In subsequent stages, however, maintaining the connection between the meta information and the documents will become operationally important.

Additionally, informal document productions make it difficult to keep tabs on the correlation between (a) what has been requested from whom, and (b) what has been produced by whom. Again, that's not especially important when the committee is getting its arms around the scope of the investigation and informing itself on the general subject matter. Once the investigation moves beyond the generally-informative and scope-establishing phase, however, it will be important to know who has been asked to produce what information, as well as the sufficiency of the response. Formal document requests, discussed below, are capable of maintaining that correlation.

The general logic of ordering the methods by which one obtains information (internal documents before external; documents before personal interactions, etc.) applies in the initial phase of the investigation as it does in all others, but the stakes are low enough that switching it up is unlikely to cause any irremediable mistakes. At this stage, the biggest risk would be an interview that turns out to be less informative than it could have been, or a document request that fails to adequately describe the needed information. The remedy is simply to redo the interview or document request. The only thing lost is time.

The informal phase of the investigation is complete when the committee is confident it has a working knowledge of the subject-matter and understands the various dimensions of the investigation's "scope." This foundation will play a large role in determining how the investigation progresses in the formal phase. It will focus the committee's attention on the aspects of the subject that will determine whether a hearing is necessary, illuminate the avenues in need of detailed exploration, and reveal likely sources of information. And it will give the committee confidence that, as it enters the more public phase, it is prepared to ask well-informed questions that will drive the investigation to a considered and prudent conclusion.

3. FORMAL INVESTIGATORY PHASE

Although every part of the investigation should be conducted with the assumption it is preparing the committee for a hearing, that is especially true when the process reaches the formal phase. The principal characteristic of this stage is the use of legally-enforceable investigatory techniques to acquire and preserve pieces of the story under investigation (primarily, subpoenas duces tecum and depositions). In this stage, the committee will use these tools to engage in a deep and precise

exploration of the subject. Its aim must be a comprehensive understanding of the story to the extent it intersects with the legislature's responsibilities. For reasons addressed below, most (if not all) of the information the committee will use in a hearing will be produced through this part of the investigation.

Because these techniques carry the force of law, they can accomplish objectives that are simply beyond the reach of informal methods. There are, however, trade-offs between the two approaches. Before engaging these techniques, the committee should consider how they color the nature and amount of information they produce.

The most significant difference in the two approaches relates to the nature of the information they produce. Informal methods elicit a spontaneous flow of information, a narrative full of the rich context and meaning that we normally convey when we tell stories we know well. Formal methods, on the other hand, naturally tend to turn up discrete pieces of information. It takes more of a practiced hand to use these methods to draw out the connective webbing that turns individual facts into a meaningful story.

On a per-question basis, formal methods are also likely to produce less information than informal methods. A legally-enforceable question will draw an attorney's attention as surely as autumn draws attention to Lambeau Field. And an attorney will almost always counsel a witness not to offer information not specifically requested. As a result, formal investigatory methods involve a stylized dance in which the investigator must be versed in how to discover the story in the steps.

But formal methods are capable of doing things informal approaches simply cannot. First and foremost, they can reach information even when the custodian is unwilling to produce it. That unwillingness may arise because of confidentiality requirements, or a sensitive work environment, or inconvenience, or even out of hostility to the committee's efforts. Some of those bases for reluctance are more worthy than others, but even when well-founded they must normally yield to the legislature's need for information so that it may responsibly exercise its legitimate functions. Consequently, "[i]t is unquestionably the duty of all citizens to cooperate with the [legislature] in its efforts to obtain the facts needed for intelligent legislative action."[144] The formal methods of obtaining information exist to enforce that duty: "It is [a citizen's] unremitting obligation to respond to subpoenas, to respect the dignity of the [legislature] and its committees and to testify fully with respect to matters within the province of proper investigation."[145]

144 *Watkins v. United States*, 354 U.S. 178, 187, 77 S. Ct. 1173, 1179, 1 L. Ed. 2d 1273 (1957).
145 *Id*. at 177-78.

Additionally, formal investigatory methods outshine informal methods in terms of the depth and precision of information they can produce. A subpoena, for example, will focus a person's mind in a way that a cafe conversation won't: "Experience has taught that mere requests for such information [that is, information in aid of the legislative function] often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed."[146] Memory improves with concentration. So does the thoroughness of the work product. People will normally check and double-check what they provide in response to a subpoena or a question posed during a deposition, whereas an informal inquiry is likely to produce a narrative with holes and fuzzy, imprecise edges.

Finally, formal investigatory methods will produce information in a manner that will make its use in the anticipated hearing much more productive, persuasive, and focused. There are several reasons this is so. First, there is the question of document authentication, a concept borrowed from litigation but also important to the smooth operation of a legislative hearing. "Authentication" is the process of establishing what the document is. Who created it? Why was it created? What is the source of the information it contains? How has it been curated? Is it an original, or at least a true and correct copy of the original? If any of these questions remains unanswered when the document is presented in a hearing, its impact could be dampened because of doubt about its provenance. And trying to address those questions during the hearing risks derailing the story the committee is trying to tell by chasing down important details that should have been addressed before the first witness was called. Subpoenas and depositions, as described below, surface that information and preserve it so the hearing can focus on the significance of the information the document *contains*, as opposed to questions about what the document *is*.

The second reason formal methods are important to the acquisition and use of documentary material is that they make the eventual hearing much more orderly. If a hearing relies on documents of any kind, it is important that all participants (committee members, witnesses, the public) know which document the committee is referencing. Having them pre-marked as exhibits (or Bates-numbered) as part of a response to a subpoena or a deposition makes it easy to ensure everyone is looking at the same document during the hearing. Without that preparation during the investigation phase, the committee will waste considerable amounts of time just making sure everyone is on the same page, so to speak.

Formal investigatory tools (depositions, in particular) are especially important with respect to obtaining and preserving verbal information. Indeed, a deposition is virtually the only

146 *McGrain v. Daugherty*, 273 U.S. 135, 175, 47 S. Ct. 319, 329, 71 L. Ed. 580 (1927).

reliable method of preserving that type of information. The only record of an informal conversation is the participants' memories, and any notes they may have taken. But those don't always reflect what they really said. They record what each understood the other to have said. The two are not necessarily the same. If the information an individual provides is important enough to eventually use in a hearing, then it's important enough to use a formal method to capture it accurately.

The following subsections discuss the formal methods of obtaining information. It is entirely natural that committee members might not be conversant with these methods—they are not, after all, tools used in the normal affairs of life. The committee should not hesitate to contract with a consultant to assist with this phase of the investigation. While it is true that litigation and legislative hearings differ in many important respects, the dynamics involved in gathering information have much in common. Consequently, a litigation attorney who is conversant with legislative procedure could bring substantial benefit to the committee.

a. SUBPOENA DUCES TECUM (DOCUMENT SUBPOENA)

The idea behind subpoenas duces tecum is really straightforward. They are formal demands that an identified person (or entity) provide the documents described by the subpoena. They may be directed to anyone who may have information reasonably related to the subject under investigation, and the demands are subject to enforcement through contempt proceedings. Subpoenas are often used in an iterative fashion, in which the response to one document subpoena narrows and directs the requests contained in a subsequent subpoena. There is no limit to how many the committee may issue, but care should be taken that there is an adequate and reasonable justification for each one.

Subpoenas should be drafted with two goals in mind. First, they should unambiguously describe the recipient's obligations, including instructions on how to comply with their requirements, a clear identification of the documents to be produced, the method of production, and the deadline for compliance. Second, because their demands are legally enforceable, they should be drafted with an eye on the elements a court will look for in determining whether they must be obeyed.

An effective and legally enforceable subpoena duces tecum is really a compendium of documents. The primary document is the subpoena, which refers is supported by several separate documents referred to as "Schedules." The complete subpoena package comprises the following:

- Subpoena Duces Tecum[147];
- Description of Items to be Produced (Schedule A[148]);

147 *See* Appendix D.
148 *See* Appendix G. The Description of Items to be Produced must be prominently marked "Schedule A" on the first page.

- Instructions (Schedule B[149]);
- Definitions (Schedule C[150]);
- Authorizing Resolution (Schedule D[151]); and
- Committee Rules (Schedule E[152]).

This modular composition minimizes the amount of customization necessary to make it effective in a wide variety of circumstances. The following anatomy of a subpoena duces tecum package explains each of the essential components. For the purpose of illustration, a sample of the first four components of the package appears as Appendices D-G at the end of this Manual.[153]

i. Subpoena Duces Tecum[154]

The subpoena is the legally actionable part of the package; all of the other components play a supporting role. It is typically no more than a one- to two-page document that identifies the legislative house issuing the subpoena, the person or entity to whom it is directed, the command to obey its requirements no later than a date certain and at a designated place, a direction to an authorized person to effect service, and the required signatures.

A brief explanation of each section of the subpoena form follows. Each of the sections requires the insertion of material specific to the subpoena being issued, which is indicated by a bracketed and italicized description of that information.

Subpoena: Caption

The caption appears at the top of the subpoena; its function is to (1) state the nature of the document, (2) identify the legislative house issuing the demand, and (3) identify the person or entity to whom it is directed:

149 *See* Appendix I. The Instructions must be prominently marked "Schedule B" on the first page.
150 *See* Appendix J. The Definitions must be prominently marked "Schedule C" on the first page.
151 The copy of the Authorizing Resolution accompanying the subpoena must be prominently marked "Schedule D" on the first page.
152 The copy of the Committee Rules accompanying the subpoena must be prominently marked "Schedule E" on the first page.
153 The Authorizing Resolution, of course, is the document that authorized the oversight activities, as discussed in Part III.C. The Committee Rules to which this package refers comprise any rules the legislative house has adopted that govern the conduct of oversight activities.
154 Appendix D.

Subpoena

The [*Assembly/Senate*] of the State of Wisconsin

To: [*Name of Person (or Entity)*]

[*Position (if relevant)*]

[*Address*]

Subpoena: Command

The "Command" section of the subpoena form is the operational heart of the entire subpoena package. This is where the committee introduces itself as the investigating entity, identifies its authority to compel a response from the recipient, describes what the recipient must produce, and provides directions on how and when the response should be made. It accomplishes most of this work by referring to the other components of the subpoena package (the "Schedules"). Consequently, the actual language in this section is pretty brief. There are no magic words that must be used, but each of the elements must be present. The following language accomplishes that goal:

The [*name of the investigating committee*] of the Wisconsin [*Assembly/Senate*] is conducting an investigation and/or a hearing as described in the Authorizing Resolution (attached as Schedule D) pursuant to the authority of the Wisconsin [*Assembly/Senate*], the Rules of the said legislative house as they relate to oversight investigations and hearings (attached as Schedule E[155]), and Wis. Stat. §§ 13.26 through 13.36.

You are therefore commanded to appear, at the place and time identified below before the [*name of the investigating committee*] of the Wisconsin [*Assembly/Senate*], there to produce the items identified in the Description of Items to Produce (attached as Schedule A[156]), in accordance with the Instructions (attached as Schedule B[157]) and Definitions (attached as Schedule C[158]).

If you cause all of the items identified in the Description of Items to Produce to be delivered to the place of production prior to the indicated time, you do not need to appear in person.

Place of production: [*State the name of the location and address*]

Date: _____ Time: _____

Failure to comply with the requirements of this subpoena may subject you to summary arrest, imprisonment, and criminal prosecution according to law.

Subpoena: Order for Service and Return

This section of the form is addressed to whomever will serve the subpoena package on the recipient. It need not identify the person by name; it may instead refer to a person by title, and may authorize that individual to designate another to effect service. Although any adult may serve the subpoena package, employing a commercial process server for this purpose will almost always be the most effective method of accomplishing this task. The proposed language, below, requests the Sergeant at Arms, or his designee, to serve the package. A cover letter or note may

155 These need only be the rules that bear on the conduct of oversight activities.
156 *See* Appendix G.
157 *See* Appendix I.
158 *See* Appendix J.

be added requesting that the Sergeant at Arms select a commercial process server as his designee for this task.

This section also tells the process server to whom he should deliver the proof of service (the "return"). This is entirely up to the committee, but it makes the most sense to have it delivered to the committee chairman.

Here is the suggested language for this section of the subpoena form:

> To the [*Assembly/Senate*] Sergeant at Arms: You or your designee are requested and directed to serve this subpoena and its attachments forthwith, and make return to
>
> [*Name of Committee Chairman*]
> [*Name of investigating Committee*]
> [*Address*]

Subpoena: Authorizing Signatures

The last section of the subpoena form contains the signatures required to authorize service on the recipient. According to Wis. Stat. § 13.31, both the presiding officer and chief clerk of the legislative house issuing the subpoena must subscribe their signatures. Although not required, it is recommended that the issuing legislative house also affix its seal as an aid in establishing the authenticity of the document. The signature block, therefore, is as follows:

Witness my hand and the seal of the [*Assembly/Senate*] of the State of Wisconsin, at the city of Madison, this _____ day of _____ in the year _____ .

[SEAL]

_____

[*Name of Presiding Officer*]
[*Speaker of the House/President*]
[*Assembly/Senate*] of the State of Wisconsin

Attest:

_____

Chief Clerk
[*Assembly/Senate*] of the
State of Wisconsin

ii. Description of Items to Produce[159]

The second component of the subpoena package is the Description of Items to Produce. The "items" will normally be documents and electronically-stored information, but this type of subpoena can also be used to require the production of any physical object.

This attachment to the subpoena (identified in the subpoena form as "Schedule A") contains a list of the items the recipient must produce. It can contain as many entries as is necessary to cover all of the needed items. Each entry in the list will describe either a specific item or a category of items. If a question ever arises as to whether the recipient properly produced all responsive items, a court will look carefully at the way the committee described the items or categories.

If the committee is interested in a specific item (as opposed to a number of items in a particular category), the description should contain enough identifying information that the recipient can be reasonably expected to understand which item the committee wants. Keep in mind, however, that the recipient's attorney will likely be supervising the interpretation of the description and providing advice on

159 Appendix G.

how to respond. If the description is overly-particular, it may offer the recipient an opportunity to respond that he has no such item.

When drafting a category of items the recipient must produce (as opposed to a single, specific item), the entry should be sufficiently expansive that it covers all of the items the committee believes to be in that category. But the committee should also be careful to include reasonable limits in the description to ensure that the volume of responsive items won't be an unmanageable deluge. Additionally, if the description calls for an inordinately voluminous response, the committee may receive an objection instead of the demanded items.

The Description of Items to Produce should include a brief introductory sentence that identifies itself and calls attention to the Instructions and Definitions. The following language is sufficient for that purpose: "The subpoena requires You to produce all of the items described below in accordance with the Instructions (attached as Schedule B). Be advised that capitalized terms carry the meaning assigned to them in the Definitions (attached as Schedule C)."

iii. Instructions[160]

The committee and the subpoena recipient both have unspoken assumptions about what will satisfy the subpoena's commands. Problems arise when they do not match. The "Instructions" component of the subpoena package is the committee's opportunity to reduce the number of differing assumptions by bringing some structure to the recipient's response. Here, the committee instructs the recipient on the extent of its obligations, the format in which to produce documents (including electronically-stored information), how to mark the items so that they may be identified with the subpoena, and explains any other requirement that will conform the recipient's response to the committee's expectations. The set of Instructions appearing in Appendix I illustrates some of the more common requirements and directions.

The instructions advance two of the objectives that make this formal investigatory tool superior to informal methods of obtaining information. The first, and most obvious, is that they provide the precision and comprehensiveness necessary to reduce ambiguities and unwarranted assumptions about the items the recipient must produce. This ensures the response will contain the full range of information the committee requested.

