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STATE OF WISCONSIN
SUPREME COURT
Appeal No. 03-0442-CR
Circuit Court Case No. 02-CF-00245

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHARLES CHVALA,

Defendant-Appellant-Petitioner.

DEFENDANT-APPELLANT-PETITIONER'S INITIAL BRIEF TO THE WISCONSIN SUPREME COURT

Appeal From the Wisconsin Court of appeals, District IV

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STATEMENT OF THE ISSUES

I. DO SEPARATION OF POWERS PRINCIPLES PRECLUDE THIS PROSECUTION?

ANSWERED BY THE COURT OF APPEALS: NO

II. IS THE PROSECUTION OF COUNTS 7-10 VOID FOR VAGUENESS?

A. DOES THE SENATE POLICY MANUAL CREATE DUTIES THAT MAY BE THE BASIS FOR A FELONY PROSECUTION UNDER WIS. STATS. § 946.12(3)?

ANSWERED BY THE COURT OF APPEALS: YES

B. DO THE POLICY STATEMENTs IN WIS. STATS. § 11.001(2) and 15.001(1) CREATE DUTIES THAT MAY BE THE BASIS FOR A FELONY PROSECUTION UNDER WIS. STATS. § 946.12(3)?

ANSWERED BY THE COURT OF APPEALS: YES

STATEMENT OF THE CASE

Counts 7-10 of the criminal complaint, the caucus counts, represent a case of first impression. The State's complaint charged Senator Chvala with felony misconduct in office based on a violation of the Senate Policy Manual. In opposition to Senator Chvala's Motion to Dismiss, the State added several misdemeanor statutes from Chapters 11 and 19 as the basis for the duty violated.

The "rule" on which the prosecutor relies is set forth in the Senate Policy Manual. The entire text of the policy is:

> No political activity is permitted during working hours. No state facility, office equipment, supplies, etc. may be used for political purposes at any time. During non-office time, employes may exercise their citizenship rights by political activity and community involvement. (Senate Policy Manual I.-14).

The trial court agreed that there is a gray area between what is a political activity and what is a legislative activity, but held that the alleged activities in this case were political. (R.31, p. 4; A.App.42 [Appellant's Appendix, hereinafter "A.App."]). Despite having no statement from the legislature as to what the senate rule meant, the trial court interpreted the rule based on its own sense of what the legislature meant.

The court of appeals likewise could not find a definition of "political activity" in the Senate Policy Manual. Nor does the manual refer to any other source for a definition. Nonetheless, the court grafted a meaning onto the manual based on Wis. Stats. § 11.01(16)(a). Reliance on Wis. Stats. § 11.01(16) is unhelpful, however, because the definition is so broad that it includes virtually everything a senator does.

The State alleged four counts against Senator Chvala with respect to the Senate Democratic Caucus ("SDC"). Count 7 involves an allegation that Senator Chvala controlled the SDC, made all the hiring decisions, and

hired people to work on campaigns while employed by the SDC. (R.1, p. 21; A.App. 133-134). Specifically, Senator Chvala is charged with hiring Wendy Kloiber to be an SDC employee, whose job included working on Alice Clausing's campaign. (R.1, p. 20; A.App.100).

Count 8 involves a job offer to Heather Colburn in October of 1998. (R.1, p. 21; A.App.101). The State alleges that Senator Chvala offered Ms. Colburn a job with SDC to do fundraising work. (R.1, p. 22; A.App.102). Ms. Colburn declined the job offer. (R.1, p. 22; A.App.102). There is no allegation that Ms. Colburn ever worked one minute on a campaign, much less an allegation the she used any state resources. The Complaint alleges that Ms. Colburn was informed that her major function would be as a fundraiser, but that she would have to do some policy work. (R.1, p. 23; A.App.103).

The court of appeals does not address how Senator Chvala could have violated the Senate Policy Manual by attempting to hire someone. The court further fails to explain how Senator Chvala violated Wis. Stats. § 11.001(2) by offering a person a job.

Count 9 alleges that Senator Chvala used SDC employees to work on campaigns in the 1998 election. Specifically, Senator Chvala had SDC staff members work on the Robson,

Erpenbach and Baumgart campaigns. (R.1, p. 25; A.App.105). However, the State does not allege that the campaign work was the sole work performed by the SDC employees for the Senate.

Count 10 alleges that Senator Chvala directed SDC employees to work on campaigns during the 2000 elections. The specific campaigns mentioned are those of Alice Clausing, Dave Hanson, and Mark Meyer. Senator Chvala is alleged to have used the SDC staff on these elections in the same manner he used them in the 1998 elections.

There are no allegations that Senator Chvala used any caucus employees on his own campaigns, and there is no allegation that any caucus member improperly raised funds for Senator Chvala.

STANDARD OF REVIEW

The issues presented in this appeal are constitutional and statutory. Each of these issues is reviewed de novo. In Interest of Reginald D., 193 Wis. 2d 299, 305-306, 533 N.W.2d 181, 184 (1995), citing Szarzynski v. YMCA, Camp Minikani, 184 Wis. 2d 875, 883-84, 517 N.W.2d 135, 138 (1994); State v. McManus, 152 Wis. 2d 113, 129,447 N.W.2d 654, 660 (1989); State v. Herman, 164 Wis. 2d 269, 281, 474 N.W.2d 906, 910 (Ct. App. 1991).

ARGUMENT

I. THE SEPARATION OF POWERS DOCTRINE PRECLUDES THIS PROSECUTION.

Article 4, § 8 of the Wisconsin Constitution gives the senate exclusive authority to develop its own rules. Each branch has exclusive core constitutional powers into which other branches may not intrude. State ex. rel. Friedrich v. Dane County Cir. Ct., 192 Wis. 2d 1, 13, 531 N.W.2d 32 (1995). This is the essence of the separation of powers doctrine.

The separation of powers doctrine is not explicitly set forth in the constitution, but is implicit in the division of governmental powers. State v. Horn, 226 Wis. 2d 637, 643, 594 N.W.2d 772 (1999). Further:

> There are zones of authority constitutionally established for each branch of government upon which any other branch of government is prohibited from intruding. As to these zones of authority, the unreasonable burden or substantial interference test does not apply: *any* exercise of authority by another branch of government is unconstitutional.

State ex. rel. Fiedler v. Wisconsin Senate, 155 Wis. 2d 94, 100, 454 N.W. 2d 770 (1990).

Courts have examined separation of powers questions in a number of different contexts. They have examined the legislature's and the executive's relationship with the courts. For instance, in Wisconsin, the executive may not

provide quarters for a court that are not acceptable to the judge of that court. In In re Courtroom and Officers of Fifth Branch Circuit Court, Milwaukee County, 148 Wis. 109, 134 N.W. 490 (1912), the supreme court ruled that the constitution allowed a circuit court to enter *ex parte* orders without a lawsuit to protect its interests. As a result, the executive could not move the circuit court to a new facility.

In In the Matter of the Appointment and Removal of the Janitor of the Supreme Court, 35 Wis. 410 (1874), the executive branch replaced the supreme court's janitor without consulting the justices. The court held that such power to appoint and fire the janitor was constitutionally left to the supreme court:

> It is a power inherent in every court of record, and especially courts of last resort, to appoint such assistants; and the court itself is to judge the necessity. This principle is well settled and familiar, and the power so essential to the expedition and proper conducting of judicial business, that it may be looked upon as very doubtful whether the court can be deprived of it. As a power judicial and not executive or legislative in its nature, and one lodged in a co-ordinate branch of the government separated and independent in its sphere of action from the other branches, it seems to be under the protection of the constitution, and therefore a power which cannot be taken from the court, and given to either the executive or legislative departments, or to any officer of those departments.

This power was reaffirmed in Barland v. Eau Claire County, 216 Wis. 2d 560, 575 N.W.2d 691 (1998). The circuit court in Eau Claire employed judicial assistants. The assistants were members of a collective bargaining unit that allowed assistants with more seniority to replace those with less seniority in certain circumstances. The supreme court held that the power to remove a judicial assistant was a core power that belonged solely to the court, and struck down the "bumping" provision in the collective bargaining agreement.

The executive branch is constitutionally protected by the separation of powers doctrine. For instance, the executive branch has the authority to veto laws. This power has been interpreted to mean that the governor may change appropriations, or strike out single letters in words. State ex. rel. the Wisconsin Senate v. Thompson, 144 Wis. 2d 429, 424 N.W.2d 385 (1988). The legislature and the courts are forbidden from interfering with this power.

The above cases illustrate the separation of powers doctrine as it protects the judicial and executive branches. The State's prosecution in this case would violate this doctrine as it applies to the legislature.

This case implicates two separation of powers concerns: (1) only the senate may interpret ambiguous

language in a senate rule; and (2) the prosecution cannot inquire into the legislative work of senate employees. This prosecution, therefore, violates the constitution.

A. Only The Senate May Interpret Ambiguous Terms In The Senate Policy Manual.

The State alleges that SDC employees used state time to do campaign work, rather than what the State deems "legitimate policy work", in violation of the senate rule that states, "No political activity is permitted during working hours." Even if a senate rule could create a duty under Wis. Stats. § 946.12(3), this particular rule, because it is ambiguous, cannot. While courts are empowered to interpret ambiguous statutes, they do not have the right to interpret an ambiguous senate rule. Rather, it is the duty of the senate to interpret its own rules:

> We note first that we agree with the intuition behind Rostenkowski's argument: a sufficiently ambiguous house Rule is non-justiciable. . .[T]he Rulemaking clause of Article I clearly reserves to each House of the Congress the authority to make its own rules, and judicial interpretation of an ambiguous House Rule runs the risk of the court intruding into the sphere of influence reserved to the legislative branch under the Constitution.

United States v. Rostenkowski, 313 U.S. App. D.C 303, 318; 59 F.3d 1291 (D.C. Cir. 1995).