The second reason the subpoena is more useful than an informal request is its ability to preserve the "meta" information related to the produced items. The

160 Appendix I.

instructions, for example, require that the recipient affix identifying information to the produced items (such as Bates-numbering). This makes each item (and each page in a document) uniquely identifiable, which is essential to using it effectively in a deposition or hearing. The Instructions also require the recipient to include with its response a cover letter that identifies the items produced. This allows the committee to track which items it received from which source, and also provides much of the information needed to authenticate them for use in a deposition or hearing.

iv. Definitions[161]

The Definitions component of the subpoena package assigns precise meanings to some commonly-used terms that would otherwise be ambiguous in the context of a subpoena duces tecum. The committee should feel free to add as many definitions to this document as are necessary to bring maximal clarity to the subpoena's requirements. There are two types of terms the committee should seriously consider including in this document.

The first category are those terms that carry special meanings either in legislative parlance or in the field of the subject under investigation. These should be defined because not everyone receiving a subpoena will be familiar with them. And to the extent they are colloquial, it would be difficult for the recipient to get an adequate definition from the dictionary.The second category comprises those terms that take the place of really long descriptions that would make the subpoena difficult to understand, and bulky, if they were set forth at length every time such a reference was necessary. Perhaps the best example of this category is the term "Document," which (according to the Definitions) means:

> Any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (emails), text messages, instant messages, MMS or SMS messages, contracts, cables, telexes, notations of any type of conversation, telephone call, voicemail, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies

161 Appendix J.

> and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electronic records or representations of any kind (including, withou limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.

If the committee had to repeat all of that material when it described each category of documents in the Description of Items to Produce, the resulting schedule would be so tedious and mind-numbing that it would actually reduce the subpoena's clarity.

v. Authorizing Resolution

The Authorizing Resolution belongs in the subpoena package to satisfy two legal requirements. The first relates to the objective of the committee's investigation, and plays a significant role if the subpoena should ever come under judicial scrutiny. As discussed in Part II.C.1 ("The Functional Limitation"), an investigation must have a legitimate and substantive connection to its lawmaking function. "No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress. Investigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible."[162] If the investigation does not have a legitimate legislative purpose, the court will not enforce the committee's subpoena. However, if the committee drafted the Authorizing Resolution in accord with Part III.C ("The Resolution"), the subpoena's reference to that schedule and inclusion in the subpoena package will automatically demonstrate a legitimate legislative purpose.

The second legal requirement fulfilled by including the Authorizing Resolution in the subpoena package relates to the recipient's knowledge regarding the obligations imposed by the subpoena. As discussed in Part III.C.1 ("Whereas: Story"), the recipient of compulsive process (whether a subpoena to produce items or a subpoena to give testimony) has a due process right to know whether its demands fall within

162 *Watkins*, 354 U.S. at 187 (emphasis supplied).

the ambit of an investigation supported by a legitimate legislative purpose:

> "It is obvious that a person compelled to make this choice [viz., whether to respond to the committee' compulsion] is entitled to have knowledge of the subject to which the interrogation is deemed pertinent. That knowledge must be available with the same degree of explicitness and clarity that the Due Process Clause requires in the expression of any element of a criminal offense. *The 'vice of vagueness' must be avoided here as in all other crimes.*"[163]

Without the Authorizing Resolution, the recipient would have to guess at whether the subpoena's requirements are legally enforceable. If he has to guess, the court will not enforce the subpoena.

vi. Legislative Rules

Including the relevant parts of the legislative rules governing the investigation and hearing in the subpoena package is, like the Authorizing Resolution, part of the due process the committee owes to the recipient. The legislature's rules are, for the most part, internal documents that govern internal affairs. Investigations and hearings, however, reach outside of legislative chambers into places the legislature's rules generally do not govern. The committee must include the legislative rules governing investigations and hearings so that the recipient may have advance notice of the procedures to which he will be answerable.

b. TESTIMONIAL SUBPOENAS

A deposition is, by far, the most powerful and versatile method of learning what others know.[164] It is a live conversation between the committee's designee and a witness, conducted under oath and before a court reporter. A deposition is superior to an informal conversation for several reasons. The presence of a court reporter and the witness's attorney will unavoidably focus the witness's mind and impress on him the gravity of the proceedings.[165] Because the deposition is conducted under oath, the witness is likely to provide more thorough and honest answers than may

163 *Id*. at 208-09.
164 Committees have the authority to conduct depositions pursuant to Proposed Rule 1001(1)(b)5.
165 The witness need not be accompanied by an attorney, but as a practical matter it is a rare witness who will venture into a deposition without legal counsel.

have been the case in an informal conversation.[166] Further, a deposition results in a verbatim transcript of the witness's sworn statements, so there is no risk of conflicting memories about what the witness said. This also makes the material especially useful in further depositions or the eventual hearing.

The decision to depose an individual or entity is made by vote of the committee, a majority being present.[167] Alternatively, the committee may adopt an ad hoc resolution granting the chair the authority to authorize subpoenas subject to such requirements and limitations as the committee may prescribe.[168] A deposition may be conducted at any place in the State of Wisconsin not prohibited by the Senate or Assembly rules, and at any time no sooner than five days after the subpoena calling for the deposition is tendered to the Sergeant at Arms for service.[169]

Theoretically, depositions can be conducted by the committee. But such a process would be cumbersome and inefficient, and would ultimately yield less useful information than one conducted by a specified individual. That's why Proposed Rule 1003(2) provides that the committee shall "select a member, a staff member, or consultant to conduct the deposition." Pursuant to Proposed Rule 1003(3), the designee of the minority members of the committee may cross-examine the witness once the committee's designee is finished. Although any member of the committee may attend the deposition, only the designees may address questions to the witness.[170]

A witness at a deposition must answer every question put to him by the committee's or minority's designee. The only exception to this requirement is when answering the question would subvert a constitutionally-protected right or testimonial privilege[171] (such as the right not to incriminate oneself or the attorney-client privilege). Failure to answer a question, except in those instances, is punishable as a contempt of the legislative house that issued the subpoena.[172]

---

166 Part of the impetus for testifying accurately and truthfully is the risk of a perjury prosecution if the witness gives information he knows to be inaccurate:

> Whoever under oath or affirmation orally makes a false material statement which the person does not believe to be true, in any matter, cause, action or proceeding, before any of the following, whether legally constituted or exercising powers as if legally constituted, is guilty of a Class H felony:
> * * *
> (h) A legislative body or committee.

Wis. Stat. § 946.31.
167 Proposed Rules 1002(1) & 1003(1).
168 *Id.*
169 Proposed Rule 1003(1).
170 Proposed Rule 1003(7).
171 Proposed Rule 1003(5).
172 Proposed Rule 1003(6).

Careful preparation is necessary for a deposition to reach its full potential. Detailing that preparation is beyond the scope of this Manual, but there are a few basic considerations for which the committee should account before starting a deposition. The committee's designee should, for example, draft an outline of the information he is seeking from the witness. Because the purpose of the outline is to ensure no line of questioning is overlooked, the level of specificity is up to the designee. Some parts of the outline may address broad categories that will serve as a guide to the conversation, while other parts descend so far into the weeds that they identify discrete facts the designee wants the witness to address.

Depositions are also excellent opportunities to learn more about the documents received in response to a subpoena duces tecum. For that reason, part of the preparation will involve determining the type of information the designee needs to know about them. That might include the following (with the understanding this is not meant to be an exhaustive list of what the investigator might wish to know about any given document):

- An explanation of its contents;
- Authenticity and accuracy of the document;
- Identity of the person or entity creating the document;
- Reason the document was created;
- How the document was curated.

Some of the preparation will be entirely practical. For example, if the designee intends to use or refer to documents during the deposition, he must ensure each one has a unique identifier associated with it. This will most often involve the use of self-adhesive exhibit stickers that can be marked with an exhibit number.[173] The designee may mark the documents in advance, or he can ask the court reporter to mark them during the deposition. In most circumstances, the deposition will proceed more smoothly if the documents are all marked in advance.

The designee must also make sure he arrives at the deposition with an appropriate number of copies of each document to which he intends to refer. Only copies of original documents should be used in a deposition; the originals should remain in the committee's possession at all times. Normally, the designee will need no less than three copies of the documents he intends to use in the deposition. One copy

173 The committee should maintain a log of exhibits to ward against accidentally assigning the same number to different documents. An Exhibit Number Log appears as Appendix M at the end of this Manual.

will be presented to the witness for his reference while the designee questions him. This copy will become part of the official record of the deposition, and will remain in the court reporter's custody until requested by the committee. A second copy is for use by the witness's attorney. The attorney will retain that copy for his own records. The third copy is for the designee's reference during the deposition. The designee should preserve his copy of all the documents used in the deposition. This is not an official record, but as an organizational matter, it is a handy resource if the designee later has a question about what documents were used in a particular deposition.

Depositions come in two varieties. The first is the deposition of an individual specifically named in the subpoena. The proper response to such a command is for the named individual to appear at the time and place indicated and answer all questions posed by the committee's designee. The second is a deposition of the "person most knowledgeable" about a supplied list of topics (as shorthand, these are often referred to as "PMK depositions"). The proper response to this type of command is for the entity named in the subpoena to designate and produce for examination one or more individuals who will provide testimony on behalf of the entity regarding the listed topics.

The subpoena's contents with respect to each of these types of deposition are very similar to the subpoena duces tecum. However, their variances are such that it makes the most sense to address them separately.

i. Deposition of a Named Individual

This subpoena is used when there is a specific individual from whom the committee wishes to derive information. It is the simplest and shortest of the various types of subpoena packages, but it nonetheless comprises a compendium of documents, consisting of the following:

- Subpoena for Named Individual[174];
- Authorizing Resolution (Schedule A[175]);
- Committee Rules (Schedule B[176]); and
- Witness Fee Voucher (Schedule C[177]).

174 *See* Appendix E.
175 The copy of the Authorizing Resolution accompanying the subpoena must be prominently marked "Schedule A" on the first page.
176 The copy of the Committee Rules accompanying the subpoena must be prominently marked "Schedule B" on the first page.
177 *See* Appendix K. The Witness Fee Voucher must be prominently marked "Schedule C" on the first page.

The only component with a substantive change from the subpoena duces tecum is the Subpoena Form. This subpoena package also contains a component that the subpoena duces tecum package does not: the Witness Fee Voucher, explained below.

The [*name of the investigating committee*] of the Wisconsin [Assembly/Senate] is conducting an investigation and/or a hearing as described in the Authorizing Resolution (attached as Schedule A) pursuant to the authority of the Wisconsin [Assembly/Senate], the Rules of the said legislative house as they relate to oversight investigations and hearings (attached as Schedule B), and Wis. Stat. §§ 13.26 through 13.36.

You are therefore commanded to appear, at the place and time identified below before the [name of the investigating committee] of the Wisconsin [Assembly/Senate] or its designee, there to give your testimony, under oath, as to matters of inquiry described by the Authorizing Resolution, until such time as you are given leave to depart by the committee or subcommittee named herein or its designee.

Place of testimony: [*Location*]

[*Address*]

Date: _____ Time: _____

Testimony given in a deposition will be conducted by a designee of the committee or subcommittee outside the presence of the committee or subcommittee. Testimony given in a hearing will be presented to the committee or subcommittee itself.

This subpoena requires testimony in a (check one):

____ Hearing ____ Deposition

Failure to comply with the requirements of this subpoena may subject you to summary arrest, imprisonment, and criminal prosecution according to law.

Providing testimony pursuant to this subpoena entitles you to a witness fee and mileage pursuant to Wis. Stat. § 13.36. After testifying, fill out the Witness Fee Voucher (attached as Schedule C) and return it to the committee chair at the address indicated below.

This Subpoena Form is designed to require a witness to appear for either a deposition or a hearing. The committee need only check the proper box (Hearing v. Deposition) to customize it for the intended purpose.

Witness Fee Voucher

Any witness who appears and gives testimony pursuant to a subpoena issued pursuant to Wis. Stat. § 13.31 is entitled to a witness fee and mileage. Currently, the witness fee is $2 per day of testimony, plus one-way mileage at $0.10 per mile.[178] It's not much, but the committee should make sure it is paid. Attached as Appendix K is a Witness Fee Voucher, which should be served as part of the subpoena package.

After testifying, the witness should fill out the Witness Fee Voucher and send it to the chair of the committee or subcommittee that authorized the subpoena. The chair shall then certify the voucher to the department of administration. The certified amount will then be "paid out of the state treasury and charged to the appropriation for the legislature."[179]

ii. PMK Deposition[180]

PMK depositions are useful when an organization or bureaucracy has information on specific topics related to the investigation, but the committee doesn't know which individuals might be knowledgeable about each of the topics. A PMK deposition allows the committee to issue a subpoena to the entity in question, along with a list of topics on which it requires testimony. The entity is then responsible for identifying and producing individuals who will testify on its behalf with respect to each of the subjects.

The subpoena for a PMK deposition is, like the subpoena for an individual deposition, similar to the subpoena duces tecum. The "Command" element of the subpoena form needs an adjustment, a new schedule—Topics of Testimony—gets added to the subpoena package, and the "Definitions" schedule returns. The complete subpoena package for a PMK deposition is as follows:

- Subpoena for "Person Most Knowledgeable"[181];
- Topics of Testimony (Schedule A[182]);

178 Wis. Stat. § 13.36.
179 *Id.*
180 Appendix F.
181 *See* Appendix F.
182 *See* Appendix H. The Topics of Testimony must be prominently marked as "Schedule A" on the first page.

- Definitions (Schedule B[183]);
- Authorizing Resolution (Schedule C[184]);
- Committee Rules (Schedule D[185]); and
- Witness Fee Voucher (Schedule E[186]).

Subpoena: Caption

The only difference in the "Caption" section of the subpoena form is that, instead of directing the subpoena to a named individual, it is addressed to the name of the entity from which the committee seeks testimony.

Subpoena: Command

The primary change in the "Command" section of the subpoena form is the requirement to produce one or more individuals whose identities the committee does not yet know, and a reference to the topics on which those individuals are to testify:

183 *See* Appendix J. The Definitions must be prominently marked as "Schedule B" on the first page.
184 The copy of the Authorizing Resolution accompanying the subpoena must be prominently marked "Schedule C" on the first page.
185 The copy of the Committee Rules accompanying the subpoena must be prominently marked "Schedule D" on the first page.
186 *See* Appendix K. The Witness Fee Voucher must be prominently marked as "Schedule E" on the first page.

The [*name of the investigating committee*] of the Wisconsin [*Assembly/Senate*] is conducting an investigation and/or a hearing as described in the Authorizing Resolution (attached as Schedule C) pursuant to the authority of the Wisconsin [*Assembly/Senate*], the Rules of the said legislative house as they relate to oversight investigations and hearings (attached as Schedule D), and Wis. Stat. §§ 13.26 through 13.36.

You are therefore commanded to cause one or more individuals to appear, at the place and time identified below before the [*name of the investigating committee*] of the Wisconsin [*Assembly/Senate*] or its designee, there to give their testimony, under oath, as to the topics listed on the Topics of Testimony (Schedule A) in accordance with the Definitions (attached as Schedule B), all of which pertain to matters of inquiry described in the Authorizing Resolution. The individual or individuals shall give their testimony until such time as they are given leave to depart by the committee or subcommittee named herein or its designee.

Place of testimony: [*Location*]

[Address]

Date: _____ Time: _____

Testimony given in a deposition will be conducted by a designee of the committee or subcommittee outside the presence of the committee or subcommittee. Testimony given in a hearing will be presented to the committee or subcommittee itself.

This subpoena requires testimony in a (check one):

____ Hearing ____ Deposition

Failure to comply with the requirements of this subpoena may subject you to summary arrest, imprisonment, and criminal prosecution according to law.

Providing testimony pursuant to this subpoena entitles you to a witness fee and mileage pursuant to Wis. Stat. § 13.36. After testifying, fill out the Witness Fee Voucher (attached as Schedule E) and return it to the committee chair at the address indicated below.

As with the subpoena for the deposition of a named individual, this version can be used to summon the witness to testify at either a deposition or a hearing. However, for the reasons explained in Part III.F.4.a.ii (Subpoenaed Invitation), a PMK-style subpoena should only rarely be used to summon a witness to testify at a hearing.

Witness Fee Voucher

As with the subpoena for the deposition of an individual, the subpoena package for a PMK deposition also contains a witness fee voucher. The purpose and effect are the same as with the individual deposition.

c. HOW TO SUBPOENA DOCUMENTS AND WITNESSES

Subpoenaing documents or witnesses is a process that takes place in four steps: authorization, drafting, issuance, and service.

i. Authorization

To "authorize" a subpoena is to make a formal decision that the use of this tool in a particular instance (whether to obtain documents or testimony) is suitable and useful in accomplishing the goals of an investigation or hearing. The current version of the Wisconsin Statutes, Assembly Rules, Senate Rules, and Joint Rules, however, say nothing about who authorizes a subpoena or how the authorization is accomplished.

Proposed Rule 1002 fills in that gap. It provides that the power to authorize a subpoena belongs to the committee conducting the investigation. It also provides two methods by which a subpoena may be authorized. First, the committee may make the decision, providing that a majority of members are present and vote (assuming, of course, that the committee otherwise meets quorum requirements). Second, the committee may adopt an ad hoc rule that delegates the authority to authorize subpoenas to the committee chair, subject to such limitations as the committee may wish to impose.[187]

ii. Drafting

The Manual describes the components in each of the types of subpoena packages above at Part III.D.3. And the appendices contain a sample of each component to make the drafting task as easy as possible. All of the components, however, will

187 Proposed Rule 1002(1) & 1003(1).

require customization before they are ready to be issued and served. The customizable parts of the components are italicized and bracketed in the forms included in the appendices. A brief explanation of those elements follows:

Subpoena duces tecum (Appendix D)

- *Name of person or entity/position/address*. This is the person or entity on whom the subpoena will be served. If naming an entity, it may be helpful to identify the position of the person who has custody of the items requested.

- *Name of the investigating committee.* Insert name of the committee that authorized the subpoena.

- *Assembly/Senate.* Identify which of the legislative house is issuing the subpoena.

- *Place of production*. Unless circumstances dictate otherwise, it is best for the documents to be delivered to the committee chair's office. However, this is a matter of discretion, and the committee may select a different location should that make more sense.

- *Deadline for production.* The subpoena must state the date by which the documents must be delivered. Normal practice is 30 days, but that can be shortened or lengthened based on the exigencies of the circumstances. The form also requires the time of day that the documents must be produced for technical reasons. Subpoenas require a personal appearance, either of a named individual or an entity's representative. With respect to a subpoena duces tecum, that person is required to hand over the documents at the indicated time and place. As a practical matter, a subpoenaed person will simply cause the documents to be delivered prior to the specified deadline, as allowed by terms of the subpoena.

- *Return.* This portion of the document specifies where the Proof of Service should be delivered once the subpoena packaged has been successfully served. The form anticipates the committee will wish to have it delivered to the committee chair, but this is a matter of discretion.

- *Signatures.* The date, the legislative house issuing the subpoena, the name of the presiding officer, and the presiding officer's office must be inserted.

Subpoena for named individual **(Appendix E) (same as above except as noted)**

- *Place of testimony.* This may be at the Capitol Building or anywhere else in the state convenient to the committee and the witness.

- *Date and Time.* Unlike the subpoena duces tecum, this is the date and time the witness must actually appear and give testimony.

- *Hearing/Deposition.* The committee may use this subpoena form to compel attendance at either a hearing or a deposition. Simply check the appropriate box.

Subpoena for "person most knowledgeable" **(Appendix F)**

- Customization is the same as with the subpoena for a named individual.

Authorizing Resolution

- *Schedule.* The copy of the Authorizing Resolution attached to the subpoena must be prominently identified as a "Schedule" on the first page. The schedule designation must match the designation given in the corresponding subpoena, so the Authorizing Resolution should be marked as follows:

  Schedule A—when using a subpoena for a named individual.

  Schedule C—when using a subpoena for a "person most knowledgeable."

  Schedule D—when using a subpoena duces tecum.

Rules

- *Schedule.* The copy of the Rules attached to the subpoena must be prominently identified as a "Schedule" on the first page. The schedule designation must match the designation given in the corresponding subpoena, so the Rules should be marked as follows:

  Schedule B—when using a subpoena for a named individual.

  Schedule D—when using a subpoena for a "person most knowledgeable."

Schedule E—when using a subpoena duces tecum.

Description of Items to Produce **(Appendix G)**

- N.B. This schedule is used only with a subpoena duces tecum.

- *Item or category of items.* The committee may describe the items it wishes produced with as much specificity or generality as it deems appropriate. This document may contain as many entries as are necessary to accurately describe all of the items, or categories of items, the committee needs.

Topics of Testimony **(Appendix H)**

- N.B. This schedule is for use only with a subpoena for a "person most knowledgeable."

- *Topic of Testimony.* The committee may describe the topics of testimony with as much specificity or generality as it deems appropriate. This document may contain as many entries as are necessary to accurately describe all of the topics on which the committee needs testimony.

Instructions **(Appendix I)**

- N.B. This schedule is for use only with a subpoena duces tecum.

- After reviewing the model instructions under the General Instructions heading, the committee should feel free to modify any instructions to conform them to any particularized circumstances. The committee may also choose to include new instructions if necessary to clarify the subpoena recipient's responsibilities, or to make the response more useful to the committee.

- The Instructions also cover the production of electronically-stored information. The general rule is that electronically-stored information should be produced in its native format on a portable data storage device. This is the default rule, and appears under the heading "Electronic Production Instructions." But if the committee is using document management software to assist in managing documents, there will be very specific technical requirements with which the recipient must comply. In that case, the committee's technical consultant should provide a set of production instructions to replace the default electronic-production instructions.

- When adding or modifying instructions, be sure defined terms are included in quotes.

Definitions (Appendix J)

- N.B. This schedule is for use only with subpoenas duces tecum and subpoenas for a "person most knowledgeable."

- Schedule. The schedule designation must match the designation given in the corresponding subpoena. It will be Schedule B when used with a subpoena for a "person most knowledgeable," and Schedule C when used in a subpoena duces tecum.

- The entries in the Definitions document are sufficient for most instances. However, if the subpoena addresses matters that use technical terms or jargon that could be misunderstood, their definitions should be added to this document.

Witness Fee Voucher (Appendix K)

- N.B. This schedule is for use only with subpoenas for named individuals and subpoenas for a "person most knowledgeable."

- *Schedule.* The schedule designation must match the designation given in the corresponding subpoena. It will be Schedule C when used with a subpoena for a named individual, and Schedule E when used with a subpoena for a "person most knowledgeable."

iii. Issuance

To "issue" a subpoena is to have it signed by the required officers and sent to the individual who will serve it on the person therein named. Our statutes provide that the required signatures are those of the "presiding officer" and the chief clerk of the legislative house issuing the subpoena.[188] In the Assembly, the presiding officer for the purpose of this signature requirement is the Speaker,[189] and in the Senate it is the President.[190]

188 Wis. Stat. § 13.31.
189 "The speaker shall: . . . Issue subpoenas, with the countersignature of the chief clerk, for the attendance of witnesses." Assembly Rule 3(1)(o). For the sake of clarity, this rule should be amended to provide that it applies to subpoenas duces tecum as well.
190 Senate Rule 44.

After the subpoena has been signed, the entire subpoena package is sent for service on the named recipient. The statutes provide that a subpoena may be served by anyone, which provides a great deal of flexibility in accomplishing this task. But experience teaches that if a matter is serious enough to require issuance of a subpoena, it is serious enough to give the task of service to someone who knows how to do it. As discussed above in Part III.D.3.a.i ("Order for Service"), the subpoena should nominate the Sergeant at Arms, or his designee, as the person responsible for service. And the Sergeant at Arms should be encouraged to designate a commercial process server as the actual agent for service.

iv. Service

The committee should provide the Sergeant at Arms with three copies of the fully-executed subpoena package. The original should be maintained by whomever the committee decides should be the custodian of the investigation and hearing's records. The process server designated by the Sergeant at Arms will give one copy of the subpoena package to the named recipient, and keep one for his personal records.

The third copy of the subpoena package will be attached to the Proof of Service and returned to the committee in care of whomever the committee identifies in the subpoena. This is known as the "return" of the subpoena.

The purpose of the Proof of Service is to provide documentary evidence that the subpoena package was served on the recipient. If the committee ever has need of enforcing the subpoena against a recalcitrant recipient, the first fact it will have to establish is proper service of the subpoena package. This document accomplishes that objective.

Because the purpose of this document is to prove what the recipient received, it should list each of the components included in the subpoena package. The components should be the same for every subpoena duces tecum, but they will differ slightly for a deposition subpoena. Consequently, the committee will need to customize the Proof of Service (Appendix L) so that it accurately reflects what it requested the Sergeant at Arms to serve on the recipient. The executed Proof of Service (and attached subpoena package) should be maintained in the same place as the subpoena package with the original signatures.

d. ENFORCING SUBPOENAS

The reason formal investigatory tools (such as document demands and depositions) are valuable is because they are enforceable. Informal techniques, while they have beneficial aspects that make them valuable for other reasons, ultimately depend on a

person's voluntary decision to provide the requested information. The only resources the investigator has at his disposal to obtain compliance with those inquiries are a winning smile and a persuasive argument. When the parts of the story the committee needs to learn are critical to the exercise of its oversight duties, however, nothing is as effective as the force of law that stands behind the formal investigatory tools.

Failure to faithfully comply with the terms of a subpoena constitutes contempt of the legislative house issuing the subpoena:

> "Each house may punish as a contempt, by imprisonment, a breach of its privileges or the privileges of its members; but only for one or more of the following offenses: . . . Refusing 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, or to produce any books, records, documents, papers or keys according to the exigency of any subpoena."[191]

Addressing the contempt begins when the chair of the committee that authorized the subpoena certifies to the legislative house issuing the subpoena that the witness failed to comply with its terms.[192] There are three different proceedings from which the legislature may choose in resolving the contempt: (1) summary enforcement of the subpoena's terms; (2) legislative punishment; and (3) criminal prosecution. These are not alternatives, and may be used in combination. Choosing between the methods depends on what the committee wishes to accomplish through enforcement of the subpoena.

i. Summary Enforcement

The committee should choose summary enforcement if its goal is to immediately obtain the testimony or items the subpoena required the recipient to provide. As the term "summary" suggests, there is very little procedure the committee must follow to put it in motion.

If the person fails to appear at the specified time and place to give his testimony or to supply the items identified in the subpoena package, the committee chair sends a certificate describing the failure to the presiding officer (the Speaker or the President, as the case may be).[193] The legislative house issuing the subpoena is then required to issue summary process compelling the person's attendance.[194]

---

191 Wis. Stat. § 13.26(1)(c).
192 Wis. Stat. § 13.34.
193 Wis. Stat. § 13.32(1).
194 After receiving the committee chair's certification, "summary process to compel the attendance of such person shall be issued." Wis. Stat. § 13.32(1) (emphasis supplied).

- The "summary process" is similar to an arrest warrant in that it authorizes the Sergeant at Arms (or his designee) to immediately take custody of a person. This document must contain the following elements:

- The name of the person who failed to appear as required by the subpoena; An instruction that the Sergeant at Arms immediately take the person into custody "in the name of the State of Wisconsin";

- Direction that, upon arrest of the named individual, the Sergeant at Arms bring the person to the legislative house whose subpoena the person disobeyed;

- Signature of the presiding officer and chief clerk of the legislative house that issued the subpoena.[195]

The individual remains under arrest until released by the legislative house that issued the subpoena.[196] During that time, the officer in charge of the individual shall, from time to time as the committee directs, bring him before the committee for the purpose of providing his testimony or producing the items demanded by the subpoena.[197] When the person is not actively answering to the committee, he must remain in the custody of the Sergeant at Arms (or his designee).[198]

When the committee is finished examining the arrestee, the chair shall certify that fact to the presiding officer.[199] The individual will then be brought before the whole house, which shall either release him or "proceed to punish the witness for any contempt of such house in not complying with the requirement of this chapter or of any writ issued or served . . . ."[200] That punishment is the subject of the second method of dealing with a witness's refusal to comply with a legislative subpoena.

ii. Legislative Punishment

The statutes provide that, if a person is determined to be in contempt of either of the legislative houses, he shall be imprisoned.[201] They say nothing about the procedure capable of producing that result. However, because of the nature of the punishment, it is certain that there must be some modicum of due process before that result may obtain. The minimum process consistent with our constitution is that the legislature give the person notice he has been charged with contempt, and

195 Wis. Stat. § 13.32(2).
196 Wis. Stat. § 13.32(3).
197 Wis. Stat. § 13.32(2) & (3).
198 Wis. Stat. § 13.32(3).
199 *Id.*
200 *Id.*
201 Wis. Stat. § 13.27(1).

that it conduct a hearing at which the person may defend himself: "The legislature cannot sentence a person to confinement for contempt without notice and without giving an opportunity to respond to the charge."[202]

Even though adjudication of contempt will lead to imprisonment, the hearing before the legislature need not resemble a criminal prosecution.[203] Courts recognize that legislatures have the authority to punish for contempt, but that they are not organized or constituted for the purpose of conducting full-on adversarial contests. The somewhat truncated process involved in legislative adjudication of contempt is ameliorated by the fact that the offense in question actually takes place in the presence of the legislature (by failing to provide testimony or demanded items).

> "The potential for disrupting or immobilizing the vital legislative processes of State and Federal Governments that would flow from a rule requiring a full-blown legislative 'trial' prior to the imposition of punishment for contempt of the legislature is a factor entitled to very great weight; this is particularly true where the contemptuous conduct, as here, is committed directly in the presence of the legislative body. The past decisions of this Court strongly indicate that the panoply of procedural rights that are accorded a defendant in a criminal trial has never been thought necessary in legislative contempt proceedings."[204]

The "process" that is "due" in the adjudication of legislative contempt, therefore, is to give the alleged contemnor an opportunity to explain why he refused to give his testimony or provide the items required by the subpoena:

> "The customary practice in Congress has been to provide the contemnor with an opportunity to appear before the bar of the House, or before a committee, and give answer to the misconduct charged against him. Such would appear to have been the general practice in colonial times, and in the early state legislatures. This practice more nearly resembles the traditional right of a criminal defendant to allocution priorto the imposition of sentence than it does a criminal prosecution."[205]

202 *Groppi v. Leslie*, 404 U.S. 496, 92 S. Ct. 582, 30 L. Ed. 2d 632 (1972).
203 "[I]t is not to be supposed, nor indeed is it necessary or desirable, that the hearings by a congressional committee be conducted with the conventional traditional formalities of a trial in a court of law; nor, indeed, are such procedures desirable in the conduct of an administrative hearing; but, informality of procedure must not be permitted to endanger the protection of constitutional rights. There is just as heavy a duty upon any organ of the Government, congressional, executive, or judicial, to observe constitutional limitations as to perform diligently and effectively the tasks committed to them by the Constitution and legislation passed pursuant thereto." *United States v. Fitzpatrick*, 96 F. Supp. 491, 494 (D.D.C 1951).
204 *Groppi*, 404 U.S. at 500-01.
205 *Id. at 501* (citing *Jurney v. MacCracken*, 294 U.S. at 143-144, 55 S.Ct. at 376-377; *Kilbourn v. Thompson*, 103 U.S. at 173, 174; *Anderson v. Dunn, 6 Wheat.* at 209-211; *Marshall v. Gordon*, 243 U.S. 521, 532, 37 S.Ct. 448, 449, 61 L.Ed. 881 (1917)).