Wisconsin courts have historically not interfered with legislative rule-making. In Integration of Bar Case, 244

Wis. 8, 11 N.W. 604 (1943), a question arose regarding the use of "pairing". The legislature set up a rule whereby members could pair with each other on a bill. If members were going to vote the opposite on a bill, they could pair, and neither one would vote on that particular bill. Id., at 29-30. The rule was set up by the assembly, and had been in place for quite some time before the bill in question was introduced. The bill would have created the State Bar Association. The governor vetoed it, but the senate voted to override the veto. Id., at 16. The question then came before the assembly, and they needed a two-thirds majority to override the veto. The vote, as recorded by the assembly, was sufficient and the bill became law. The petitioner sued on a number of theories, including a claim that the pairing rule violated the two-thirds majority provision of the constitution, because it did not require the same 2 to 1 margin. Id., at 35. The court ruled that although the assembly rule made it easier to override vetoes, it was not relevant to the case, because the rule did not violate the constitution. Id. The court had no power to review internal legislative rules.

In another case concerning legislative rulemaking, the court came to the same conclusion. At issue in State ex.

rel. Elfers v. Olson, 26 Wis. 2d 422, 132 N.W.2d 526 (1965), was the method the legislature used to determine the winner of an election in Kenosha County. The assembly decided that Olson was the winner even though the circuit court previously had declared Elfers victorious. Id., at 431. The court first decided that the issue was not about expelling a member of the legislature, but rather settling an election contest. The court concluded that the method and result reached by the assembly were "none of our business". Id. These cases demonstrate that the legislature has a core zone of authority and that interpreting its own rules falls within that core zone.

B. Although The Prosecution Cannot Constitutionally Inquire Into The Legislative Work Of Employees, It Invariably Does So By Relying On Two Ambiguous Phrases In The Senate Policy Manual As A Basis For Its Misconduct Charges.

There are two ambiguous phrases in the policy manual relied on by the State:

1. What is the meaning of "political activity"?

2. What is the meaning of "working hours"?

1. **Reliance On Wis. Stats. § 11.01(16)(a) to Define "Political Activity" Violates The Separation Of Powers Doctrine, Because The Definition Includes Legitimate Legislative Activity, And Because Irrespective Of Such Definitional Imprecision, Neither The Court Of Appeals Nor The Prosecution Is Empowered To Supply The Missing Definition.**

The court of appeals attempted to define "political activity" by reference to Wis. Stats. § 11.01(16)(a). This section defines acts done for a political purpose as those intended to influence the election of an individual to a state office. However, this definition is so broad that it impacts virtually everything a legislator does. A state senator is going to be concerned about the political impact of her vote on a controversial issue. For instance, when Miller Park was being discussed the political ramifications of a particular vote were apparent. Another example is constituent relations. A senator who is not responsive to her constituents' calls and letters may well be out of a job. It would be strange indeed if a senator were called to task in a criminal court for using staff members to poll the electorate on the Miller Park issue or to return calls to the voters in her district.

This is not to suggest that there is no way to define what is "political" and what is "legislative". Further, it is not suggesting that some of the activities alleged in

the criminal complaint would not fall within the definition set forth in Wis. Stats. § 11.01(16)(a). Rather, the contention is that neither the prosecutor nor this court is empowered to create a clear definition of "political activity". This task belongs solely and wholly to the legislature.

This very point is expressed emphatically in People v. Ohrenstein, 549 N.Y.S.2d 962, 153 A.D.2d 342 (1989), a case where New York sought criminal sanctions against a state senator for using his staff on political campaigns. The court's extensive analysis addressed the issues involved in this case.

In Ohrenstein, the senate minority leader was indicted on numerous felony charges for using legislative staff on political campaigns. As in this case, one of the issues was whether the courts could separate political from legislative functions of a legislator and his staff. The court explained the inextricable link between political activities and the legislative process:

> . . . the ability to effectively accomplish particular legislative goals is in great measure predicated upon such partisan party affiliations. **Enactment of legislation cannot be separated from political involvement and, realistically, political party platforms are the basis for legislation under our system of government.** The wide range of activities performed outside the purely legislative sphere which have grown over the years in part because they are a

> means of developing continuing support for future elections have been held to be entirely legitimate activities. (United States v. Brewster, supra.[408 U.S. 501, 92 S.Ct. 2531 (1972)]) **It can be argued that politics historically has been an integral part of the legislative process and is intimately related to, and intertwined with, the legislator's public role in attempting to garner public support for the legislative programs which he or she espouses**; and, the record indicates that the use of legislative staff for a broad spectrum of political duties, including partisan campaigns, is not a new phenomenon. That this practice may be personally distasteful or offensive to us is, however, not the barometer.

Id., at 366 -367 (emphasis added).

Despite the fact that politics have historically been part of the legislative process, the court of appeals attempted to draw a line between what is and what is not political activity. The court held:

> [W]hether "opposition research" is in itself "political activity" is not free from doubt. We therefore conclude that evidence that [a SDC employee] conducted opposition research does not allege a justiciable violation of Wis. Stat. § 946.12(3).

State v. Chvala, 2004 WI App. 53, 678 N.W.2d 880. Likewise, the court of appeals concluded that research against targeted senators was not political activity and therefore did not violate Wis. Stats. § 946.12(3). Chvala, 2004 WI App. at 64. The court of appeals concluded that these items were not justiciable, even though the executive branch included them in the criminal complaint.

The court of appeals made a value determination that some opposition research was sufficiently related to some legislative purpose to avoid prosecution. If a senate majority leader directed the entire caucus and his own staff to work solely on opposition research, would that be sufficiently legislative to avoid felony prosecution?

The court of appeals seems to take the obscenity approach to prohibited political activity. The court cannot define it, but it knows it when it sees it. Rostenkowski eschewed this approach, and concluded that the issue was a political question in the absence of an explicit directive from the legislature.

What the court of appeals seems to suggest is that an activity that furthers the legislative process is not political and, consequently, non-justiciable. State v. Chvala, 2004 WI App. 53. However, this approach only begs the question. As Ohrenstein aptly observes, "enactment of legislation cannot be separated from political involvement." Id., at 366.

The definition of "political activity" should be left to the senate. The senate has several options available. It could amend the policy manual to use the words "campaign activity", rather than "political activity". It could

eliminate the caucuses. It could prescribe definite rules of conduct.

It has been argued that even if there is ambiguity at the edges of "political activity" and "legislative activity", the conduct alleged in this case is so clearly "political" that the ambiguity is of no moment. Notwithstanding its facial appeal, this argument is flawed, because without guidance from the legislature as to what it meant by "political activity", there is a danger of punishing some behavior the legislature condoned.

A court must resist the temptation to fill in the definition for the legislature. Rostenkowski exemplifies proper judicial restraint in this respect. The court concluded that an allegation that Congressman Rostenkowski used staff to pick up his laundry, drive his family, and work on his campaign was non-justiciable. The following passage underscores the court's exercise of considerable restraint:

> If we seem to have been overly cautious in our analysis or to have allowed that some activities that were most likely "personal" might have been "official" depending upon the circumstances, we have good reason. First, because the doctrine of separation of powers lies at the very heart of our constitutional system, we must avoid interpreting the term "personal" any more broadly than necessary. If there can be a reasonable doubt about whether, assuming the allegations of the indictment are true, a Member used Congressional

> resources for his own benefit in violation of a House Rule, then the court cannot presume to interpret the rule.

Rostenkowski, U.S. App. D.C. at 324.

2. **The Absence Of Any Definition And The Consequent Ambiguity Of "Working Hours" As Used In The Senate Policy Manual Necessitates Inquiry Into Non-Justiciable, Legislative Activity And Thus Violates The Separation Of Powers Doctrine.**

There is another definitional problem in the Senate Policy Manual that both the court of appeals and the State ignore. Neither the court of appeals nor the State has defined the meaning of "working hours". The State wishes to argue that "working hours" means during business hours – presumably weekdays from 8 a.m. to 5 p.m. Yet this specification does not exist; therefore, the State's definition is untenable. In fact, the senate rules state in relevant part:

> All employees shall perform such duties in connection with the work of the Senate as are assigned to them by the superior officers, and shall be available **at such hours as their superior officers direct. (Senate Rule 88(3))**. (Emphasis added).

Senate employees do not have regular working hours, and the Senate Policy Manual provides that a caucus employee may work on political campaigns on their own time. Thus it is unclear what portion of any day is state time rather than

personal time. Neither the State nor the court of appeals addresses the definition of "working hours."

The Ohrenstein court understood that the irregularity of working hours for legislative staff was another reason why the court should find the issues raised by the prosecution non-justiciable:

> The question is whether it is appropriate for a court to attempt to legislate the precise terms and conditions of employment which, in its judgment, constitute "the proper duties" for employees of another co-equal branch of government, whose character and operations are in so many ways at variance with the judicial format both in its partisan character and activities as well as in the irregularity and seasonal vagaries of its work schedule.

Id., at 367 (emphasis added).

Paragraph 137 of the complaint demonstrates the ambiguity of "working hours". (R.1, p. 45; A.App.125). The complaint alleges that an SDC employee provided substantial assistance to the Senator Mark Meyer campaign. The complaint states:

> Senator Meyer also believed Mr. Wadd was assisting his campaign on vacation time or at other times outside of Mr. Wadd's employment with the Senate Democratic Caucus.

(R.1, p. 45; A.App.125). This allegation reflects the utter vagueness of the concept of "working hours." An SDC staff member is free to work on a campaign on vacation

time, compensatory time, or other times outside their employment.

The ambiguity of "political activity" and "working hours" reveals why the approach in Rostenkowski and Ohrenstein should be adopted in Wisconsin. Saying that certain activities of SDC employees are non-justiciable does not solve the problem. It is not enough for the State to show that an SDC employee performed "justiciable" "political activity"; it must also show that this "justiciable" "political activity" was performed during "working hours." This will require a jury to do the following:

1. Analyze all of the work done by the SDC employee including budget work, constituent work, background research, voting history, demographics, etc.