As spartan as this proceeding might be, the legislature would still do well to pay particular attention to the factors a court would consider in a question of contempt:

- Is the investigation or hearing for which the subpoena was issued properly authorized?
- Is the investigation or hearing pursuing a valid legislative purpose?
- Are the topics of testimony or demanded items pertinent to the subject matter of the investigation or hearing?
- Did the person have information available to him indicating the testimony or items were pertinent to the investigation or hearing?
- Did the subpoena violate the person's constitutionally-protected rights in any manner? [206]

If the committee drafted the Authorizing Resolution as outlined in Part III.C, and assembled and maintained the subpoena package as described in Part III.D.3, all but the last of these elements can be satisfied by producing the subpoena package with the attached Proof of Service and the committee chair's certification that the witness failed to appear or produce the required items. The burden for establishing the last element belongs to the witness, so the legislature will simply need to carefully consider his argument and make a ruling on whether a constitutionally-protected right excuses his compliance with the subpoena.

If the legislature should determine, after due consideration, that the person has been contumacious, he is to be committed to the Dane County jail, there to be detained "in close confinement for the term specified in the order of imprisonment, unless the person is sooner discharged by the order of such house or by due course of law."[207] The jailer has no discretion in deciding whether to accept the prisoner—the statute speaks in mandatory terms: "[T]he jailer shall receive and detain the person . . . ."[208]

The power of a subpoena lies in the public's understanding that its terms are mandatory and that there are legal repercussions if they are not honored. If the legislature issues a subpoena, it must be prepared to enforce it if it is not obeyed. Failure to do so will result, over time, in a casual and even dismissive response to the legislature's subpoenas. So if you don't mean to enforce it, don't issue it.

---

206 *See Wilkinson v. United States*, 365 U.S. 399, 408–09, 81 S. Ct. 567, 573, 5 L. Ed. 2d 633 (1961).
207 Wis. Stat. § 13.27(1).
208 *Id.*

iii. Criminal Prosecution

Finally, a contemnor is subject not just to the legislature's punishment, but to criminal prosecution as well. The legislature, after adjudicating a person as contumacious, may refer the matter to the Dane County District Attorney's office for prosecution as a misdemeanor:

> "Any person who is adjudged guilty of any contempt of the legislature or either house thereof shall be deemed guilty also of a misdemeanor, and after the adjournment of such legislature, may be prosecuted therefor in Dane County, and may be fined not more than $200 or imprisoned not more than one year in the county jail."[209]

When the legislature issues a subpoena, it does so with authority borrowed from the people of Wisconsin. A person's failure to honor the subpoena's commands is, therefore, an offense against all of Wisconsin's citizens, making it an apt subject for the criminal justice system.

***

The purpose of an investigation is to move from having just the piece of the story that captured the committee's attention to having the rest of the story. If the committee uses the methodology contained in this Manual, and the tools explained above, it will know the rest of the story by the time it is finished. And that puts it exactly where it needs to be to determine what its next steps will be.

E. THE CONTEMPLATIVE PAUSE

The beginning of a story does not always predict where it will end. Life is nothing if not surprising, and because an oversight investigation is an inquiry into a real-life story, it is possible the committee will reach a conclusion it did not expect when it commenced its proceedings. That is why, in every intelligent and well-designed oversight expedition, there must come a point where the committee stops to consider what it has learned, and what it should do next. A contemplative pause following completion of the investigation gives the committee space to intentionally and thoughtfully assess its options. Those include, but are not necessarily limited to: (1) proceeding to a hearing as originally planned; (2) adjusting and redirecting the committee's goals; or (3) concluding the oversight proceedings without a hearing.

209 Wis. Stat. § 13.27(2).

Full Steam Ahead

Tunnel vision is an actual thing. It is a part of our human nature that, once we have decided on a particular course, we are prone to dismissing evidence that we might be on the wrong track. Resist that temptation. Proceeding to a hearing as originally planned is the easy choice once the investigation wraps up. It confirms our original assumptions and justifies all of the work already undertaken. It may very well be that the originally anticipated hearing is the correct next step. But it shouldn't occur simply because the process is on auto-pilot.

The decision should be informed by a careful review of the material turned up by the investigation. This will necessarily involve some ordering of the information now in the committee's possession. The interview notes, internal and publicly-sourced documents, material obtained through subpoenas duces tecum, and testimony from depositions will all be sitting in someone's office, but they won't be organized in anyone's mind in a comprehensible fashion. Select committee members should meet with the consultants to talk through the available material.

Through this collaborative process, the pieces will gradually come together to tell a story. Viewed through the eyes of a disinterested observer, is it the one the committee originally anticipated?[210] Does it still suggest the action the committee envisioned (i.e., adopting a new law, persuading a wayward administrator to conform his work to existing law, discouraging the executive from impinging on the legislature's prerogatives, etc.)?

The result of that process should determine what the committee does next. If it leads to the conclusion the committee had initially expected, and the story it reveals makes the case for the originally-contemplated action, the process should proceed to a hearing. If that is the committee's decision, it will of course result in the same next step as would have occurred without the contemplative pause. But going through the exercise will give the committee confidence it is still on the right path.

Course Correction

But perhaps the pause reveals a delta, some amount of distance, between where the committee thought the investigation would lead and where it ended up. That's not a bug in this oversight methodology—it's a feature. The committee should always be willing to follow where the story takes it. Oversight is about seeking out a *true* story; it is not about reaching a pre-ordained conclusion despite what the committee learns.

210 It's important to note here that "disinterested" does not mean "uninterested." The point to this exercise is to see the material the way a person would who had not become invested in the process through the hard work of pursuing and gathering the information.

An unexpected conclusion to the investigation should prompt the committee to consult the original objective and consider it anew in light of the information revealed in this process. Perhaps the material suggests a new law is still needed, but one that is different from what the committee originally contemplated. Maybe it reveals that the program the committee was investigating was achieving its goal, but the investigation uncovered unexpected waste, fraud, or abuse along the way. And so on.

Whatever may be the delta between expectation and reality, the committee should consider whether the investigation nonetheless revealed a matter falling within its oversight jurisdiction. If so, the committee will need to revisit (probably briefly) the major components of oversight proceedings conducted to date:

- *Authorizing Resolution.* Because this document has both practical and legal significance, it should be updated to reflect the newly revised objective. That may require modifications to the "Story" and "Legislative Purpose" clauses in the "Whereas" section of the resolution, as well as the "What is the Committee Addressing" and "When May the Committee Act" clauses in the "Resolved" section. [211]

- *The Plan.* If the revised objective requires additional information the investigation did not turn up, the committee should update the plan for acquiring the rest of the story. [212]

- *Informal Beginnings*. Although unlikely at this stage of the proceedings, a new objective may benefit from a brief return to informal story-gathering practices. This is only likely if the delta is so pronounced that the committee believes some foundational research is necessary. [213]

- *Subpoenas Duces Tecum and Depositions.* The committee should consider whether it has all the information necessary to achieve the hearing's revised objective. If not, it can top up the store of information with new depositions and document demands. [214]

Discovering a delta during this pause, and making the necessary adjustments, should not be taken as an indication the committee erred or failed to adequately plan its activities. It is a rare plan that makes the voyage from ideation to conclusion without course corrections. This pause is essential to making sure the committee is continuing to work towards a valuable and viable goal.

211 *See* Part III.C.
212 *See* Part III.D.1.
213 *See* Part III.D.2.
214 *See* Part III.D.3.

Mission Accomplished

It is entirely possible that, after reviewing the story told by the material gathered during the investigation, the committee will conclude a hearing is not warranted. There are several reasons this might occur. An investigation commenced to determine the wisdom of a new law may discover that the subject under investigation simply isn't amenable to a legislative fix. It is a sign of sound judgment to recognize that reality and choose to end the oversight proceedings as a consequence. Or the committee may conclude that legislative intervention would have too many unintended or unknown consequences. Indeed, there is no premise upon which the committee might base its decision to engage in oversight that is not falsifiable. It should come as no surprise that, from time to time, the committee will discover that its premises do not justify a hearing.

Should the committee come to such a conclusion, it should declare "mission accomplished." The decision to engage in oversight must always carry the (often unspoken) assumption that it will wrap up immediately upon discovering there is no further work to be done. Should that point arrive during the pause, the committee has not failed. It has simply fulfilled its commitment and responsibility sooner than expected.

The investigation and the material it compiles, even when they do not lead to a hearing, nonetheless have historical and pedagogical significance. The report required by Proposed Rule 1001(2) will preserve the value the committee created by going through this process.

F. THE HEARING

If the committee has reached this point in the oversight process, it is because it has a true, fact-filled story that demands some type of response. Whether the committee can achieve that response will depend, in large part, on how it conducts the hearing. This is the committee's chance to tell the story it learned in the investigation—not to dismally rehearse the facts, but to tell the *story*. The difference between the two could not be more stark. Facts convey knowledge, but provide no direction or purpose; story connects the facts in a way that conveys meaning and an impetus to do something. The committee can effectively tell that story by taking the following steps:

- Establish the theme;
- Select Witnesses and Documents;
- Draft the Plan of Presentation;

- Prepare for the Hearing;
- Present the Story

1. THEME

Stories have a theme, an organizing principle that carries the action from its commencement to its conclusion. Hearings are no different. Fortunately, most of the work in identifying the hearing's theme has already been done. Before the committee decided to launch the investigation, it engaged in an exercise in which it described the purpose of the oversight activities at a bird's-eye level. The result of that exercise was an organizing principle that informed the contents of the Authorizing Resolution and helped direct the course of the investigation. Now it serves as the rough draft of the hearing's theme (as potentially modified during the "contemplative pause").

The committee is conducting a hearing, of course, only because the investigation established that some action is required to address its findings. Thus, whereas the rough draft was necessarily inquisitive in nature, the thematic version is directive—it is an expression of what the committee believes the story says must happen. The following chart shows examples of how a pre-investigation inquiry morphs into a directive theme:

INQUIRY	THEME
Explore whether circumstances indicate the need for a new law	Adopting a new law that [*requires X*] will contribute to human flourishing because [*circumstances Y and Z*] are detrimental to society.
Compare a potentially wayward administrator's work to the requirements of an existing law	[*Administrator X*] is executing [*law Y*] in a way that frustrates the legislature's purpose for adopting that law, which must be addressed because [*reason Z*].
Assess the effectiveness of a program administered by the executive branch	[*Program X*] is not accomplishing its intended objective, and so [*modification Y*] is necessary to get it back on the right track.
Determine whether the executive branch is impinging on the legislature's constitutionally-vested authority	[*Executive branch agency or individual X*] must stop [*activity Y*] because it intrudes on the legislature's authority, causing [*negative effect Z*].

The theme is operationally important because it will guide each step of the hearing. It will, for example, be introduced in the committee's opening statement, which will foreshadow the story arc the audience is about to hear. And it will inform the committee's selection of witnesses, documents, and other material that will tell the story. Don't proceed to the next step until there is an agreed-upon theme.

2. SELECTING WITNESSES AND DOCUMENTS

Because an oversight hearing tells a unique story, it will necessarily be different from any other oversight hearing ever conducted. This presents both opportunities and challenges. On the plus side, this means the committee is free to approach the hearing's organization with very few preconceptions about the best way to tell the story. Witnesses, documents, and other material can be arranged and presented to enhance their informative and persuasive value. And the manner of examination can be customized by the committee as circumstances warrant. On the downside, the unique quality of oversight hearings means the committee cannot simply replicate a prior hearing. Proper organization requires some original thought.

The investigation will likely produce a significant number of documents and potential witnesses. One of the keys to an effective presentation is knowing that not all of it belongs in a hearing. Sometimes quantity has a quality all its own (such as when you are making the point that something is widespread, or recurring, or common). In most circumstances, however, less is more (as the saying goes). With the selected theme as its guide, the committee should carefully choose the people and material on which it will rely to tell its story.

a. DOCUMENTS

Documents are powerful. They can also be dry, dusty, opaque, and impenetrable by those not schooled in the subject they address. But none of that detracts from their power. A document that says "X" will be believed more readily than a witness who says the same thing. And a witness who says "X" while pointing to a document as his source will carry more weight than a witness without a document. This power derives partly from the fact that something in writing is fixed in its meaning and, because it was prepared sometime before the hearing, it is perceived as more objective. It's also harder to change or mischaracterize a document's content than someone's testimony. Some additional part of its power surely comes from the years we spent in school learning that there is knowledge in all that written material we were assigned to read. For that reason, the committee should ensure that as much of the story as possible is undergirded by documents. That's not to say that every such document will be presented in the hearing. Those the committee will use in the hearing should accomplish one or more of the following purposes:

- *Critical elements*. To the extent it is possible, the critical elements of the story, the parts about which there must be no doubt, should be substantiated by documentation. Witnesses can either read their contents, or at least refer to them as the source of their testimony.

- *Reference material.* Those parts of the story that involve data, technical information, or otherwise arcane material that would be difficult to present from memory should be available to the witness for reference.

- *Emphasis.* The committee should use documents that bring emphasis to particular points of the story simply by conveying to the audience that they exist in writing.

- *Witness's choice.* The witnesses should be consulted to determine what documents they would like available to them during the hearing. Witnesses should be made as comfortable as possible, and oftentimes the ability to rely on documents for at least part of their testimony is reassuring.

- *Rebuttal.* The Proposed Rules allow the committee's minority to call witnesses. They might offer a different perspective, or they may actually challenge the hearing's premises. The committee should do what it can to anticipate such testimony and have documents available to clarify or rebut it.

A thoughtful selection of documents will produce a more accurate presentation, enhance the proceeding's credibility, and give the audience confidence that the story they are hearing is a true and fact-filled story. That's the type of hearing that can accomplish the committee's objectives.

b. WITNESSES

As with documents, it is very unlikely that the committee will want to call upon every potential witness revealed by the investigation. And that means it must have a method of identifying which of them will participate in the hearing. There are three specific considerations that will assist with that task. The first involves matching witnesses to the pieces of the story. This step ensures that critical aspects of the story are not skipped by inadvertently failing to have a necessary witness available. Every potential witness should be matched to a piece of the story; the resulting list will be narrowed down at the end of the selection process.

The second consideration involves connecting documents to witnesses. The nature and significance of some documents are manifest just by the fact of their

existence. But not all documents can stand on their own. Those that cannot need someone to explain what they are and what they say. The person who will accomplish that task is known as a "sponsoring" witness. That may be one of the people already identified as telling part of the committee's story, or it may be someone whose role goes no further than sponsoring the document.

The third consideration is the trickiest. It is likely that the first two considerations will identify multiple witnesses who can tell the same parts of the story, or sponsor the same documents. Now the committee must narrow the list of potential witnesses down to those who will actually testify. To do that, the committee needs to know a little bit about those on its list.

Witnesses are complicated. They have particularized interests and biases. They have stores of knowledge that might be narrow and deep in some cases, shallow but broad in others, or some permutation thereof. Some have impressive credentials, but testifying makes them nervous and less convincing as a consequence. Others come with no particular credential save for their life's experience, but have a natural and unaffected manner when talking with others that makes their words carry a great deal of authority. Depending on the subject of the hearing, witnesses could be celebrities who shine in front of cameras; or they might be cloistered technicians who are uncomfortable with any audience at all.

Any of these types of witnesses are potentially appropriate for a hearing—depending on the hearing's goals. But witnesses don't just bring information to the table. They also color the tenor of the hearing, its mood. A specific part of the story may be best told in one mood (a well-credentialed witness who exudes authority, for instance, is best for technical data), while other parts benefit from a different mood (such as a witness who experienced the problems the committee is addressing). So as the committee narrows down the list of potential witnesses to those who will testify, it should make its choices with these mood/tenor characteristics in mind.

Finally, the committee should tend to the minority's request to present witnesses. The Proposed Rules allow the minority to nominate witnesses, subject to the committee's vote not to invite.[215] And because access to the subpoena is controlled by the committee's majority, the minority's witnesses, if they are to attend, will have to do so voluntarily (unless the committee decides their presence is sufficiently important to warrant a subpoena).[216]

215 Proposed Rule 1004(3)(b).
216 *Id.*

3. PLAN OF PRESENTATION

Planning a hearing need not be a complex endeavor. Spending some quality time thinking through the committee's objectives, and how it wants the story to unfold, will produce a natural presentation that persuasively explains the matter under scrutiny and convinces the intended audience to appropriately address it. The plan should be reduced to writing, which need be little more than an ordered list of the witnesses and the documents associated with them (the "Presentation Plan").

a. WITNESS ORDER

How the committee chooses to present the story is entirely a discretionary matter. The history of story-telling teaches us there are many different presentation methods, many of which are functionally oriented (e.g., discursive, Socratic, narrative, etc.). But the technique probably best suited to an oversight hearing is the Aristotelian story arc, which later became popularized as the five-act structure (and which was eventually used to divide Shakespeare's plays into acts).

This approach will bring to vivid life the reason the committee engaged in the oversight process, and it will organize the story in a way that inexorably drives it toward the necessary conclusion. The elements of this method are:

- *Connection.* The beginning of the story must immediately create a connection between the storyteller and the audience. There must be a reason to care about how the story will develop. If the audience does not identify with this part of the presentation, it will pay no attention to the rest.

- *Development.* The story develops as events unfold and the tension between how things are and how they ought to be rises.

- *Climax.* This is the crux of the story, the problem that must be fixed, the tension that cannot be abided.

- *Trajectory towards resolution.* At this stage of the story arc, the path to resolving the problem becomes apparent.

- *Resolution.* The story concludes as it reaches the resolution mapped out by the path revealed in the prior step.

An oversight hearing, by design, tells only the first four parts of the story. This isnecessarily so because the point of telling the story is get the intended audience to supply the fifth part, the resolution. If the committee tells the first four parts well,

it will create an irresistible impetus to see that the resolution occurs. It will persuade the legislature to adopt the law that will fix the problem illustrated in the climax. It will convince the administrator to bring his execution of the law into conformance with its requirements. It will build pressure to reform a program that isn't accomplishing its stated purpose.

Whichever story-telling method the committee chooses, that method will inform the order in which the witnesses will appear. In the Aristotelian story arc, the presentation order would follow this logic:

- *Connection.* The first few witnesses should be geared towards capturing the attention of the intended audience (e.g., legislators, administrators, the public, etc.). The audience should sense an affinity with the part of the story these witnesses tell. This is most effectively accomplished with witnesses who have suffered the ill-effects of whatever problem the committee is addressing.

- *Development.* Witnesses called in this stage of the story describe the history and nature of the problem.

- *Climax.* This is the part of the story to which the entire oversight process points. Witnesses during this stage describe the full extent and import of the problem they are addressing. They explain how the effect of the problem goes beyond the individuals introduced in the "Connection" stage. They warn against leaving the problem unresolved and describe the consequences if the intended audience does not act.

- *Trajectory towards resolution.* These will be the subject matter experts who know how to fix the problem described in the "Climax" stage. They should be prepared to lay out in detail what the intended audience can do to supply the resolution. This should be presented in straightforward and accessible terms because although this ends the part of the story the committee tells, the resolution lies in the hands of the intended audience. The committee owes that audience a clear pathway they can follow to resolution.

That leaves the witnesses identified by the minority. The committee is free to schedule them as it wishes, and may save them for the end of the hearing if earlier testimony would detract from the cogency of the story being told. If the minority's witnesses testify at the end of the hearing, the committee should allow the minority to choose the order in which their witnesses will appear.

This is, of course, just a guideline. Real life does not always fit precisely within theoretical constructs, and so the committee should not be concerned if the presentation does not exactly follow its chosen model. Sometimes one witness will have testimony that covers more than one of the stages. Sometimes scheduling exigencies require someone to be taken out of order. The point of this model is to help the committee arrange the presentation of the story so that it will have maximal effect. Occasional departures from the model, so long as the overall structure remains largely intact, should have minimal effect on the hearing's impact.

b. EXHIBIT PACKAGES

For ease of reference, each document the committee plans to use in the hearing should be assigned a unique exhibit number. As described in Part III.D.3.b, the investigation began keeping a log of exhibits once it moved into the formal phase. Documents that received an exhibit number during the investigation need not be re-marked, but the committee should assign exhibit numbers to all remaining documents it intends to use at the hearing. The committee should be careful not to duplicate any of the numbers in the log, and it should update the log with the newly assigned exhibit numbers.

The exhibits must then be organized into packages according to the witnesses who will use them. The bulk of this work was done when the committee selected the witnesses—one of the criteria for choosing them was ensuring every document would be associated with someone capable of identifying what it is and describing the significance of its contents. Consequently, there should be no orphan documents, save only for those whose existence and meaning need no explanation.

The committee should prepare a separate exhibit package for each witness. This will facilitate a smooth transition between witnesses once the hearing commences. Instead of having the witness's table overloaded with all the documents the committee will use throughout the hearing, it will contain only the exhibits relevant to the specific witness's testimony. And when the next witness is preparing to testify, a staff member can simply swap in the next exhibit package.[217]

Once the exhibit packages are prepared, the Presentation Plan should be updated to reflect which exhibits are associated with which witnesses. The result will be a document that allows all participants to know how the hearing will progress, and identifies the materials the witnesses need to tell their own part of the story.

217 This procedure will likely result in some exhibits appearing in multiple exhibit packages. However, the duplication cost is more than offset by not having to worry about whether the witness has all the documents he needs.

4. PREPARING FOR THE PRESENTATION

Now that the theme has been selected, the witnesses and documents have been chosen, the exhibit packages have been prepared, and the Plan of Presentation has been completed, the committee is nearly ready to present its story at the hearing. The remaining tasks to accomplish include arranging witness appearances, assembling briefing books, creating exhibit copies, scheduling a stenographer or videographer, and coordinating press relations.

a. ARRANGING WITNESS APPEARANCES

Most witnesses testify voluntarily at oversight hearings because they are interested in the story the committee is pursuing, and recognize the importance of sharing what they know. For those witnesses, an informal approach is sufficient to prepare them and the committee for their testimony. Other witnesses, whether because of confidentiality obligations, hostility to the committee's objectives, or other factors that would make their voluntary appearance problematic, will require an invitation secured by a subpoena.

i. Informal Invitation

If the committee hasn't done so already, it should reach out (preferably in person or by telephone) to ask each witness to attend the hearing. The discussion, which will likely be conducted by staff members, should cover the following subjects:

- *Date and time of the anticipated testimony.* The committee should be respectful of the witness's time. Some hearings take place over multiple days, and it would be unreasonable to expect the witness to commit to sitting in the hearing room for the entire proceeding. Even when the hearing is not expected to last more than a day, the committee should try to let the witness know whether his testimony will occur in the morning or afternoon.

- *Topic.* The committee should confirm the nature of the testimony the witness will offer. If the topic of the witness's testimony is likely to be a contested issue, the witness should be made aware of the types of question he may receive from dissenting members of the committee.

- *Prepared testimony.* Although the committee can choose to waive this requirement, Proposed Rule 1004(3)(d) requires witnesses to submit written testimony no later than three business days before they appear. The committee should provide guidance on what to cover in the written testimony, and a target length.

- *Biographical information.* Not everyone on the committee will be familiar with the witnesses, so it is helpful to have biographical information submitted with the prepared testimony. This need be nothing more extensive than a resume.[218]

- *Sensitive information.* If the witness's testimony will include material that may tend to defame, degrade, or incriminate a person, the staff member should instruct the witness on how to handle such evidence during the hearing. If a question calls for the disclosure of such material, the witness should alert the chair that his testimony is such that the committee may wish to hear it in closed session.[219]

- *Documents.* The committee should review with the witness which documents it will have available at the witness table while he is testifying, and solicit input on what documents the witness would like to use. Any last-minute adjustments are best done here rather than during the hearing.

- *Committee rules.* The committee should explain the rules that govern the conduct of an oversight hearing, and offer to supply a copy of them for the witness's reference.[220]

Following this contact, the committee should send the witness a confirming letter with a brief encapsulation of each of the subjects discussed, as well as a copy of relevant rules (if requested).

ii. Subpoenaed Invitation

If, after contacting the witness, it becomes apparent that he is either unable or unwilling to testify voluntarily, the committee must issue a subpoena to secure his presence at the hearing. The testimonial subpoenas discussed above in Part III.D.3 are designed to secure a witness's attendance at either a deposition or a hearing; the committee need only mark the appropriate box—all else will be the same. Just as was possible in the investigation phase, a subpoena may direct a specifically identified person to appear and give testimony, or it can be directed to an organization with instructions that it produce one or more witnesses who are qualified to testify on the subjects identified in the subpoena (a PMK subpoena).

The complete subpoena package necessary to compel an individual witness's attendance at a hearing consists of the following:

---

218 Proposed Rule 1004(3)(d).
219 Proposed Rule 1004(4)(c).
220 Proposed Rule 1004(3)(c).

- Subpoena Form for Named Individual (Appendix E);
- Authorizing Resolution;
- Committee Rules; and
- Witness Fee Voucher (Appendix K).

Each component of this package performs the same function here as it does when used in compelling appearance at a deposition.[221]

The package for a PMK subpoena consists of the following:

- Subpoena Form for "Person Most Knowledgeable" (Appendix F);
- Topics of Testimony (Appendix H);
- Definitions (Appendix J);
- Authorizing Resolution;
- Committee Rules; and
- Witness Fee Voucher (Appendix K).

As with the individual subpoena, each component of this package performs the same here as it does with depositions.[222] But the committee should use a PMK subpoena for a hearing in only the most unusual circumstances. This device is useful only when the committee does not know the identity of the person who has the information it needs to present. And in all but the most unusual circumstances, this might also suggest the committee also does not know what, exactly, the testimony will be. The methodology presented in this Manual provides that hearings are for presenting information, not discovering it. Consequently, a PMK subpoena should only be used when the anticipated testimony will address such well-established facts that the witness's identity is of no moment. Otherwise, the committee risks putting itself in a position to be surprised by the testimony, which should never happen absent a really good reason.

221 *See* Part III.D.3.b.i.
222 *See* Part III.D.3.b.ii.

b. BRIEFING BOOKS AND EXHIBIT COPIES

Committee members, of course, will have unequal levels of involvement in the development of the investigation and hearing preparation. Nonetheless, it is important that every member have as much information as needed to participate in the hearing to the extent desired. To that end, each member should have a briefing book and immediate access to all exhibits that will be used in the hearing.

i. Briefing Books

The briefing book contains the essentials needed to track the hearing as it progresses. It should contain the following:

- *Presentation Plan.* This contains the list of witnesses in the order they will testify, as well as the exhibits associated with each.
- *Witness information.* Each witness's prepared testimony and biographical information should be included in the order in which the witnesses will testify.
- *Authorizing Resolution.* This is useful as a refresher on the scope of the investigation, source of authority, and the legislative purpose for which the hearing is being conducted.
- *Memoranda.* If any memoranda specific to this investigation or hearing have been prepared, they should be included here.
- *Relevant law.* If the hearing is likely to address current laws, they should be included in the briefing book.
- *Rules.* Including all the rules that bear on the conduct of the hearing, whether standing or ad hoc, will be helpful in keeping the hearing moving smoothly.

These elements are likely to be useful for every member. Of course, individual members may customize the briefing book by including opening comments, proposed questions, and other material to whatever extent it helps the member execute his oversight responsibilities.

ii. Exhibit Copies

A complete copy of all exhibits should also be prepared for each member. Nothing is more distracting than trying to share exhibits or passing them down the panel. The

hearing will maintain focus and move more briskly if each member can seamlessly access their own copies of the documents.

If the committee has authorized one or more consultants to examine the witnesses, an additional copy of the briefing book and exhibits should be prepared for each such consultant.

c. STENOGRAPHER/VIDEOGRAPHER

What transpires at the hearing is, of course, important as it relates to the immediate issue being addressed. But it's also potentially important as a historical matter. So the committee should schedule a stenographer or videographer to record the hearing for future reference. Additionally, this will have some immediate utility if the committee requests a summary of the day's testimony pursuant to Proposed Rule 1004(4)(g). It will also be instructive when the committee prepares the reports required by Proposed Rule 1001(2).

d. PRESS RELATIONS

The audience the committee hopes to reach with the hearing may be the public, someone in the executive branch, perhaps the legislature itself, or maybe a political subdivision of the state. Whoever the intended audience might be, the public must always be included. The legislature should not just *do* oversight, it should be seen to be doing oversight. The committee should make every effort, through public notices, press releases, individual press contacts, and other methods to invite the public and press to attend or watch the hearing.

5. PRESENTING THE STORY

When the day of the hearing arrives, all of the heavy lifting has been done. The story's content has been determined by the result of the investigation, the storytellers have been identified and sorted into the proper order, the exhibits are available for everyone's reference, and the public is watching. Now it's time to tell the story. This final section of the Manual addresses the procedures that will govern how that occurs, which are governed by the Proposed Rules found in Appendix B.

a. QUORUM

It is almost always better to have the full committee present for the hearing. However, life being what it is, sometimes this isn't possible. Because an oversight hearing does not involve voting on any measures, the Proposed Rules provide that an acceptable quorum can be as low as one-third of the committee's whole

number.[223] A majority of the committee's membership can bring that threshold even lower if circumstances warrant.[224]

b. OPENING STATEMENTS

Every member of the committee will have an opportunity to present opening remarks, but the chair's should be first. The content and length are entirely at the chair's discretion, but ideally it should accomplish the following:

- *Introductions.* The chair should introduce the committee (not the individual members, necessarily (although there's nothing wrong with that)), just the name of the committee, himself as the chair, and perhaps the ranking minority member.

- *Theme.* The chair should set the table (no pun intended) for the audience. He should present the subject the committee is addressing, describe the purpose of the hearing, and lay out the theme in as little or as much detail as seems appropriate.[225]

- *Procedure.* The chair should describe the procedures that will govern the hearing. This does not need to be detailed, but should indicate that each witness will present prepared testimony, and describe the manner in which each witness will be examined. If there is a likelihood that the hearing will need to be closed to receive any of the anticipated testimony, that procedure should be addressed here as well. The goal for this part of the opening statement is to make the process as transparent as possible for the audience so that it does not distract from the story being told.

- *Etc.* If there are any other matters that will help the audience understand what will happen during the hearing, they should be addressed here.

It is not necessary for the other members to present opening remarks, but if they wish to do so, they will follow the conclusion of the chair's remarks. It would be wise for members to consult amongst themselves prior to the hearing about the subject of their remarks so that cumulative or repetitive matters may be reduced.

Unless the committee has a preferred method of proceeding, remarks should alternate between majority and minority members, starting with the ranking member once the chair's remarks have concluded. There are no limits on how long the members may speak, but a good benchmark is around five minutes each. Five minutes sounds much, much longer to the audience than it does to the one speaking.

223 Proposed Rule 1004(1).
224 *Id.*
225 Proposed Rule 1004(2).

c. WITNESSES

With the completion of the opening statements, it's time to hear from the witnesses. The chair is responsible for calling each witness to testify in the order indicated in the Presentation Plan. He (or his designee) will introduce the witness and administer the oath or affirmation.[226]

i. Witness Testimony and Examination

After being sworn, the witness will orally present the previously submitted written testimony.[227] The questions commence when he finishes, which brings us to the matter of how the committee examines a witness.

Traditional legislative hearings proceed with each committee member conducting a brief examination (typically, no more than five minutes each). Once every member who so desires has asked questions within that constraint, the chair recognizes those who wish to examine the witness more extensively. The chair then directs traffic from that point until all members are satisfied their questions have been answered or the committee votes to release the witness.