2. Categorize that work to determine what was "justiciable political activity" and what work was "non-justiciable political activity."

3. Add up the hours and determine how many hours were for "justiciable political activity" and how many hours were for "non-justiciable political activity."

4. Determine the amount of compensatory time accrued by the SDC members, and what work was done to accrue said compensatory time.

5. Determine the amount of vacation time the SDC staff member accrued and used.

6. Determine whether the SDC staff member cheated the state by engaging in an insufficient number

> of hours on non-justiciable activities to justify the staff member's salary.

This process necessitates a comprehensive examination of the internal workings of the legislature. Thus, it would violate the separation of powers doctrine. As shown below, it also would invade areas protected by the Speech or Debate Clause of the Constitution.

II. THE SPEECH OR DEBATE CLAUSE PRECLUDES PROSECUTION OF THE CAUCUS COUNTS.

The Speech or Debate Clause reads:

> No member of the legislature shall be liable in any civil action or criminal prosecution whatever for words spoken in debate.

Article 4, § 16 of the Wisconsin Constitution provides legislators immunity for activities related to the Speech or Debate Clause. State v. Beno, 116 Wis. 2d 122, 134 N.W.2d 668 (1984) confirmed speech or debate immunity extended beyond statements made on the floor of the Legislature. In addition, the immunity reaches:

> [M]atters that are an integral part of the processes by which members of the legislature participate with respect to the consideration of proposed legislation or with respect to other matters which are within the regular course of the legislative process.

Id., at 144. In addition, the immunity extends to legislative aides. Id., at 147.

The federal courts also have found similar controversies non-justiciable and therefore beyond the pale of criminal prosecution:

> So it is that so-called political questions are denied judicial scrutiny, not only because they invite courts to intrude into the province of coordinate branches of government, but also because courts are fundamentally under-equipped to formulate national policies or develop standards of conduct for matters not legal in nature. A challenge to the interworkings of a senator and his staff member raises at the outset the specter that such a question lurks, and it is to an investigation of that possibility that we first turn.

United States ex. rel. Joseph v. Cannon, 642 F.2d 1373, 1379 (1981).

Cannon concerned a civil claim against a United States Senator for using a staff member "extensively and exclusively" for reelection purposes. The court dismissed the claim because there was and is no judicially manageable standards for resolving the questions raised by the complaint. Id., at 1379. The court stated:

> Indeed, the interpretation of the False Claims Act suggested by the appellant would license the courts to monitor every action taken by a Senator and his aide in an effort to determine whether it is sufficiently "official" or too "political". Id., at 1384.

Therefore, whether a particular activity is political or legislative is a fact issue that would require a jury to consider the interrelationship of a senator and a staff member. The Cannon court held that this is precisely the

type of inquiry that cannot be done and therefore criminal prosecutions that would require such an inquiry are forbidden.

In Ohrenstein, the State filed a six-hundred-plus-count indictment involving the use of legislative aides to work primarily or solely on campaigns. The prosecution's theory was exactly the same as that advanced in this case; namely, the State should not pay for partisan campaigns. Citing the Speech or Debate Clause, the court of appeals dismissed the charges against Senator Ohrenstein for those employees who worked on campaign and legislative activities. Id., at 355-356. The court held:

> When it is apparent that legislative employees have performed legislative acts, the Speech or Debate Clause prevents inquiries, "even though their conduct, if performed in other than legislative contexts, would in itself be unconstitutional or otherwise contrary to criminal or civil statutes." Id., at 357.

The court also held that the obligation to show that privileged legislative acts are not involved rests with the prosecution, because the Speech or Debate Clause protects not only legislative acts, but also the legislators from defending claims arising out of legislative acts. Id., at 357.

The conclusion reached in Ohrenstein should be adopted by this court. If an SDC employee engaged in both

"legislative activity" and "political activity", there can be no prosecution based on that employee's activities.

Federal courts have dealt with the issues raised in the State's complaint and have concluded that Speech or Debate Clause immunity bars prosecution for personnel decisions relating to employees integral to the legislative process. In Browning v. Clerk, U.S. House of Representatives, 789 F.2d 923, 252 (D.C. Cir. 1986), an official reporter sued the House of Representatives on the theory she was fired because of her race. The court of appeals dismissed the case because the suit intruded into the protected realm of the Speech or Debate Clause of the Constitution. The court held:

> The Speech or Debate Clause is intended to protect the integrity of the legislative process by restraining the judiciary and the executive from questioning legislative actions.

Browning,789 F.2d at 927.

The court then determined that personnel issues could implicate the Speech or Debate Clause and explained the test as follows:

> Thus, if the employee's duties are an integral part of the legislative process, such that they are directly assisting members of Congress in the "discharge of their functions" personnel decisions affecting them are correspondingly legislative and shielded from judicial scrutiny.

Browning, 789 F.2d at 929.

The court looked at the status of an official reporter and concluded that a person who takes verbatim testimony is an employee integral to the legislative process. Id.

A U.S. Court of Appeals held that a person who acts as a stenographer is vital to the legislative process. It follows that SDC employees who are charged with policy-making responsibility are integral to the legislative process, and thus decisions respecting their employment are privileged under the Speech or Debate Clause.

The State's reliance on Forrester v. White, 484 U.S. 219 (1988) for the proposition that Browning v. Clerk, 789 F.2d 923 (D.C. Cir. 1986) has been implicitly overruled is misplaced. The legislative branch enjoys Speech or Debate Clause immunity, whereas the other two branches do not. The Forrester court stated:

> Furthermore, on facts analogous to those in the case before us the Court indicated that a United States Congressman would not be entitled to absolute immunity in a sex discrimination suit filed by a personal aide whom he had fired unless such immunity was afforded by the Speech or Debate Clause.

Forrester, 484 U.S. at 224. (emphasis added).

The supreme court was saying that legislative hiring and firing decisions must be viewed through the lens of the Speech or Debate Clause. In Davis v. Passman, 442 U.S. 228, fn. 11, the court held that the Speech or Debate Clause

constitutionally limits judicial review of congressional employment decisions.

A more recent case, Niedermeier v. Office of Baucus, 153 F. Supp. 2d 23, fn. 5 (D.D.C. 2001), reaffirms Browning's validity:

> It also appears that this Court lacks subject matter jurisdiction over plaintiff's amended claim because the Speech or Debate Clause provides defendant immunity for his legislative acts and this circuit has defined legislative acts to include personnel actions of members of Congress.

Niedermeier, 153 F. Supp. 2d, at fn. 5.

This court has decided the issue of whether judicial assistants are integral to the functioning of a court, and concluded that they are. Barland, 216 Wis. 2d at 593. The county argued that personnel decisions were administrative functions of the court. This argument was rejected. Id. at 581. The court ruled that separation of powers considerations do not allow the executive or the legislature to intrude on the firing of judicial assistants. Id.

The facts presented in this appeal fall squarely within the holdings of this court in Barland, 216 Wis. 2d at 593, and In the Matter of the Appointment and Removal of the Janitor of the Supreme Court, 35 Wis. 410 (1874). Senator Chvala is charged with crimes based on his personnel decisions.

This case arises out of the same John Doe that was the subject of this court's recent opinion in In the Matter of a John Doe Proceeding, v. Sarah B. O'Brien, 2004 WI 65, 680 N.W.2d 792. In Doe, this court analyzed the Speech or Debate Clause to determine whether electronic records of legislators and their staff maintained by the Legislative Technology Services Bureau could be subpoenaed in the John Doe proceeding. This court held that on the record before it the subpoena did not violate Section 16:

> However, given the state of the record before us, we cannot determine whether constitutionally permissible criminal charges are under investigation in the John Doe proceeding or whether the allegations are intertwined with duties the legislators were elected to perform.

In this case a criminal complaint is before the court. That complaint shows the allegations against Senator Chvala are intertwined with his duties as a legislator and senate majority leader. This is not the case where an SDC employee performed an act that was illegal, such as destroying evidence or obstructing justice. The issue is not whether SDC employees worked on partisan campaigns. Rather, the issue is whether the SDC employees performed sufficient work related to the functioning of the senate to justify their pay. This means that all of the work that the SDC employees performed on the budget, prescription

drugs, education, election finance reform, the environment, crime, tort reform, and the thousands of other bills that came before the senate during the time in question will be subject to questioning in a judicial proceeding. Only after the entire scope of the employees' work is evaluated could the prosecution prove that the employee was wrongfully being paid by the State to work on a campaign.

There is a huge overlap between legislative and political activity. Researching political contributions might be thought to be political work. However, research showing that a legislator received political contributions from a lobbyist who opposed prescription drug legislation could be useful for debate on the senate floor. Research of the amounts contributed by PACs and conduits are essential to crafting election finance legislation. The bottom line is that this inquiry cannot be made in a judicial proceeding. The work done by SDC employees related to proposed legislation or to matters within the regular course of the legislative process, is immune from use in the prosecution. The prosecution will require a judicial inquiry into matters that are intertwined with duties the legislators were elected to perform.

III. THE CLAIMS AGAINST SENATOR CHVALA ARE NON-JUSTICIABLE BECAUSE THEY PRESENT A POLITICAL QUESTION.

In Baker v. Carr, 369 U.S. 186, 217 (1961), the U.S. Supreme court set forth six, alternative factors to consider in the determination of whether an issue was a non-justiciable political question:

1. A textually demonstrable constitutional commitment of the issue to a coordinate political department; or

2. A lack of judicially discoverable and manageable standards for resolving the issue; or

3. The impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or

4. The impossibility of a court's undertaking independent resolution without expressing a lack of the respect due a coordinate branch of government; or

5. An unusual need for unquestioning adherence to a political decision already made; or

6. The potentiality of embarrassment from multifarious pronouncements by various departments on the question.

These considerations are present in this case. The rule-making clause has been discussed in detail elsewhere in this brief. That clause clearly shows that the issue has been committed to another branch of government. The second issue is that there are no judicially manageable standards for resolving the issue.