But oversight hearings do not serve the same purpose as traditional legislative hearings. Because the purpose of an oversight hearing is to tell a story, the procedure must be conducive to that effort. It is difficult, if not impossible, to present a comprehensible story if the witness is pulled in multiple directions as first one member, and then another, embarks on unrelated lines of questioning.

The Proposed Rules create a procedure that allows the committee to elicit a cogent story from the witness while preserving each member's ability to examine the witness to his satisfaction. The key to this approach is designating an individual, whether a member or a consultant, to examine the witness at length, following which each of the members propose their own questions. The order of examination, therefore, proceeds as follows:

- Committee designee examines witness at length.[228]
- Each member (who so desires) examines the witness for no more than five minutes, with the chair recognizing members in order of seniority alternating between majority and minority members.[229]

226 Proposed Rule 1004(3)(f).
227 Proposed Rule 1004(3)(d).
228 Proposed Rule 1004(4)(a).
229 Proposed Rule 1004(4)(b).

- Once all members have had an initial opportunity to examine the witness, the chair recognizes those who wish to examine the witness at greater length.[230]

The committee should take considerable care in designating the individual who will conduct the examination on its behalf. The skill set required to do this effectively is not commonly found throughout the professions. It may be that one of the committee members has a background in which this skill was developed and practiced. In that event, the committee should consider designating that member to lead the examination. But if no member has that type of preparation, the committee should not hesitate to contract with a consultant to take on this responsibility. The committee has gone through a great deal of time and effort to reach this stage in its oversight activities. It should not allow all of its work to founder for lack of someone who can effectively draw the story from each of the witnesses.[231]

ii. Closed Session

Oversight is an unblinking inquiry into human stories. Sometimes those stories reveal information that is not appropriate to publicize but is nonetheless important to have in the record. This is information that may tend to defame, degrade, or incriminate a person.[232] Because the committee has done a thorough job preparing for the hearing, it will know which witnesses will testify to such matters. In the pre-hearing conversation with those witnesses, committee staff instructed them to alert the chair should a question call for that type of testimony. The chair may then excuse the public and press and take the testimony in closed session.[233]

Testimony received in closed session may not thereafter be used in open session unless authorized by the committee, a majority being present.[234] The committee should be cognizant of the power it exercised in the investigation, and should be extraordinarily reluctant to publicly release information that may bring opprobrium on an individual. Such information should not be used in open session unless it is essential to achieving a critical objective and there is no less disruptive means of making the same point.

d. ORDER AND DECORUM

The overall conduct and character of the hearing is the chair's responsibility. Some topics the committee addresses in oversight will be more contentious than others. The Proposed Rules give the chair certain tools with which to maintain the hearing's decorum,

230 *Id.*
231 One fruitful source of such consultants is the legal profession, particularly those attorneys who are experienced litigators and who are familiar with government affairs.
232 Proposed Rule 1004(4)(c).
233 *Id.*
234 Proposed Rule 1004(4)(d).

including the power to censure, exclude from the hearing, and referral to the full legislative house for contempt proceedings.[235]

e. CONCLUDING THE HEARING

The hearing ends with the last answer to the last question of the last witness. Congratulations! It is now up to the intended audience to supply the fifth act to the story that was just told. The committee should make a note for itself to periodically look into whether the hearing had the intended effect.

Although the hearing is over, the committee may wish to hold the record open for a period of time so that it may send witnesses written follow-up questions, receive documents mentioned in the hearing but which had not been previously provided, or to allow witnesses to submit supplemental statements under oath.[236] Whether to do so lies entirely within the committee's discretion, and it may impose whatever limitations or requirements that may tend to facilitate the completion of the record.

G. POST-HEARING ACTIVITY

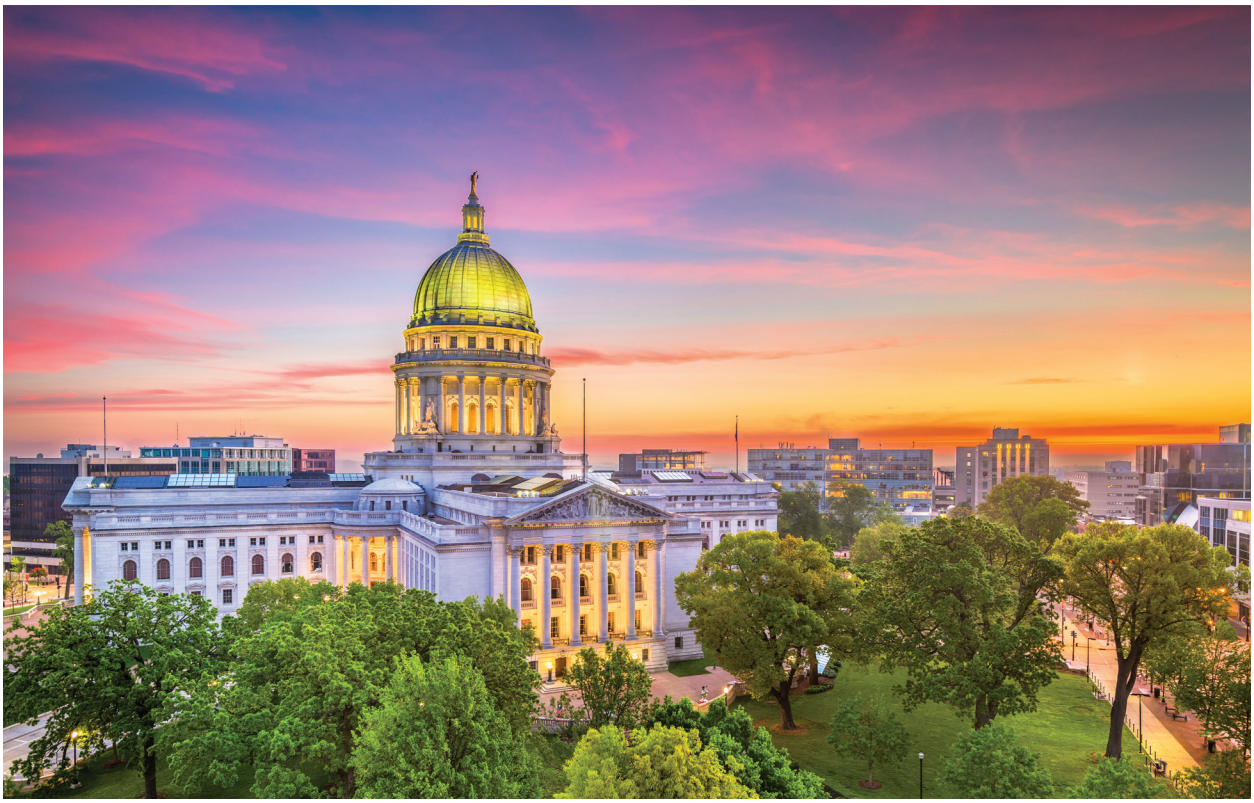
Sometime after the hearing concludes, but not too long afterwards, the committee should attend to a couple of housekeeping issues. First, it should consider sending a letter to the witnesses thanking them for participating in the hearing. Whether they appeared voluntarily or by subpoena, the committee had the advantage of their time, knowledge, and insight. And that's worth quite a lot. Further, the people of Wisconsin are the committee's ultimate bosses, and its good form to be considerate of their efforts.

Second, a report of the investigation and hearing will be prepared.[237] This is the committee's opportunity to tie a ribbon on the proceedings and describe its accomplishments. It's best to do this while the events are relatively recent, and memories have not yet faded. The report should describe the investigation, the hearing, significant lessons learned, and any follow-up activities that might be conducive to obtaining the intended result. The report must also include minority and dissenting views, if any.[238] The information in this report will provide the basis for the summary report, filed at the end of the legislative biennium, that lists all of the committee's oversight activities.[239]

235 Proposed Rule 1004(5).
236 Proposed Rule 1004(4)(e).
237 Proposed Rule 1001(2)(a).
238 Proposed Rule 1001(2)(b).
239 Proposed Rule 1001(3).

CONCLUSION

The legislature, as the first amongst otherwise equal branches of government, is both the creator and custodian of Wisconsin's public policy. Oversight is how it fulfills its custodial role. And that role must be regularly and energetically exercised. Responsible legislatures do not just legislate and walk away. They constantly look after their creations to ensure they are being honored and are achieving their intended purposes. We hope the methodology described in this Manual provides the legislature with the tools it needs to make oversight both easy and productive.



Appendix Table of Contents

Appendix A - Oversight Checklist 2
Appendix B - Proposed Rules For Oversight Investigations & Hearings 7
Appendix C - Sample Investigation Plan 17
Appendix D - Subpoena Duces Tecum 20
Appendix E - Subpoena For Named Individual 23
Appendix F - Subpoena for Person Most Knowledgeable 26
Appendix G - Description of Items to Produce 29
Appendix H - Topics of Testimony 31
Appendix I - Instructions 33
Appendix J - Definitions 38
Appendix K - Witness Fee Voucher 42
Appendix L - Proof of Service 44
Appendix M - Exhibit Number Log 46

Appendix A - Oversight Checklist

Oversight Checklist

Preliminary Matters

___ 1. Identify Potential Goal for Oversight Activities [1]

___ 2. Identify Legislative Purpose of Oversight Activities [2]

___ 3. Draft Authorizing Resolution [3]

- a. Whereas Clauses
  - i. Story
  - ii. Legislative Purpose
  - iii. Committee Jurisdiction
- b. Resolved Clauses
  - i. Who will do this?
  - ii. What is the committee addressing?
  - iii. How may the committee proceed?
  - iv. When may the committee act?
  - v. Consultants?
  - vi. Oversight Output?

___ 4. Adopt Authorizing Resolution

---

1 *See* Manual Parts I & III(intro).
2 *See* Manual Parts II.C.1 & 2.
3 *See* Manual Part III.C.

The Investigation

___ 1. Draft Investigation Plan[4]

2. Conduct Investigation

a. Informal Inquiries[5]

___ i. Review internal documents

___ ii. Review publicly-available documents

___ iii. Interview individuals with relevant information

b. Formal Inquiries

___ i. Subpoena documents[6]

___ ii. Subpoena individuals and entities for deposition[7]

The Contemplative Pause

___ 1. Review Investigation Results

___ 2. Determine What the Investigation Results Require[8]

- Full steam ahead?
- Course correction?
- Mission accomplished?

---

4 *See* Manual Part III.D.1 and Appendix C.
5 *See* Manual Part III.D.2.
6 *See* Manual Part III.D.3.a & c.
7 *See* Manual Part III.D.3.b & c.
8 *See* Manual Part III.E.

The Hearing

___ 1. Develop Theme[9]

2. Witnesses and Documents

___ a. Select Documents[10]

___ b. Select Witnesses[11]

- Witnesses needed to tell critical parts of the story
- Witnesses needed to explain documents

___ 3. Draft Plan of Presentation[12]

___ a. Determine witness order[13]

___ b. Assemble exhibit packages[14]

4. Prepare for Presentation

a. Member/Consultant preparations

___ i. Opening statements

___ ii. Questions for each witness

b. Staff preparations

___ i. Arrange for witness appearances (invitation/subpoena)

___ ii. Prepare briefing books[16]

___ iii. Prepare exhibit copies[17]

---

9 *See* Manual Part III.F.1.
10 *See* Manual Part III.F.2.a.
11 *See* Manual Part III.F.2.b.
12 *See* Manual Part III.F.3.
13 *See* Manual Part III.F.3.a.
14 *See* Manual Part III.F.3.b.
15 *See* Manual Part III.F.4.a.
16 *See* Manual Part III.F.4.b.
17 *Id.*

___ iv. Reserve stenographer/videographer[18]

___ v. Publicize the hearing[19]

5. Presenting the Story

___ a. Ensure quorum available[20]

___ b. Present opening statements[21]

c. Witness testimony

___ i. Witness presents written testimony[22]

___ ii. Designated member/consultant examines witness[23]

___ iii. Members examine witness under 5-minute rule[24]

___ iv. Members conduct additional examination

___ 6. Conclude the Hearing[25]

Conclude hearing and close the record

OR

Conclude hearing and hold record open to receive additional written testimony/records

7. Post Hearing Activity[26]

___ a. Send thank-you letters to witnesses

___ b. Draft report called for by Proposed Rule 1001(2)(a).

---

18 *See* Manual Part III.F.4.c.
19 *See* Manual Part III.F.4.d.
20 *See* Manual Part III.F.5.a.
21 *See* Manual Part III.F.5.b.
22 *See* Manual Part III.F.5.c.1.
23 *Id.*
24 *Id.*
25 *See* Manual Part III.F.5.e.
26 *See* Manual Part III.G.

Appendix B - Proposed Rules For Oversight Investigations & Hearings

Rule 1001 — Oversight
Investigations and Hearings

(1) Oversight Authorization

(a) Oversight. With respect to any matter within its jurisdiction, each committee shall conduct such investigations and hearings as it considers necessary or appropriate to provide effective oversight of the functions and conduct of the Executive Branch of government as well as political subdivisions of the state.

(b) Activities. For the purpose of carrying out any of its functions and duties under this rule a committee is authorized—

1. to sit and act at such times and places within the State of Wisconsin as are not otherwise prohibited by [*Assembly/Senate Rules*], and to conduct and hold such investigations and hearings as it considers appropriate;

2. to request any person or entity, including officials or employees of the Executive Branch of government or political subdivisions of the state, to voluntarily provide Documents, or any other item, regarding any matter within the committee's jurisdiction;

3. to require, by subpoena or otherwise, the production of Documents, or any other item, from any person or entity, including officials or employees of the Executive Branch of government or political subdivisions of the state, regarding any matter within the committee's jurisdiction;

4. to conduct the voluntary interview of any person or entity (by its designee), including officials or employees of the Executive Branch of government or political subdivisions of the state, regarding any matter within the committee's jurisdiction;

5. to require, by subpoena or otherwise, the attendance at a deposition and the testimony of any person or entity (by its designee), including officials or employees of the Executive Branch of government or political subdivisions of the state, for the discovery of information or preservation of testimony regarding any matter within the committee's jurisdiction;

6. to require, by subpoena or otherwise, the attendance at a hearing and the testimony of any person or entity (by its designee), including officials or employees of the Executive Branch of government or political subdivisions of the state, regarding any matter within the committee's jurisdiction.

(c) Conducting meetings, investigations, and hearings. The chair of the committee shall call and conduct such meetings, investigations, and hearings as the chair considers appropriate to carry out the committee's responsibilities described in these Rules.

(d) Meetings requested by committee members. Three or more members of a committee may submit to the chair a written request that the chair call a meeting of the committee for the purpose of carrying out the committee's responsibilities described in these Rules. Such request shall specify the subject matter to be considered at the meeting. If the chair does not call the requested meeting within three calendar days after submission of the request (which meeting shall be held within seven calendar days after submission of the request) a majority of the members of the committee may submit to the chair their written notice that a meeting of the committee will be held. The written notice shall specify the date and hour of the meeting and the subject matter to be considered. The committee shall meet on that date and hour. Immediately upon submission of the notice, the chair shall notify all members of the committee that such meeting will be held and inform them of its date and hour and the subject matter to be considered. Only the subject matter specified in that notice may be considered at that meeting.

(e) Minimum oversight responsibility. Each standing committee, or a subcommittee thereof, shall conduct or hold at least one investigation or hearing during each six-month period following the establishment of the committee or subcommittee on the topic of waste, fraud, abuse, or mismanagement in a government program within the jurisdiction of such committee or subcommittee.

(f) Record of meetings and hearings. Each committee shall prepare and keep a complete transcript or electronic recording adequate to fully record the proceeding of each meeting or hearing whether or not such meeting, hearing, or any part thereof is closed, unless a majority of its members vote to forgo such a record.

(g) Recess. A motion to recess the committee from day to day, or to recess subject to the call of the chair (within 24 hours), shall be privileged and shall be decided without debate.

(h) Audio/Video coverage. Subject to Rule 1002(5)(d), and to the maximum extent practicable, each committee shall allow audio and video coverage of each hearing or meeting conducted under this Rule.