The fundamental flaw in this prosecution rests on the premise, reiterated by the lower courts, that it is wrong to use public funds to finance private campaigns. The argument continues that using legislative aides to campaign on state time is wrong because it gives the incumbent an unfair advantage, and requires the public to fund a certain candidate. The job of a senator or assemblyman does not include getting reelected.

But, if this were true, then every senator, judge, governor, or other elected official who ran for reelection would be guilty of misconduct. The reason is simple. Judges, governors, senators, and assemblymen are all public employees. They are all paid by the state or by the county. They all must run for reelection if they wish to stay in office. To be reelected they must campaign and raise money for their reelection efforts. None of these activities fall within the job duties they were elected to do. Thus, any time a state official campaigns, she is using state resources, (i.e., her time) on a private campaign. The current campaign is a telling example. John Kerry, John Edwards, and George Bush are all drawing salaries as senators and the president. Yet each is traveling all over the country campaigning. None of these men is being paid to campaign.

The State may argue that there is a difference between using state resources such as printers, telephones and SDC employees and the time spent by a public official in his pursuit of office. Such an argument is unpersuasive. The money for the senate salaries, the computers, and the SDC staff comes from the taxpayer. The taxpayer is the one being forced to support private campaigns. The only difference is the degree of support being foisted on the taxpayer.

Under the State's theory, the only way for an incumbent to avoid prosecution for misconduct in public office is to take an unpaid leave of absence to campaign, or not seek reelection.

This section demonstrates that there are no judicially manageable standards to resolve the issues presented in this case. If a senator makes a call from her office to talk to a constituent and at the end of the call asks for a donation, she has used state resources for political purposes. If a senator attends a fundraiser instead of attending a floor session that senator has used state resources for political purposes. If a senator spends the entire month of October of an election year campaigning in her home district she has used state resources for a political purpose. These examples underscore the

difficulty in finding a manageable standard as to the point where political work on state time becomes felonious.

IV. THE PROSECUTION OF THIS CASE UNDER WIS. STATS. § 946.12(3) IS UNCONSTITUTIONALLY VAGUE.

The briefing and decisions to date in this case highlight the constitutional issue of vagueness. The State began with the proposition that a violation of the Senate Policy Manual gave rise to liability. (R.1, p. 7; A.App.87). The State then added a number of statutory sections Senator Chvala allegedly violated. The additions were in response to Senator Chvala's Motion to Dismiss to the trial court. The trial court found a duty in Chapters 11, 19, and the Senate Policy Manual. In its Certification Order in the Jensen and Foti matter, a different panel from the District IV Court of Appeals questioned whether any of the statutory bases cited by the prosecution and accepted by the trial court gave rise to criminal liability. (State v. Jensen, 2003 WL 349659). The Attorney General's office added more statutory violations in its briefs to the court of appeals in the Jensen, Foti, and Chvala matters. Finally, the court of appeals settled on the Senate Policy Manual, the guidelines and Wis. Stats. §§ 11.001 and 15.001 as giving rise to a duty under Wis. Stats. § 946.12(3).

None of these sources provide a basis to charge Senator Chvala with a felony.[1]

A. The Senate Policy Manual Does Not Create Duties That May Be The Basis For A Felony Prosecution Under Wis. Stats. § 946.12(3).

The court of appeals ruled that a duty giving rise to criminal liability may be found by reference to the Senate Policy Manual. State v. Chvala, 2004 WI App. 53, 678 N.W.2d 880.

A policy manual has never been used as a basis to impose felony liability against a legislator in Wisconsin. There is no indication anywhere that a violation of the Senate Policy Manual can give rise to felony liability.

The court of appeals based its holding that it could rely upon the Senate Policy Manual on a statement in Judiciary Committee Report of the Criminal Code, Wisconsin Legislative Council, February 1953, Page 176:

> [t]he duty may be imposed by common law, statute, municipal ordinance, administrative regulation, and perhaps other sources.

There are two problems with this approach. First, the section relied on by the court of appeals is the comment to

[1] The statutory sections relied on by the state in its various briefs were not relied on by the court of appeals in its decision. As this is an appeal from the decision of the court of appeals, the body of the brief will address only those bases relied on by the court of appeals. The remaining statutory sections are addressed in A.App.150-158. The pages used for that appendix have been counted against Appellant's page limit.

Wis. Stats. § 946.12(1). Senator Chvala is charged with a violation of Wis. Stats. § 946.12(3). The court's explanation that a comment for one section is applicable to another section is puzzling. The court writes: "Both subsections refer to the same 'duty' which, if violated, may lead to criminal prosecution." Chvala, 2004 WI App. at 13. The duty described by the 1953 statute under subsection 1 read: "a mandatory, non-discretionary, ministerial duty". The duty under subsection 3 concerns the exercise of a "discretionary power inconsistent with the duties of his office". The duties of a state senator cannot all be ministerial, non-discretionary duties. The committee must have viewed the duties as distinct. If the duties enunciated in subsection 1 and 3 were the same there would be no reason to have separate sections, as a violation of one would be a violation of the other.

The committee wrote a comment concerning Wis. Stats. § 946.12(3), and that comment does not reference subsection 1, ministerial duties, or the bases upon which the duty could be found. The plain language of the comment to subsection 3 underscores the committee's differentiation between the duties. The comment reads in part, "Subsection (3) states in effect that an officer or employe must act honestly in performing **duties** or exercising powers which

involve **discretion.**" Judiciary Committee Report on the Criminal Code, Wisconsin Legislative Council, February 1953, p. 176 (emphasis added). The first sentence of the comment to subsection (1) reads:

> "Subsection (1) penalizes a public officer or employe who intentionally refuses or intentionally fails to perform within the time or in the manner required by law a **duty** which is both mandatory and **non-discretionary.**"

Judiciary Committee Report on the Criminal Code, Wisconsin Legislative Council, February 1953, p. 175 (emphasis added).

The second problem with the court of appeals' use of the comment to Wis. Stats. § 946.12(1) is that even if the committee's comment were not confined to ministerial duties, the court of appeals' use of it compares apples to oranges. The Senate Policy Manual is an employee handbook. In fact, the comparable assembly document is called the Assembly Employe Handbook. Under the doctrine of *ejusdem generis*, an employee handbook would not be a source that could create a duty under Wis. Stats. § 946.12(3), because an employee handbook is dissimilar "to those objects enumerated by the preceding specific words." State v. Peters, 263 Wis. 2d 475, 491, 665 N.W.2d 171 (2003).[2]

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[2] The committee understood the doctrine of *ejusdem generis*. It is mentioned in the comments. Judiciary Committee Report on the Criminal Code, Wisconsin Legislative Council, February 1953, p. 176.

An employee handbook is not common law. It is not similar to a statute, municipal ordinance, or an administrative regulation. The common law is developed by years of appellate decisions. Statutes and ordinances must follow statutory processes for adoption that include notice, hearing, signature by executive and publication. Administrative regulations must follow the statutory requirements of the Administrative Procedure Act. See Wis. Stats. Chapter 227 (1953).

An employee handbook, on the other hand, is a document that is developed by an employer. It is used by the employer to regulate employee conduct. Violations of the handbook subject the violator to discipline by the employer, not criminal penalties.

Criminal statutes are to be strictly construed. State v. Wolter, 85 Wis. 2d 353, 364, 270 N.W.2d 230 (Ct. App. 1978). Nonetheless, the court of appeals broadly construed not a statute but a comment to a statute to find a criminal violation. This is unprecedented.

The court of appeals held:

> The failure to carry out a duty contained in a departmental rule cannot be bootstrapped into the felony of misconduct in public office. It is contrary to public policy to convert a departmental disciplinary rule into a crime, except if the departmental rule specifically prohibits some form of criminal conduct.

State v. Dekker, 112 Wis. 2d 304, 312, 332 N.W.2d 816 (Ct. App. 1983). This passage underscores the point that the use of the Senate Policy Manual by the State to form the basis of a felony is improper. The Dekker court properly analyzed the law and its holding should be adopted in this case.

Perhaps more important to the notice analysis is the fact that Dekker was the law at the time that the events giving rise to this prosecution occurred. Senator Chvala was on notice that an employee manual could not be the basis for felony misconduct. A decision by the court of appeals is binding on all citizens because the court of appeals is a unitary court. In re Marriage of Cook v. Cook, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

B. The Policy Statement In Wis. Stats. § 11.001(2) Does Not Create Duties That May Be The Basis For A Felony Prosecution Under Wis. Stats. § 946.12(3).

The court of appeals found a duty breached under Wis. Stats. § 11.001(2):

> An additional source of Chvala's duty as a public official is Wis. Stat. § 11.001(2), which is the declared policy that an incumbent is to not have an unfair advantage over a non-incumbent. Section 11.001(2) states:
>
> This chapter is ... intended to ensure fair and impartial elections by precluding officeholders from utilizing the perquisites of office at public expense

> in order to gain an advantage over non-incumbent candidates who have no perquisites available to them.

Chvala, 2004 WI App. at 19.

This section is not applicable. The intent of the section is to prevent an incumbent officeholder from using the perquisites of his office to gain an advantage over his opponent. For example, a senator could not use state resources to do a campaign mailing against his opponent.

In this case, however, there are six senate races that are identified. All three of the Democratic senators named in Count 9 were non-incumbents.[3] Two of the three Democratic senators named in Count 10 were non-incumbents.[4] Thus, five of the six candidates mentioned were non-incumbents to whom the statute would not apply.

However, the court of appeals attempts to avoid this problem by suggesting that the incumbent was Senator Chvala. The court of appeals reasons that since the election of these candidates would benefit Senator Chvala, Senator Chvala could not use the perquisites of his office to assist them. However, the flaw in the logic is that the statute would only prohibit the use of state funds if the

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[3] The Criminal Complaint (R.1, p. 26, ¶ 69, A.App.106), specifically alleges that Senators Robson, Erpenbach, and Baumgart were non-incumbents. These were the only senators mentioned in Count 9.

[4] Senator Clausing was an incumbent; Senators Hansen and Meyer were not. (Wisconsin Bluebook, 1999).

use of those funds disadvantaged non-incumbents. In other words, during the 2000 elections, state resources could be used for the Hansen-for-Senate campaign, because Hansen was running against an incumbent Republican senator. However, State resources could not be used in the Clausing-for-Senate campaign, because Senator Clausing was running against a non-incumbent. There would be no logical reason for the legislature to have created such a distinction. Moreover, such a distinction would probably violate equal protection of the laws and would be a broad interpretation of a statute to find a criminal violation.

The State does not even allege whether the opponents of the senators named in Counts 9 and 10 were incumbents. This demonstrates that the complaint was not based upon a violation of Wis. Stats. § 11.001(2). Therefore, its inclusion was an afterthought and underscores the State's desperation to discover a duty that Senator Chvala violated. The plain reading of Wis. Stats. § 11.001(2) limits its scope to the use of perquisites by an incumbent against a non-incumbent opponent.

C. Section 15.001(1) Does Not Provide The Basis For The Prosecution Of Counts 7-10.

Section 15.001(1) is found in the chapter entitled "Structure of the Executive Branch". The State and the

court of appeals believe that Senator Chvala should be able to glean duties relative to the legislative branch from this statute. The State and court of appeals cite to the declaration of policy that discusses the function of the legislature. Neither of them include the last sentence of the statute:

> It is a traditional concept of American government that the 3 branches are to function separately, without intermingling of authority, except as specifically provided by law.

The policy declaration states that it is the legislature's job to determine the policy of Wisconsin. The State contends that Chvala's actions are in conflict with that directive. The court of appeals used that directive in conjunction with the rule-making clause of the constitution to conclude that the policy of the people of Wisconsin is expressed by the internal rules of the senate. Chvala, 2004 WI App. at 14-15. The Senate Policy Manual contains rules about moving furniture, smoking, and parking[5]. These rules can hardly be said to be a statement of the people of Wisconsin. The policy declaration in § 15.001(1) does not give notice that working on campaigns is a crime as there

[5] The portion of the policy manual relied on by the State is entitled general information. The court will note that the political activity provision is on the same page as the furniture and office equipment provision and the parking spaces provision.

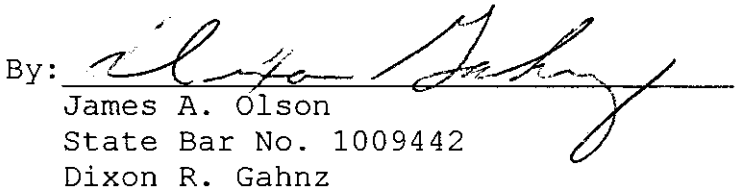
is no penalty provision for its violation, and the statute says nothing about campaigns.

CONCLUSION

For the reasons stated, it is respectfully submitted that the decision of the court of appeals should be reversed, and Counts 7-10 of the criminal complaint should be dismissed.

Dated this 22nd day of July, 2004.

LAWTON & CATES, S.C.

By: 

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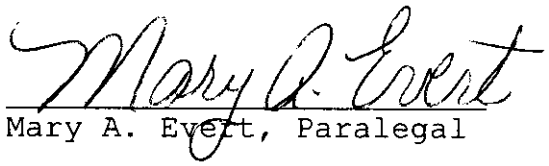
CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stats. §809.19(8)(b) and (c) for a brief produced using the following font:

X Monospaced font: 10 characters per inch, double spaced; 1.5 inch margin on left side and 1 inch margins on the other 3 sides. The length of this brief is 48 pages, 9 of which are in A.App.150-158.

Proportional serif font: Minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is _____ words.

Dated this 22nd day of July, 2004.



Mary A. Evert, Paralegal

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UNDER § 946.12(3), STATS. A.App.150-A.App.158

2004 WI App 53

COURT OF APPEALS DECISION DATED AND FILED

February 12, 2004

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 03-0442-CR

Cir. Ct. No. 02CF002451

STATE OF WISCONSIN

IN COURT OF APPEALS DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CHARLES CHVALA,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Modified and, as modified, affirmed.*

Before Vergeront, Higginbotham and Anderson, JJ.

¶1 HIGGINBOTHAM, J. Charles Chvala, a senator in the Wisconsin Legislature, appeals a circuit court order denying his motion to dismiss Counts Seven through Ten of a criminal complaint, all charging him with felony

misconduct in office, in violation of WIS. STAT. § 946.12(3).[1] Chvala contends § 946.12(3)[2] is unconstitutionally vague and overbroad as applied to this case. He also argues that this prosecution violates WIS. CONST. art. IV, § 16, Wisconsin's speech and debate clause, and violates the separation of powers doctrine.

¶2 We conclude that WIS. STAT. § 946.12(3) is not unconstitutionally vague and overbroad because it provides reasonable notice to a reasonable legislator who is intent on complying with the law that using state resources and state time to engage in campaign activity is unlawful, because it establishes proper standards for adjudication of conduct and because no fundamental First Amendment right is implicated. We also conclude this prosecution does not violate the speech and debate clause of the Wisconsin Constitution. Finally, with the exception of certain activity alleged in the complaint and described in paragraphs 58 and 64 of this opinion, this prosecution does not violate the separation of powers doctrine. Accordingly, with this modification, we affirm.

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[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[2] WISCONSIN STAT. § 946.12 provides, in relevant part:

> Any public officer ... who does any of the following is guilty of a Class I felony:
>
> (3) Whether by act of commission or omission, in the officer's ... capacity as such officer ... exercises a discretionary power in a manner inconsistent with the duties of the officer's ... office ... or the rights of others and with intent to obtain a dishonest advantage for the officer ... or another ....

A.App

BACKGROUND

¶3 Chvala, a Democrat, was elected to the Wisconsin State Senate in 1984. In 1995, his fellow Democrats elected him as the Senate Minority Leader and in 1996 as the Senate Majority Leader. Chvala served as the Majority Leader until this prosecution commenced in 2002, except for a period between April 1998 and January 1999 when he was again the Minority Leader. As the Majority Leader, Chvala was responsible for fundraising for the State Senate Democratic Committee as well as for Democratic State Senators and non-incumbent candidates in high profile races.[3]

¶4 The legislature created partisan caucuses in the 1960s and employed staff to further the purposes of the caucuses. Each party and each house of the legislature had its own caucus. As Senate Majority or Minority Leader, Chvala was responsible for hiring and firing the director of the Senate Democratic Caucus (SDC), who also reported directly to Chvala. The criminal complaint alleges that Chvala was also directly involved in the hiring of SDC staffers and at all times exercised final decision-making authority over this process. The SDC during the relevant time periods maintained state-leased office space in Madison, Wisconsin. The SDC staff consisted of a director, a deputy director, two analysts responsible for maintaining databases, a graphic artist and approximately five policy analysts and a receptionist. All of these employees worked for the State in state-leased offices using state-owned or state-leased equipment.

[3] Although Chvala denies the charges in the complaint, for the purposes of his motion to dismiss, he accepts the allegations as true.

¶5 A criminal complaint was filed on October 17, 2002, charging Chvala with extortion, misconduct in office and violations of various campaign finance laws. Counts Seven through Ten of the complaint charge Chvala with felony misconduct in office, in violation of WIS. STAT. § 946.12(3), for hiring SDC staff and directing their work on various Democratic political campaigns. Chvala filed a motion to dismiss all twenty counts of the criminal complaint. The circuit court denied Chvala's motion to dismiss. With respect to Counts Seven through Ten, the circuit court denied Chvala's motion to dismiss, concluding that § 946.12(3) was not vague because WIS. STAT. Chs. 11 and 19, as well as the Senate Policy Manual, firmly establish that political campaigning is not permitted on state time with state resources. The circuit court rejected Chvala's claim that § 946.12(3) violated the separation of powers doctrine on the same grounds. The circuit court also rejected Chvala's speech and debate clause argument, determining that hiring and directing state employees to conduct campaign activity on state time with state resources was not protected legislative activity and was not an integral part of the legislative process.

¶6 Chvala filed a petition for leave to appeal. We granted leave to appeal, but only for Counts Seven through Ten, concluding that Chvala did not satisfy the criteria for granting leave to appeal on the remaining issues presented in the petition. Consequently, this decision addresses Chvala's appeal only as to Counts Seven through Ten.

A.App

DISCUSSION

Vagueness/Overbreadth

Vagueness

¶7 Chvala contends WIS. STAT. § 946.12(3) is unconstitutionally vague because it fails to give him notice that hiring and directing SDC staff to work on campaigns on state time with state resources violates his "duty" as a state legislator and fails to provide him notice that such actions could result in a felony prosecution for misconduct in office. Chvala argues that the State has failed to identify any statute specifically prohibiting him from engaging in political activity on state time with state resources and that the complaint fails to allege the basis for the duty that Chvala was to have violated. Chvala also argues that the State has failed to cite any statute that expressly creates a duty specific to him as a senator, which, if violated, could result in criminal prosecution.

¶8 The State counters by arguing that Chvala has failed to establish that WIS. STAT. § 946.12(3) as applied to him is unconstitutional beyond a reasonable doubt because the statute provides him with adequate notice that he had a duty to refrain from hiring and directing SDC staff to engage in partisan campaigns using state resources and funds. The State further argues Chvala had a clear fiduciary duty to the public to refrain from using taxpayer dollars to run private political campaigns and that the Senate's own rules prohibit the type of activities in which Chvala was engaged. The State points to WIS. STAT. chs. 11, 12 and 19 as

explicitly establishing Chvala's duty as a public official to refrain from engaging in the conduct for which he faces prosecution[4].