(i) As used in Rules 1001–1003, the term "committee" includes subcommittees unless the context requires otherwise.

(2) Oversight Reports

(a) Committee report. For each of its oversight investigations and hearings, the committee shall prepare and adopt a report for submission to the [*Assembly/Senate*]. Such report shall include any supplemental, minority, additional, or dissenting views submitted pursuant to paragraph (2)(b). The chair, or the member acting in lieu of the chair, shall file the complete report with the chief clerk of the [*Assembly/Senate*].

(b) Supplemental, minority, additional, or dissenting views. If at the time of approval of a report of the oversight meeting or hearing a member of the committee gives notice of intention to file supplemental, minority, additional, or dissenting views for inclusion in the report, all members shall be entitled to not less than two additional calendar days after the day of such notice (excluding Saturdays, Sundays, and legal holidays except when the [*Assembly*/*Senate*] is in session on such a day) to submit such written and signed views to the chair of the committee.

(c) Joint report. A report of an oversight investigation or hearing conducted jointly by more than one committee may be filed jointly, provided that each of the committees complies independently with all requirements for approval and filing of the report.

(d) Extended report deadline. If an oversight report is to be filed after an adjournment sine die of the last regular session of the [*Assembly*/*Senate*], then any member who has given timely notice of intention to file supplemental, minority, additional, or dissenting views pursuant to paragraph (2)(b) shall be entitled to not less than seven calendar days in which to submit such views for inclusion in the report.

(3) Summary Reports

(a) Reports to be filed. Not later than January 2 of each odd-numbered year, every committee having performed oversight activities during the legislative biennium shall file a summary report on the oversight activities of that committee with the chief clerk of the [*Assembly*/*Senate*].

(b) Report contents. Such report shall include—

1. a list of oversight investigations and hearings conducted under these Rules during the legislative biennium;

2. a summary of the subject matter and purpose of each oversight investigation and hearing; and

3. a summary of the actions taken and recommendations made with respect to its oversight activities.

(c) Filing of report by committee chair. After an adjournment sine die of the last regular session of the legislative biennium, or after December 15 of an even-numbered year, whichever occurs first, the chair of a committee may file the report required by paragraph (3)(a) with the chief clerk of the [*Assembly*/*Senate*] at any time and without approval of the committee, provided that—

1. a copy of the report has been available to each member of the committee for at least seven calendar days; and

2. the report includes any supplemental, minority, additional, or dissenting views submitted by a member of the committee.

(4) Committee Records

(a) Contents of the Record. When conducting oversight activities, the written record of the committee's proceedings required by Wis. Stat. § 13.45(4)(d) shall include—

1. in the case of a hearing transcript, a substantially verbatim account of remarks actually made during the proceedings, subject only to technical, grammatical, and typographical corrections authorized by the person making the remarks involved; and

2. a record of the votes on any question on which a record vote is taken.

(b) Availability of the Record. Unless otherwise prohibited by the rules of the [*Assembly/Senate*], the result of each such record vote shall be made available by the committee for inspection by the public at reasonable times within 48 hours of such record vote. Information so available shall include a description of the proposition on which the record vote was taken, the name of each member voting for and each member voting against such proposition, and the names of those members of the committee present but not voting.

(c) Separate records. All committee records relating to investigations and hearings conducted under these Rules shall be kept separate and distinct from the office records of the member serving as its chair. Such records shall be the property of the committee, and each member shall have access thereto.

(5) Written Rules.

(a) Committees may adopt written rules to govern their proceedings. Such rules—

1. shall be adopted in a meeting that is open to the public unless the committee, in open session and with a quorum present, determines by record vote that all or part of the meeting on that day shall be closed to the public;

2. may not be inconsistent with any [*Assembly/Senate*] Rule, Joint Rule, or those provisions of law having the force and effect of [*Assembly/Senate*] Rules.

(b) Each committee shall make its rules publicly available in electronic form.

Rule 1002 — Subpoenas

(1) Authorization and issuance. A subpoena under these Rules for the purpose of conducting oversight activities must be authorized by a committee, a majority being present. The power to authorize subpoenas under these Rules may be delegated to the chair of the committee subject to such requirements and limitations as the committee may prescribe. Authorized subpoenas shall be issued pursuant to the Rules of the [*Assembly/Senate*] and the provisions of Wis. Stat. §§ 13.31 & 13.32.

(2) Compliance. A subpoena may provide that the respondent appear at a time and place other than at a meeting or hearing of the committee authorizing the subpoena, and may allow the respondent to supply the documents required by a subpoena duces tecum in lieu of appearing.

(3) Enforcement. Compliance with a subpoena may be enforced pursuant to the Rules of the [*Assembly*/*Senate*] and Wis. Stat. §§ 13.26, 13.27, & 13.31-13.34.

Rule 1003 — Depositions

(1) Authorization. A deposition is authorized by the committee by authorizing the subpoena commanding the witness's appearance pursuant to Rule 1002(1). The deposition may take place any place in the State of Wisconsin not prohibited by the Senate or Assembly rules, and shall be set for a date no fewer than five business days after the subpoena is tendered to the Sergeant at Arms for service.

(2) Examination by the committee. The committee shall select a member, a staff member, or consultant to conduct the deposition.

(3) Examination by the minority. The minority members of the committee may select a member, staff member, or consultant to cross-examine the deponent.

(4) Oath or affirmation. Prior to providing testimony, the deponent shall subscribe to an oath or affirmation before a member or other person authorized by law to administer the same. The deposition shall be stenographically recorded.

(5) Objections. Information secured pursuant to the authority described in this Rule shall retain the character of discovery until offered for admission in evidence before the committee, at which time any proper objection shall be timely. The witness may not refuse to answer a question notwithstanding an objection, except when necessary to preserve a constitutionally-protected right or recognized testimonial privilege (such as the attorney-client privilege).

(6) Enforcement. An unjustified refusal to answer any question posed during a deposition shall be treated as a contempt of the legislative house issuing the subpoena, and addressed pursuant to Rule 1003(3).

(7) Attendance. Any member of the committee may attend the deposition. However, no questions may be put to the deponent except by the individuals selected under subsection (2) or (3), unless provided otherwise by motion. No quorum is necessary to conduct a deposition authorized under subsection (1).

Rule 1004 — Conduct of Hearings

(1) Reduced quorum for taking testimony. The quorum for the purpose of taking testimony in a hearing shall be no less than one-third of the committee's entire membership, unless the committee has fixed a lesser number by a majority vote of its entire membership.

(2) Opening Statements. The chair of the committee shall announce in an opening statement the subject of the hearing and make such further remarks as the chair deems appropriate in facilitating a general understanding of the subject and the conduct of the hearing. Following the chair's statement, each member of the committee may make an opening statement in the order determined by the chair, and subject to time limits established by the committee, which time limits shall be uniform with respect to all members other than the chair.

(3) Calling witnesses.

(a) Witnesses called by the majority. The chair shall call all witnesses selected by a majority of the committee membership. Such witnesses shall be called by invitation, by subpoena, or by other lawful means.

(b) Witnesses invited by the minority. The minority members of the committee shall be entitled, upon request to the chair by a majority of them, to invite witnesses to testify with respect to the subject matter under consideration. The request shall be made prior to commencement of the hearing. The request shall be considered granted upon timely presentation unless the committee votes to deny or revoke the invitation. The minority's witnesses may be summoned by subpoena only in accordance with the provisions of Rule 1002. The minority's witnesses may testify at a time determined by the chair of the committee, but no later than the last day of the hearing.

(c) A copy of these Rules, and any other rules adopted by the committee for the purpose of conducting investigations or hearings pursuant to these Rules, shall be made available to each witness on request.

(d) Written Testimony. Every witness who is to appear before the committee in any hearing must submit to the chair, at least three business days before the date of the appearance, the testimony the witness intends to offer at the hearing, along with brief biographical information (such as a resume), unless the chair and the ranking minority member determine that there is good cause for noncompliance. When called at the hearing, the witness will orally present this testimony to the committee. The chair shall provide a copy of the written statement and biographical information to each of the committee members. If so requested, the staff of the committee shall prepare for the use of the members of the committee before each day of hearing a digest of the statements that have been filed by witnesses who are to appear before the committee on that day.

(e) Counsel. Witnesses at hearings may be accompanied by their own counsel for the purpose of advising them concerning their constitutionally-protected rights or testimonial privileges.

(f) Oath or affirmation. The chair of the committee, or a member designated by the chair, may administer oaths or affirmations to witnesses.

(g) Summary of testimony. After the conclusion of each day of hearing, if so requested by the committee, the staff shall prepare for the use of the members of the committee a summary of the testimony given before the committee on that day. After approval by the chair and the ranking minority member of the committee, each such summary may be printed as a part of the committee hearings if such hearings are ordered by the committee to be printed.

(4) Questioning witnesses

(a) Questioning by designee. The committee shall designate a member, staff member, or consultant retained by the committee to examine each witness who appears before the committee. The designee may examine the witness until either the designee or the committee (as expressed through a majority vote) is satisfied that all relevant information has been obtained.

(b) Five-Minute rule. Following examination by the committee's designee, all members of the committee may question the witness. However, no member may question a witness for longer than five minutes until such time as each member of the committee who so desires has had an opportunity to question the witness. During this phase of questioning, the chair will recognize members in order of seniority alternating between majority and minority members.

(c) Testimony in closed session. Whenever it is asserted by a member of the committee that the evidence or testimony at a hearing may tend to defame, degrade, or incriminate any person, or it is asserted by a witness that the evidence or testimony that the witness would give at a hearing may tend to defame, degrade, or incriminate-

1. such testimony or evidence shall be presented in closed session if, in the presence of the number of members required under the rules of the committee for the purpose of taking testimony, the committee determines by vote of a majority of those present that such evidence or testimony may tend to defame, degrade, or incriminate any person;

2. the committee shall proceed to receive such testimony in open session only if the committee, a majority being present, determines that such evidence or testimony will not tend to defame, degrade, or incriminate any person; and

3. in either case, the committee shall receive and dispose of requests from such person to subpoena additional witnesses for the purpose of rebutting or explaining the evidence that may tend to defame, degrade, or incriminate such person.

(d) Use of closed session material in open session. Evidence or testimony taken in closed session, and proceedings conducted in closed session, may be released or used in public sessions only when authorized by the committee, a majority being present.

(e) Supplemental materials. Following the completion of a hearing, the committee may hold the record open for a certain period of time to allow, in its sole discretion, to allow:

i. Committee members to submit follow-up questions to any witnesses who testified at the hearing, directing that the answers provided shall be under oath and be received by the committee no later than the date by which the record will close;

ii. Witnesses to submit brief and pertinent sworn statements in writing for inclusion in the record in addition to the statement submitted pursuant to paragraph (3)(g). The committee is the sole judge of the pertinence of testimony and evidence adduced at its hearing;

iii. Receipt of documents, in the committee's sole discretion, that were referenced in the hearing but which had not been previously produced.

(f) Transcript copies. A witness may obtain a transcript copy of the testimony of such witness given at a public session or, if given at a closed session, when authorized by the committee. The witness shall bear the cost of producing the transcript.

(5) Order and Decorum. The chair may punish breaches of order and decorum, and of professional ethics on the part of counsel, by censure and exclusion from the hearings; and the committee may refer the offender to the [*Assembly*/*Senate*] for contempt proceedings.

Rule 1005 — Definitions

(1) "Documents" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (emails), text messages, instant messages, MMS or SMS messages, contracts, cables, telexes, notations of any type of conversation, telephone call, voicemail, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electronic records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.

(2) "Closed Session" means that portion of a meeting or hearing conducted for the purpose of receiving testimony or evidence that may tend to defame, degrade, or incriminate a person and that is for that reason not open to the public.

(3) "Executive Branch" means all offices established by the Wisconsin Constitution, and all administrative departments, offices, and independent agencies established by law.

Appendix C - Sample Investigation Plan

Investigation Plan

Informal Inquiries

Priority	Type of Information Needed
I.	[*Briefly describe type of information needed*]
	Internal or Publicly-Available Document Sources
___	1.
___	2.
___	3.
	. . .
	Individuals with potentially relevant information
___	1.
___	2.
___	3.
	. . .
II.	[*Briefly describe type of information needed*]
	Internal or Publicly-Available Document Sources
___	1.
___	2.
___	3.
	. . .
	Individuals with potentially relevant information
___	1.
___	2.
___	3.
	. . .

Formal Inquiries

Priority	Type of Information Needed

I. [*Briefly describe type of information needed*]

Subjects Upon Whom to Serve Subpoenas Duces Tecum

___ 1.
___ 2.
___ 3.
. . .

Individuals or Entities to Subpoena for Depositions

___ 1.
___ 2.
___ 3.
. . .

II. [*Briefly describe type of information needed*]

Subjects Upon Whom to Serve Subpoenas Duces Tecum

___ 1.
___ 2.
___ 3.
. . .

Individuals or Entities to Subpoena for Depositions

___ 1.
___ 2.
___ 3.
. . .

Appendix D - Subpoena Duces Tecum

Subpoena

The [*Assembly/Senate*] of the State of Wisconsin

To: [*Name of Person (or Entity)*]
[*Position (if relevant)*]
[*Address*]

The [*name of the investigating committee*] of the Wisconsin [*Assembly/Senate*] is conducting an investigation and/or a hearing as described in the Authorizing Resolution (attached as Schedule D) pursuant to the authority of the Wisconsin [*Assembly/Senate*], the Rules of the said legislative house as they relate to oversight investigations and hearings (attached as Schedule E), and Wis. Stat. §§ 13.26 through 13.36.

You are therefore commanded to appear, at the place and time identified below before the [name of the investigating committee] of the Wisconsin [*Assembly/Senate*], **there to produce the items identified in the Description of Items to Produce** (attached as Schedule A), in accordance with the Instructions (attached as Schedule B) and Definitions (attached as Schedule C).

If you cause all of the items identified in the Description of Items to Produce to be delivered to the place of production prior to the indicated time, you do not need to appear in person.

Place of production: [*Location*]
[*Address*]

Date: _____ Time: _____

Failure to comply with the requirements of this subpoena may subject you to summary arrest, imprisonment, and criminal prosecution according to law.

To the [*Assembly/Senate*] Sergeant at Arms: You or your designee are requested and directed to serve this subpoena and its attachments forthwith, and make return to

[*Name of Committee Chairman*]
[*Name of investigating Committee*]
[*Address*]

Witness my hand and the seal of the [*Assembly/Senate*] of the State of Wisconsin, at the city of Madison, this _____ day of _____ in the year _____.

[SEAL]

_____
[*Name of Presiding Officer*]
[*Speaker of the House/President*]
[*Assembly/Senate*] of the State of Wisconsin

Attest:

_____
Chief Clerk
[*Assembly/Senate*] of the
State of Wisconsin

Appendix E - Subpoena For Named Individual

Subpoena

The [*Assembly/Senate*] of the State of Wisconsin

To: [*Name of Person (or Entity)*]
[*Position (if relevant)*]
[*Address*]

The [*name of the investigating committee*] of the Wisconsin [*Assembly/Senate*] is conducting an investigation and/or a hearing as described in the Authorizing Resolution (attached as Schedule A) pursuant to the authority of the Wisconsin [*Assembly/Senate*], the Rules of the said legislative house as they relate to oversight investigations and hearings (attached as Schedule B), and Wis. Stat. §§ 13.26 through 13.36.

You are therefore commanded to appear, at the place and time identified below before the [*name of the investigating committee*] of the Wisconsin [*Assembly/Senate*] or its designee, **there to give your testimony**, under oath, as to matters of inquiry described by the Authorizing Resolution, until such time as you are given leave to depart by the committee or subcommittee named herein or its designee.