¶9 We review the constitutionality of statutes *de novo*, without deference to the trial court. ***State v. Bertrand***, 162 Wis. 2d 411, 415, 469 N.W.2d 873 (Ct. App. 1991). Statutes enjoy a presumption of constitutionality and we review the statutes so as to preserve their constitutionality. ***Id.*** A party challenging the constitutionality of a statute must demonstrate that it is unconstitutional beyond a reasonable doubt. ***State v. Pittman***, 174 Wis. 2d 255, 276, 496 N.W.2d 74 (1993).

¶10 Whether a statute is unconstitutionally vague as applied is a question of law. ***Pittman***, 174 Wis. 2d at 276. A vagueness challenge must satisfy a two-prong test:

> The first prong of the vagueness test is concerned with whether the statute sufficiently warns a person 'wishing to obey the law that [their] ... conduct comes near the proscribed area.' The second prong is concerned with whether those who must enforce and apply the law may do so without creating or applying their own standards.

Id. (citations omitted). A statute is not unconstitutionally vague "simply because in some particular instance some type of conduct may create a question about its impact under the statute." ***State v. Smith***, 215 Wis. 2d 84, 91-92, 572 N.W.2d 496 (Ct. App. 1997) (citation omitted).

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[4] The State first argues Chvala lacks standing to challenge WIS. STAT. § 946.12(3) on vagueness grounds, *see* ***State v. Tronca***, 84 Wis. 2d 68, 87, 267 N.W.2d 216 (1978), because Chvala was aware "of the criminality of his conduct and the consequences." ***Id.*** The crux of this case is that § 946.12(3) failed to give Chvala notice that his alleged conduct could lead to a felony prosecution. Because we address the issue squarely, we need not address the more tangential issue of standing.

> The ambiguity must be such that 'one bent on obedience may not discern when the region of proscribed conduct is neared, or such that the trier of fact in ascertaining guilt or innocence is relegated to creating and applying its own standards of culpability rather than applying standards prescribed in the statute or rule.'

Pittman, 174 Wis. 2d at 277 (citation omitted). A person whose conduct intentionally comes close to "an area of proscribed conduct" assumes the risk that his conduct may fall into the area of proscribed conduct. ***State v. Courtney***, 74 Wis. 2d 705, 711, 247 N.W.2d 714 (1976) (citations omitted). A criminal statute is not vague if "by the ordinary process of construction, a practical or sensible meaning may be given to the ... [law] ...." ***State v. Arnold***, 217 Wis. 340, 345, 259 N.W. 843 (1935).

¶11 We first determine, under the first prong of ***Pittman***, whether WIS. STAT. § 946.12(3) sufficiently warns Chvala, as a legislator and a reasonable person wishing to obey the law, that his alleged conduct approaches the proscribed activity. Section 946.12(3) prohibits the exercise of a discretionary power in a manner inconsistent with the duties of an officer's office. The existence of a duty is a question of law. ***State v. Schwarze***, 120 Wis. 2d 453, 456, 355 N.W.2d 842 (Ct. App. 1984).

¶12 Chvala contends no statute specifically identifies his duty as a legislator and the State has not identified any statute establishing that duty. Chvala also argues the complaint does not specifically state what duty has been transgressed leading to this prosecution. The State argues Chvala's duty as a public official and as a state legislator is determined by various sources, including Senate rules and policies, state statutes and his common law fiduciary duty to the public to use public funds for public purposes, all of which, the State claims, make it clear that managing private campaigns on state time with state resources is

unlawful.[5] Chvala asserts that the statutes relied upon by the State as establishing his "duty" do not apply. Chvala criticizes the State for "cobbling" together these statutes and ethics codes, as well as the State Senate Policy Manual, to create his duty. The State explains that the legislature prescribed a broad scope of conduct by enacting WIS. STAT. § 946.12(3), which may be interpreted in a flexible manner so as to bring the alleged conduct here under the statute's constrictions.

¶13 We conclude the arguments Chvala asserts are without merit. Chvala cites no authority for the proposition that we are confined to a specific statute or to one specific source to ascertain his duty as a legislator. Moreover, "[t]he duty [under WIS. STAT. § 946.12(1)] may be imposed by common law, statute, municipal ordinance, administrative regulation, and perhaps other sources ...." *Judiciary Committee Report on the Criminal Code*, Wisconsin Legislative Council, February 1953, p. 176. Although this language pertains to § 946.12(1), we find no reason to not extend it to § 946.12(3). Both subsections refer to the same "duty" which, if violated, may lead to criminal prosecution. We therefore conclude that a legislator's duty under § 946.12 may be determined by reference to a variety of sources, which in this case, includes the Senate Policy Manual, applicable statutes and legislative rules and guidelines. *See* ***State v. Tronca***, 84 Wis. 2d at 80 ("the powers of a public official ... are not limited to expressly conferred powers but apply to *de facto* powers which arise by custom and usage ...."); *see also* ***United States v. Rostenkowski***, 59 F.3d 1291, 1305 (D.C. Cir. 1995) (a United States congressman may be held to the law and rules of

[5] Because we conclude Chvala's duty as a senator for purposes of prosecution under WIS. STAT. § 946.12(3) may be determined by sources other than his common law fiduciary duty, we need not address this part of the State's argument. Furthermore, our analysis is not limited to the sources identified by the State.

Congress). We now turn our attention to determine the scope of Chvala's duty as a legislator.

¶14 The general duty of a legislator is to determine "policies and programs and review of program performance for programs previously authorized ...." WIS. STAT. § 15.001(1). We examine other sources of Chvala's duty in light of this general declaration.

¶15 The Senate created the Senate Policy Manual pursuant to its authority to establish self-regulating internal rules of conduct. *See* WIS. CONST. art. IV, § 8.[6] The State contends the following section of the Senate Policy Manual creates a duty for senators:

> No political activity is permitted during working hours. No State facility, office equipment, supplies, etc. may be used for political purposes at any time. During non-office time, employes may exercise their citizenship rights by political activity and community involvement.

(Senate Policy Manual I-14, R.14, 430). Chvala asserts this rule fails to provide fair notice that using public funds and resources for partisan campaigns violates the statute because the Senate Policy Manual does not define "political activity." The State points us to a document issued by Donald Schneider, Clerk of the Wisconsin Senate, entitled "Wisconsin State Senate Guidelines for Incumbents"

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[6] WISCONSIN CONST. art. IV, § 8 provides:

> Each house may determine the rules of its own proceedings, punish for contempt and disorderly behavior, and with the concurrence of two-thirds of all the members elected, expel a member; but no member shall be expelled a second time for the same cause.

(Guidelines)[7], which is distributed in May of each election year to Senate members and to WIS. STAT. § 11.01(16)(a)[8] as establishing that "political activity" and "political purpose" refer to political campaign activity.

¶16 We conclude that the terms "political activity" and "political purpose" as used in the Senate Policy Manual plainly include political campaign activity. It is unreasonable to equate "political activity" and "political purpose" with "legislative activity" as urged by Chvala. Rather, it is apparent from the context within which these words are used that the Senate Policy Manual and the Guidelines restrict the type of activity at issue in this case: political campaigning with public resources.[9]

¶17 Chvala claims he was aware of the potential for being disciplined for violating Senate rules but was not aware he could face felony prosecution for violating WIS. STAT. § 946.12(3). Whether Chvala was aware that he could face felony prosecution for violating the statute is irrelevant. The vagueness challenge is based on what a reasonable person who is intent on obeying the law can be expected to understand what the law prohibits. Therefore, "[t]he defendant's

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[7] The Guidelines state that in November of 1977, "the Senate established a written policy that State equipment and supplies are strictly for conducting official state business and are not to be used at all for political campaign activities."

[8] The State's citation to WIS. STAT. § 11.01(16)(a) is inaccurate. The proper citation is WIS. STAT. § 11.01(16), which states in relevant part: "An act is for 'political purposes' when it is done for the purpose of influencing the election or nomination for election of any individual to state or local office ...."

[9] Chvala refers to the Senate Chief Clerk's definition of the purpose of the legislative caucus as supporting his argument that the Senate Policy Manual fails to provide him with sufficient notice that he could be prosecuted for misconduct in public office for not complying with the rule. However, this document was prepared after Chvala allegedly committed the misconduct charged here and is therefore irrelevant.

ignorance of the law or negligence as to the existence of the law is not a defense." ***State v. Collova***, 79 Wis. 2d 473, 488, 255 N.W. 2d 581 (1977).

¶18 Chvala is charged with hiring and directing SDC employees to conduct campaign activities and the complaint contains sufficient facts to establish that state offices, equipment and supplies were used on these campaigns. Chvala clearly had a duty as a legislator to steer clear of this proscribed area of conduct.

¶19 An additional source of Chvala's duty as a public official is WIS. STAT. § 11.001(2), which is the declared policy that an incumbent is to not have an unfair advantage over a non-incumbent. Section 11.001(2) states:

> This chapter is ... intended to ensure fair and impartial elections by precluding officeholders from utilizing the perquisites of office at public expense in order to gain an advantage over nonincumbent candidates who have no perquisites available to them.

Chvala was the Democrat's leader in the Senate from 1995 through 2002. In this capacity Chvala was also the leader of the SDC. Chvala, as the Majority or Minority Leader, hired, directed and fired SDC employees. He had ultimate control over SDC employee work assignments and controlled their wages. The complaint alleges Chvala used his power and authority, which are perquisites of his office as Senate Majority or Minority Leader, at public expense, in order to gain an advantage over nonincumbent candidates by hiring and directing SDC employees to engage in partisan campaign for incumbent Senators and non-incumbent senatorial candidates. A reasonable legislator can easily conclude by the language of this statute that directing SDC staff to engage in political campaign activity with state resources is inconsistent with the rights of others and is intended to obtain a dishonest advantage. We conclude the State may rely on

§ 11.001(2) as a source of Chvala's duty as a legislator to prosecute him for criminal misconduct in office.