Place of testimony: [*Location*]
[*Address*]

Date: _____ Time: _____

Testimony given in a deposition will be conducted by a designee of the committee or subcommittee outside the presence of the committee or subcommittee. Testimony given in a hearing will be presented to the committee or subcommittee itself.

This subpoena requires testimony:

___ Hearing ___ Deposition

Failure to comply with the requirements of this subpoena may subject you to summary arrest, imprisonment, and criminal prosecution according to law.

Providing testimony pursuant to this subpoena entitles you to a witness fee and mileage pursuant to Wis. Stat. § 13.36. After testifying, fill out the Witness Fee Voucher (attached as Schedule C) and return it to the committee chair at the address indicated below.

To the [*Assembly/Senate*] Sergeant at Arms: You or your designee are requested and directed to serve this subpoena and its attachments forthwith, and make return to

[*Name of Committee Chairman*]
[*Name of investigating Committee*]
[*Address*]

Witness my hand and the seal of the [*Assembly/Senate*] of the State of Wisconsin, at the city of Madison, this _____ day of _____ in the year _____.

[SEAL]

_____
[*Name of Presiding Officer*]
[*Speaker of the House/President*]
[*Assembly/Senate*] of the State of Wisconsin

Attest:

_____
Chief Clerk
[*Assembly/Senate*] of the
State of Wisconsin

Appendix F - Subpoena for Person Most Knowledgeable

Subpoena

The [*Assembly/Senate*] of the State of Wisconsin

To: [*Name of Person (or Entity)*]
[*Position (if relevant)*]
[*Address*]

The [*name of the investigating committee*] of the Wisconsin [*Assembly/Senate*] is conducting an investigation and/or a hearing as described in the Authorizing Resolution (attached as Schedule D) pursuant to the authority of the Wisconsin [*Assembly/Senate*], the Rules of the said legislative house as they relate to oversight investigations and hearings (attached as Schedule E), and Wis. Stat. §§ 13.26 through 13.36.

You are therefore commanded to cause one or more individuals to appear, at the place and time identified below before the [*name of the investigating committee*] of the Wisconsin [*Assembly/Senate*] or its designee, **there to give their testimony, under oath, as to the topics listed on the Topics of Testimony** (Schedule A) in accordance with the Definitions (attached as Schedule B), all of which pertain to matters of inquiry described in the Authorizing Resolution. The individual or individuals shall give their testimony until such time as they are given leave to depart by the committee or subcommittee named herein or its designee.

Place of testimony: [*Location*]
[*Address*]

Date: _____ Time: _____

Testimony given in a deposition will be conducted by a designee of the committee or subcommittee outside the presence of the committee or subcommittee. Testimony given in a hearing will be presented to the committee or subcommittee itself.

This subpoena requires testimony in a (check one):

___ Hearing ___ Deposition

Failure to comply with the requirements of this subpoena may subject you to summary arrest, imprisonment, and criminal prosecution according to law.

Providing testimony pursuant to this subpoena entitles you to a witness fee and mileage pursuant to Wis. Stat. § 13.36. After testifying, fill out the Witness Fee Voucher (attached as Schedule C) and return it to the committee chair at the address indicated below.

To the [Assembly/Senate] Sergeant at Arms: You or your designee are requested and directed to serve this subpoena and its attachments forthwith, and make return to

[*Name of Committee Chairman*]
[*Name of investigating Committee*]
[*Address*]

Witness my hand and the seal of the [*Assembly/Senate*] of the State of Wisconsin, at the city of Madison, this _____ day of _____ in the year _____.

[SEAL]

_____
[*Name of Presiding Officer*]
[*Speaker of the House/President*]
[*Assembly/Senate*] of the State of Wisconsin

Attest:

_____
Chief Clerk
[*Assembly/Senate*] of the
State of Wisconsin

Appendix G - Description of Items to Produce

Schedule A

Description of Items to Produce

Pursuant to the terms of the attached subpoena, the Instructions (Schedule B), and the Definitions Schedule C), you are required to produce the following described items:

1. [*Describe item or category of items, such as: "All records in your possession, custody, or control that were generated between [Date] and [Date] that relate to [topic]."*]

2. [*Describe item or category of items, such as: ["All records in your possession, custody, or control that were generated between [Date] and [Date] that contain one or more of the following terms [term 1, term 2, etc.]."*]

3. [*Describe item or category of items, such as: "All records in your possession, custody, or control supporting your assertion that [insert the assertion in which the committee is interested]."*]

4. [*Describe item or category of items, such as "All e-mails in e-mail accounts associated with [name of individual or entity] between the dates of [Date] and [Date], inclusive, that [relate to a specified topic, or contain specified terms]."*]

5. [*Etc*].

Appendix H - Topics of Testimony

Schedule A

Topics of Testimony

The entity on which the attached subpoena was served must designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf. Such individuals shall testify as to matters known or reasonably available to the organization on the following topics:

1. [*Describe topic of testimony*]

2. [*Describe topic of testimony*]

3. [*Describe topic of testimony*]

4. [*Describe topic of testimony*]

5. [*Etc.*]

Appendix I - Instructions

Schedule B

General Instructions

1. These Instructions incorporate the Definitions attached to the subpoena. Please read them carefully before reading this document.

2. In complying with this subpoena, you are required to produce all responsive documents that are in your possession, custody, or control. You shall also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Subpoenaed documents shall not be destroyed, modified, removed, transferred, or otherwise made inaccessible to the committee.

3. All documents produced in response to this subpoena shall be sequentially and uniquely Bates-stamped.

4. In the event that any entity, organization, or person identified in this subpoena has been, or is also known by any other name than that herein identified, the subpoena shall be read also to include that alternative identification.

5. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.

6. If a date or other descriptive detail set forth in this subpoena referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the subpoena, you are required to produce all documents that would be responsive as if the date or other descriptive detail were correct.

7. Documents produced in response to this subpoena shall be produced as they were kept in the normal course of business together with copies of file labels, dividers, or identifying markers with which they were associated when the subpoena was served.

8. If you withhold any document pursuant to a claimed right protected by the state or federal constitution, or pursuant to a claim of non-disclosure privileges including, but not limited to, the deliberative-process privilege, the attorney-client privilege, attorney work product protections, any purported privileges, protections, or exemptions from disclosure under Wis. Stat. § 19.35 or the Freedom of Information Act, then you must comply with the following procedure:

a. You may only withhold that portion of a document over which you assert a claim of privilege, protection, or exemption. Accordingly, you may only withhold a document in its entirety if you maintain that the entire document is privileged or protected. Otherwise you must produce the document in redacted form.

b. In the event that you withhold a document—in whole or in part—on the basis of a privilege, protection, or exemption, you must provide a privilege log containing the following information concerning each discrete claim of privilege, protection, or exemption:

- the privilege, protection, or exemption asserted;
- the type of document;
- the date, author, and addressee;
- the relationship of the author and addressee to each other; and
- a general description of the nature of the document that, without revealing information itself privileged or protected, will enable the committee to assess your claim of privilege, protection, or exemption.

c. In the event a document or a portion thereof is withheld under multiple discrete claims of privilege, protection, or exemption, each claim of privilege, protection, or exemption must be separately logged.

d. In the event portions of a document are withheld on discrete claims of privilege, protection, or exemption, each separate claim of privilege, protection, or exemption within that document must be separately logged.

e. You must produce the privilege log contemporaneously with the withholding of any document in whole or in part on the basis of a privilege, protection, or exemption.

f. You must certify that your privilege log contains only those assertions of privilege, protection, or exemption as are consistent with these Instructions and are warranted by existing law or by a non-frivolous argument for extending, modifying, or reversing existing law, or for establishing new law.

g. Failure to strictly comply with these provisions constitutes waiver of any asserted privilege, protection, or exemption.

9. The committee does not recognize any purported contractual privileges, such as non-disclosure agreements, as a basis for withholding the production of a document. Any such assertion shall be of no legal force or effect, and shall not provide a justification for such withholding or refusal, unless and only to the extent that the chair of the committee has consented to recognize the assertion as valid.

10. This subpoena is continuing in nature and applies to any newly-discovered information. Any document not produced because it has not been located or discovered by the return date shall be produced immediately upon subsequent location or discovery.

11. If you discover any portion of your response is incorrect in a material respect you must immediately and contemporaneously submit to the committee, in writing, an explanation setting forth: (1) how you became aware of the defect in the response; (2) how the defect came about (or how you believe it to have come about); and (3) a detailed description of the steps you took to remedy the defect.

12. A cover letter shall be included with each production and include the following:

a. The Bates-numbering range of the documents produced, including any Bates-prefixes or -suffixes;

b. If the subpoena is directed to an entity as opposed to an individual, a list of custodians for the produced documents, identifying the Bates range associated with each custodian;

c. A statement that a diligent search has been completed of all documents in your possession, custody, or control that reasonably could contain responsive material;

d. A statement that the search complies with good forensic practices;

e. A statement that documents responsive to this subpoena have not been destroyed, modified, removed, transferred, or otherwise made inaccessible to the committee since the date of receiving the committee's subpoena or in anticipation of receiving the committee's subpoena;

f. A statement that all documents located during the search that are responsive have been produced to the committee or withheld in whole or in part on the basis of an assertion of a claim of privilege or protection in compliance with these Instructions; and

g. Your signature, attesting that everything stated in the cover letter is true and correct and that you made the statements under penalty of perjury.

13. You must identify any documents that you believe contain confidential or proprietary information. However, the fact that a document contains confidential or proprietary information is not a justification for not producing the document, or redacting any part of it.

14. Electronically-stored documents must be produced to the committee in accordance with the attached Electronic Production Instructions in order to be considered to be in compliance with the subpoena. Failure to produce documents in accordance with the attached Electronic Production Instructions, may, in an exercise of the committee's discretion, be deemed an act of contumacy.

15. If properties or permissions are modified for any documents produced electronically, receipt of such documents will not be considered full compliance with the subpoena.

Electronic Production Instructions

The production of electronically-stored documents shall be prepared according to, and strictly adhere to, the following standards:

16. Documents shall be produced in their native format with all meta-data intact.

17. Documents produced shall be organized, identified, and indexed electronically.

18. Only alphanumeric characters and the underscore (_'') character are permitted in file and folder names. Special characters are not permitted.

19. Production media and produced documents shall not be encrypted, contain any password protections, or have any limitations that restrict access and use.

20. Documents shall be produced to the committee on one or more memory sticks, thumb drives, or USB hard drives. Production media shall be labeled with the following information: production date, name of the subpoena recipient, Bates range.

21. All documents shall be Bates-stamped sequentially and should not duplicate any Bates-numbering used in producing physical documents.

Appendix J - Definitions

Schedule____[27]

Definitions

"**All**," "**any**," and "**each**" shall each be construed as encompassing any and all. The singular includes the plural number, and vice versa. The masculine includes the feminine and neuter genders.

"**And**" and "**or**" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this subpoena any information that might otherwise be construed to be outside its scope.

"**Committee**" means the committee named in the subpoena.

"**Communication**" means each manner or means of disclosure or exchange of information (in the form of facts, ideas, inquiries, or otherwise), regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in an in-person meeting, by telephone, facsimile, e-mail (desktop or mobile device), text message, MMS or SMS message, regular mail, telexes, releases, intra-company messaging channels, or otherwise.

"**Communication with**," "**communications from**," and "**communications between**" means any communication involving two or more people or entities, regardless of whether other persons were involved in the communication, and includes, but is not limited to, communications where one party is cc'd or bcc'd, both parties are cc'd or bcc'd, or some combination thereof.

27 Schedule B when used in a subpoena for a "person most knowledgeable"; Schedule C when used in a subpoena duces tecum.

"**Documents**" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (emails), text messages, instant messages, MMS or SMS messages, contracts, cables, telexes, notations of any type of conversation, telephone call, voicemail, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electronic records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.

"**Employee**" means a current or former: officer, director, shareholder, partner, member, consultant, senior manager, manager, senior associate, permanent employee, staff employee, attorney, agent (whether de jure, de facto, or apparent, without limitation), advisor, representative, attorney (in law or in fact), lobbyist (registered or unregistered), borrowed employee, casual employee, consultant, contractor, de facto employee, independent contractor, joint adventurer, loaned employee, part-time employee, provisional employee, or subcontractor.

When referring to a person, "**to identify**" means to give, to the extent known: (1) the person's full name; (2) present or last known address; and (3) when referring to a natural person, additionally: (a) the present or last known place of employment; (b) the natural person's complete title at the place of employment; and (c) the individual's business address. When referring to documents, "to identify" means to give, to the extent known the: (1) type of document; (2) general subject matter; (3) date of the document; and (4) author, addressee, and recipient.

"**Indicating**" with respect to any given subject means anything showing, evidencing, pointing out or pointing to, directing attention to, making known, stating, or expressing that subject of any sort, form, or level of formality or informality, whatsoever, without limitation.

"**Party**" refers to any person involved or contemplating involvement in any act, affair, contract, transaction, judicial proceeding, administrative proceeding, or legislative proceeding.

"**Person**" is defined as any natural person or any legal entity, including, without limitation, any business or governmental entity or association, and all subsidiaries, divisions, partnerships, properties, affiliates, branches, groups, special purpose entities, joint ventures, predecessors, successors, or any other entity in which they have or had a controlling interest, and any employee, and any other units thereof.

"**Pertaining to**," "**referring**," "**relating**," or "**concerning**" with respect to any given subject means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with, or is in any manner whatsoever pertinent to that subject.

"**Possession, custody or control**" means (a) documents that are in your possession, custody, or control, whether held by you or your employees; (b) documents that you have a legal right to obtain, that you have a right to copy, or to which you have access; and (c) documents that have been placed in the possession, custody, or control of any third party.

"**Processes**" means any processes, procedures, methodologies, materials, practices, techniques, systems, or other like activity, of any sort, form, or level of formality or informality, whatsoever, without limitation.

"**You**" or "**Your**" shall mean (in the case of an entity) the entity named in the subpoena, as well as its officers, directors, subsidiaries, divisions, predecessor and successor companies, affiliates, parents, any partnership or joint venture to which it may be a party. If the person named in the entity is either an individual or an entity, "you" and "your" also means your employees, agents, representatives, consultants, accountants and attorneys, including anyone who served in any such capacity at any time during the relevant time period specified herein.

Appendix K - Witness Fee Voucher

Schedule____[28]

WITNESS FEE VOUCHER

(*This section to be completed by the witness*)

I, _____ , state and affirm that I appeared and gave testimony at a deposition or hearing for the

_____
(*name of the committee*)

pursuant to a subpoena issued by the (*check one*):

_____ Assembly of the State of Wisconsin
_____ Senate of the State of Wisconsin

Number of the days on which I gave testimony: _____
Miles travelled (one-way) to attend the deposition or hearing: _____

_____
(*witness signature*)

_____
_____
_____
(*address*)

Date: _____

Mail or deliver to the committee chair at the address to which the subpoena directs the Sergeant at Arms to make return

(***This section for use by the legislature only***)

I certify that the above-named witness travelled the indicated number of miles to attend a deposition or hearing to give testimony for the indicated number of days.

_____
(*chair's signature*)

28 Schedule C when used in a subpoena for a named individual; Schedule E when used in a subpoena for a "person most knowledgeable."

Appendix L - Proof of Service

Proof of Service

Subpoena for: _____[*name of individual or entity*]_____
Address: _____[*individual or entity address*]_____

Before the _____[*committee name*]_____

Issued by: [*Assembly/Senate*] of the State of Wisconsin

Documents Served: Subpoena
[*List all that are applicable:*
Description of Items to be Produced
Topics of Testimony
Instructions
Definitions
Authorizing Resolution
Committee Rules
Witness Fee Voucher]

Manner of service: _____

Date: _____
[*date of service*]

Served by: _____
[*printed name*]

_____
[*title*]

_____

_____
[*server's address*]

Appendix M - Exhibit Number Log

Exhibit Number Log

Ex. No.	Description	Source