¶20 Chvala's duty as a legislator is sufficiently delineated in the Senate Policy Manual, in the Guidelines issued by Senate Chief Clerk Schneider in May of every election year and WIS. STAT. § 11.001(2) such that a reasonable person would be aware that using discretionary powers to obtain a dishonest advantage over others by waging partisan political campaigns with state resources violates one's duty as a public official. We conclude Chvala has not satisfied the first prong of the ***Pittman*** test because he had notice that directing SDC staff to work on political campaigns with state resources violated his duty as a public official, and therefore violates § 946.12(3).

¶21 The second prong of the ***Pittman*** test for vagueness, whether those who must enforce and apply the law may do so without creating or applying his or her own standards, has also not been met. A clear duty has been established prohibiting Chvala from engaging in the conduct alleged in Counts Seven through Ten. The standards are clear for those who enforce and apply WIS. STAT. § 946.12(3): Chvala's duty as a legislator is to not direct and manage SDC employees to run political campaigns. This standard is unambiguous and can be easily applied. Accordingly, we conclude § 946.12(3) is not unconstitutionally vague as applied to this case.

Overbreadth

¶22 Chvala next argues WIS. STAT. § 946.12(3) is unconstitutionally overbroad as applied to the facts of this case. He maintains that the statute criminalizes legitimate legislative activity and, as a result, will have a chilling effect on legislators in serving their constituents. Chvala asserts that this

prosecution "implicates core First Amendment values at every turn," claiming that a legislator and her or his staff speak, assemble, and petition as part of their duties every day. The State counters by arguing that under ***Tronca*** the *facial* validity of § 946.12(3) has been upheld against a claim of overbreadth and therefore Chvala's claim of overbreadth must fall. In the alternative, the State argues that the prohibitions of § 946.13(3), as applied to this case, regulate conduct, not speech. Finally, the State contends that should we find the statute susceptible to First Amendment scrutiny, Chvala's arguments must still fall because the charged violations of § 946.12(3) are reasonable, content-neutral restrictions. Because our conclusion that § 946.12(3) regulates conduct and not speech is dispositive, we do not take up the State's other arguments.

¶23 An overbreadth challenge to a statute invokes the protections of the First Amendment to the United States Constitution. *See generally* ***State v. Stevenson***, 2000 WI 71, 236 Wis. 2d 86, 613 N.W.2d 90. Invalidation of a statute on overbreadth grounds is "strong medicine" that is "employed by the Court sparingly and only as a last resort." ***State v. Janssen,*** 219 Wis. 2d 362, 373, 580 N.W.2d 260 (1998), *quoting* ***Broadrick v. Oklahoma***, 413 U.S. 601, 613 (1973). "A statute is overbroad when its language, given its normal meaning, is so sweeping that its sanctions may be applied to constitutionally protected conduct which the state is not permitted to regulate." ***Janssen***, 219 Wis. 2d at 374 (citation omitted). The overbreadth doctrine is grounded in the right to substantive due process and "has the effect of preventing the limiting, by indirection, of constitutional rights." ***Tronca,*** 84 Wis. 2d at 89 (citation omitted).

¶24 WISCONSIN STAT. § 946.12(3) is aimed at specific conduct, ***Tronca***, 84 Wis. 2d 89, which, in this case, goes to the use of state resources for conducting political campaigns. Legislators or their employees are not prohibited from doing

or saying anything related to participation in political campaigns so long as they do not use state resources for that purpose. Moreover, legitimate legislative activity is not constrained by this statute. The line between what is "legislative activity" and what is "political activity" is sufficiently clear so as to prevent any confusion as to what conduct is prohibited under this statute. To the extent legitimate legislative speech is affected, it is purely secondary to the offensive conduct of campaigning on state time with state resources. *See* ***State v. Robins***, 2002 WI 65, ¶43, 253 Wis. 2d 298, 646 N.W.2d 287.

¶25 Chvala's overbreadth attack is premised on what he considers to be the likely occurrence of two scenarios or hypotheticals. In the first hypothetical, Chvala claims a state senator would violate WIS. STAT. § 946.12(3) by hiring a person to work as a part-time legislative aide and as a part-time campaign fundraiser. In his second hypothetical, Chvala claims a senator could face charges under § 946.12(3) by using research conducted by a legislative aide for legitimate legislative business against a rival's opponent in an upcoming election. We do not agree with the logic of either hypothetical.

¶26 In the first hypothetical, the duties of a legislative aide are considerably different than those of a campaign fundraiser. A legislator such as Chvala should and would know the difference. Moreover, the Senate Policy Manual and the Guidelines issued by Senate Chief Clerk Donald Schneider provide clear guidance as to when the lines between the two positions are being crossed. This hypothetical does not present any scenario under which an individual's fundamental right to free speech is impinged.

¶27 Similarly, the fruits of an aide's research conducted for legitimate legislative activity may be available to anyone, including the public, upon a proper

open records request. Certainly, information and data collected by research is public information and can be disseminated to anyone regardless of the purpose or use of the information.

¶28 We cannot conceive of any circumstance, based on these hypotheticals, that a senator could be prosecuted for engaging in legitimate legislative activity. No prosecutor could reasonably or credibly apply the statute to legislative activity of a legitimate nature. Under the facts of this case, WIS. STAT. § 946.12(3) would apply only if the senator engaged in conduct involving the use of state resources on state time for activities falling outside legitimate legislative activity. We, therefore, conclude that § 946.12(3) is not unconstitutionally overbroad.

Speech and Debate Clause

¶29 Turning to Chvala's next argument, he contends that he is protected from prosecution under the speech and debate clause of the Wisconsin Constitution, WIS. CONST. art. IV, § 16.[10] Chvala claims legislative privilege and immunity under art. IV, § 16 from inquiry into acts integral to the legislative process: personnel decisions involving SDC and legislative staff. The State disagrees, contending that operating partisan campaigns on state time with state resources is not an integral part of the legislative process and therefore the privilege does not apply; in addition, even if Chvala's personnel decisions are arguably legislative in nature, art. IV, § 16 does not protect this activity because hiring and managing state employees to direct political campaigns contravenes the

[10] WISCONSIN CONST. art. IV, § 16 provides: "No member of the legislature shall be liable in any civil action, or criminal prosecution whatever, for words spoken in debate."

intent of the speech and debate clause. In the alternative, the State contends Chvala may still face prosecution because a specific statute gives the executive and judiciary branches the right to inquire into his personnel decisions.

¶30 Whether a statute violates the speech and debate clause presents a question of constitutional interpretation. *See generally* ***State v. Beno***, 116 Wis. 2d 122, 341 N.W.2d 668 (1984). The framers' objective in enacting WIS. CONST. art. IV, § 16 was "to ensure the independence of the legislature and the integrity of the legislative process by precluding the possibility of intimidation or harassment of members of the legislature." ***Beno***, 116 Wis. 2d at 141. "The framer's judgment was that the courts are not the proper place to hold legislators accountable as elected representatives for 'words spoken in debate.'" ***Id.*** at 141-42.

¶31 Recognizing the necessity of protecting legislators from attack based on legitimate legislative activity, the framers of the Wisconsin Constitution constructed a firewall to ensure legislators are not unreasonably constrained from engaging in activities "necessary for the adequate functioning of the state legislative body." ***Id.*** at 142. WISCONSIN CONST. art. IV, § 16 protects legislators from adverse judgments, whether civil or criminal, and from questioning in judicial proceedings. ***Beno***, 116 Wis. 2d at 142. The protections of art. IV, § 16 extend to matters integral to the legislative process and to the consideration of proposed legislation and other matters "which are within the regular course of the legislative process." ***Beno***, 116 Wis. 2d at 143-44. "[T]o be protected the legislative activity must be related closely to the purposes justifying the protection." ***Id.*** at 144.

¶32 Not all activities of a legislator are protected by WIS. CONST. art. IV, § 16 insofar as that activity is not "an integral part of the deliberative and

communicative processes ...." ***Gravel v. United States***, 408 U.S. 606, 625 (1972); *see also* ***Beno***, 116 Wis. 2d at 142. "The constitution literally protects the member from liability for 'words spoken in debate.' The clause thus focuses upon matters occurring in legislative deliberations." ***Beno***, 116 Wis. 2d at 142. The Wisconsin Supreme Court undertook a historical review of art. IV, § 16, acknowledging that

> [t]he court's task of defining the bounds of the legislative privilege is difficult. The court must ensure that legislative privileges are broad enough to protect the integrity of the legislative process, but not so broad as to endow a legislator with unlimited absolute personal immunity from substantive liability or from any obligation to testify in a judicial proceeding. Judicial action may be needed to serve broad public interests, as when the court acts not in derogation of the separation of powers but to maintain the proper checks and balances or to vindicate the public interest.

Beno, 116 Wis. 2d at 142-43. Thus, art. IV, § 16 does not bar courts from exercising jurisdiction over legislators. ***Beno***, 116 Wis. 2d at 142. While legislative acts are protected by the speech and debate clause, political acts are not. *See* ***United States v. Brewster***, 408 U.S. 501, 528-29 (1972). Legislators regularly engage in activities that fall outside of the legislative process and are inherently political in nature, such as constituent contact, the issuance of press releases, speech making and newsletter mailings to constituents and others. These activities have been held as not protected by the United States speech and debate clause. ***Id.*** at 512. We thus consider whether Chvala is protected from judicial and executive examination of his conduct as alleged in the complaint pursuant to art. IV, § 16.

¶33 In our analysis, however, we are not bound by the construction given the speech and debate clause of the United States Constitution by the United States Supreme Court in interpreting WIS. CONST. art. IV, § 16. ***Beno,*** 116 Wis. 2d at 134. Chvala supports his arguments by reference to opinions issued by the United

States Supreme Court and other federal courts. The two speech and debate articles differ in both language and focus, with art. I, § 6 of the United States Constitution protecting a federal legislator from being "questioned in any other place," "for any speech or debate in either house," and art. IV, § 16 of the Wisconsin Constitution providing that members will not be "liable in any civil action, or criminal prosecution whatever, for words spoken in debate." Thus, because of the different language between the federal and state constitutions, there is no "clear implication as to the meaning of the state clause" by construing the federal speech and debate clause. ***Beno***, 116 Wis. 2d at 136. To the extent we refer to federal case law, we do so as a means of illuminating our analysis. However, we are not bound by the conclusions made in those decisions.

¶34 We now consider whether hiring, directing and managing legislative caucus staff to oversee political campaigns is protected by WIS. CONST. art. IV, § 16. Chvala first argues that ***Beno*** stands for the proposition that to protect against executive and judicial harassment of the legislature, art. IV, § 16 should apply broadly to protect the legislators not only from adverse civil and criminal judgments but also from mere questioning in a judicial proceeding. He contends that this section reaches "matters that are an integral part of the processes by which members of the legislature participate" with respect to either of two broad categories of activities: (1) "the consideration of proposed legislation," or (2) "other matters within the regular course of the legislative process."

¶35 Chvala claims that support for his arguments can be found in ***Browning v. Clerk, United States House of Representatives,*** 789 F.2d 923 (D.C. Cir. 1986), where the Court held that "if the employee's duties are an integral part of the legislative process, such that they are directly assisting members of Congress in the 'discharge of their functions,' personnel decisions affecting them

are correspondingly legislative and shielded from judicial scrutiny." ***Id.*** at 929. Chvala contends that the description of the caucus job responsibilities is overwhelming evidence of the integral part that the caucus employees play in the legislative process. He argues "that SDC employees who are charged with policy-making responsibility are vital to the legislative process, and thus decisions relating to their employment are privileged under the speech or debate clause." Chvala insists that legislative hiring and firing decisions must be viewed through the lens of the speech and debate clause.

¶36 Chvala also claims he is being criminally charged because of job duties he allegedly included in the SDC positions at issue here and because of work assignments he gave to SDC employees. He argues that these allegations go to the core of the speech and debate clause because his ability to assign tasks and job duties to his legislative and caucus staff is "within the regular course of the legislative process." Chvala contends that using SDC staff as political operatives is part of the legislative process that the speech and debate clause was designed to protect.

¶37 The State counters that WIS. CONST. art. IV, § 16 does not encompass political activities. First, it argues that under ***Beno*** the supreme court emphasized that not all conduct is protected by the speech and debate clause. Citing to ***Gravel***, the State asserts that the speech and debate clause protects words and actions occurring only in legislative deliberations and matters properly within the jurisdiction of the legislature. The State contends that Chvala's activities, as alleged in the complaint, do not fall within the legislative sphere and are not integral to the legislative process. The State points out that Chvala has not demonstrated how his activities in hiring and directing SDC staff to conduct political campaigns with state resources and on state time "relate to either the

consideration of proposed legislation or other matters which are within the regular course of the legislative process." We are persuaded by the State's arguments.

¶38 We agree that as a legislator, Chvala is protected by the speech and debate clause for his personnel decisions that serve the important tasks undertaken by a legislator. We are mindful that it would be inappropriate to scrutinize Chvala's employment decisions that further his legitimate duties as a legislator. The speech and debate clause prevents judicial intrusion into areas uniquely legislative.

¶39 The Wisconsin Supreme Court, however, has already determined that legislators are subject to judicial action. ***Beno***, 116 Wis. 2d at 142. Chvala is not being prosecuted for his legislative acts or for personnel decisions integral to the execution of those acts. We read Counts Seven through Ten as not requiring testimony regarding his legislative acts. However, we do not construe WIS. CONST. art. IV, § 16 as preventing judicial and executive inquiry into personnel decisions made by a legislator that appear on the face of the criminal complaint to violate WIS. STAT. § 946.12(3). Here, the criminal complaint specifically identifies personnel decisions made by Chvala that bear no resemblance and are not even tangential to "the *due functioning* of the legislative process." ***Browning***, 789 F.2d at 929 (citation omitted). The speech and debate clause of the Wisconsin Constitution serves as no bar to Chvala's prosecution under § 946.12(3).

¶40 We also conclude that Chvala's reliance on ***Browning*** is misplaced. The facts of that case are distinguishable from this one in that the duties performed by the court reporter dismissed by a member of Congress were integral to the legislative process. ***Id.*** at 929. However, in this case, the allegations in the

complaint are that SDC and legislative staff members directed by Chvala to run political campaigns were not engaged in any legitimate legislative duties.

¶41 We conclude that WIS. CONST. art. IV, § 16 does not protect the activities alleged in the complaint. It is difficult to conceive how directing and managing state employees to engage in private political campaign activity can be construed as activity integral to the legislative process. By its very nature, engaging in campaign activity is political. Chvala is alleged to have hired a person ostensibly as a legislative aide whose sole purpose was to manage a political campaign. Chvala is also charged with attempting to hire another individual for the same purpose and with directing SDC staff as they worked on various private campaigns. These allegations go to conduct which, if proven, fall far outside of "what is necessary to preserve the integrity of the legislative process." ***Brewster***, 408 U.S. at 517. Running partisan campaigns with public funds and resources is not "necessary for the adequate functioning of the state legislative body." ***Beno***, 116 Wis. 2d at 142.

Separation of Powers

¶42 Finally, Chvala contends that he is being prosecuted under WIS. STAT. § 946.12(3) in violation of the separation of powers doctrine. He first argues that under WIS. CONST. art. IV, § 8, the Senate has the exclusive power to regulate, police and discipline its own members. Chvala also claims that consideration of whether a particular activity is "legislative" or "political" is a non-justiciable "political question" and is therefore beyond the court's inquiry.

¶43 The State counters that the Senate has established a rule creating the duty to refrain from running political campaigns with public resources by enacting WIS. STAT. § 946.12(3), through the Senate Policy Manual, the Guidelines and

WIS. STAT. chs. 11, 12 and 19. The State asserts that Chvala's arguments put him beyond the law. It further argues that the official misconduct charges in this case are justiciable because each charge rests on unambiguous legal standards and does not interfere with any unique function of the legislature.

¶44 Whether a statute violates the doctrine of separation of powers presents a question of law. ***Barland v. Eau Claire County***, 216 Wis. 2d 560, 572, 575 N.W.2d 691 (1998). "The doctrine of separation of powers, while not explicitly set forth in the Wisconsin constitution, is implicit in the division of governmental powers among the judicial, legislative and executive branches." ***State ex rel. Friedrich v. Dane County Circuit Court***, 192 Wis. 2d 1, 13, 531 N.W.2d 32 (1995). "The Wisconsin constitution creates three separate coordinate branches of government, no branch subordinate to the other, no branch to arrogate to itself control over the other except as is provided by the constitution, and no branch to exercise the power committed by the constitution to another." ***State v. Holmes***, 106 Wis. 2d 31, 42, 315 N.W.2d 703 (1982). "Each branch has a core zone of exclusive authority into which the other branches may not intrude." ***State ex rel. Friedrich***, 192 Wis. 2d at 13. In these core areas, "*any* exercise of authority by another branch of government is unconstitutional." ***Barland***, 216 Wis. 2d at 573-74 (citation omitted).

¶45 However, the majority of governmental powers lie within areas of shared authority, where the powers of the branches overlap. ***Id.*** at 573. "In these areas of 'shared power,' one branch of government may exercise power conferred on another only to an extent that does not unduly burden or substantially interfere with the other branch's exercise of power." ***Id.***

¶46 Chvala contends the legislature possesses the "core zone of exclusive authority" in determining the proper application of its rules to its own members, an area not to be intruded upon by the executive or judiciary branches of government. In furthering this proposition, Chvala relies on the supreme court's ruling in ***State ex rel. La Follette v. Stitt***, 114 Wis. 2d 358, 338 N.W.2d 684 (1983), as establishing an absolute bar to the judiciary interpreting legislative rules. The State argues neither WIS. CONST. art. IV, § 8 nor ***Stitt*** applies to this case because Chvala is not being prosecuted for mere "errors, nonfeasance or questionable procedure" and neither the executive nor the judiciary is intruding into the Senate's ability to "determine the rules of its own proceedings." Chvala, the State points out, is facing prosecution because he violated a criminal statute, namely, WIS. STAT. § 946.12(3).

¶47 Chvala misconstrues the court's holding in ***Stitt***. One of the issues before the ***Stitt*** court was whether the court had the authority to determine whether the legislature complied with its own internal operating rules or procedural statutes in the course of enacting legislation. ***Id.*** at 364. The court was reluctant to do so because of the separation of powers doctrine and comity. ***Id.*** at 364-65.

¶48 This case presents an entirely different issue. The court is not being asked to enforce legislative rules governing the enactment of legislation. Rather, the court is being asked to enforce a penal statute that relates to the duties of a legislator and are relevant insofar as it gives affected persons notice of those duties.

¶49 We conclude that examination of the Senate Policy Manual and the Guidelines to determine whether Chvala violated his duty as a legislator does not intrude into the legislature's authority to establish its own rules of conduct and to

discipline its members for any violation thereof. Chvala is not facing prosecution for violating the Senate's internal rules but for having committed criminal misconduct in office.

¶50 Chvala finally argues that a determination of whether a particular activity is legislative or political requires an inquiry into the interworkings of a senator and a staff member, which is a "political question" and is therefore non-justiciable under ***Baker v. Carr***, 369 U.S. 186 (1962). In ***Baker***, the United States Supreme Court considered the justiciability of claims implicating the political question doctrine. ***Id.*** at 209. The Supreme Court noted that various formulations of the political question doctrine involved a function of the separation of powers. ***Id.*** at 210-11. The Supreme Court held that an issue is non-justiciable if "prominent on the surface" of that issue it finds:

> [1] A textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it, or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of the government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217. The first and second factors are implicated in this case.

¶51 As for the first factor, Chvala contends that because the State is prosecuting him based, in part, on a Senate rule, to proceed with the prosecution violates WIS. CONST. art. IV, § 8. He simply repeats the argument already set forth above pertaining to restrictions on the Court's ability to interpret legislative rules. For the reasons already stated we reject Chvala's arguments on this issue.

¶52 Chvala's primary argument focuses on the second ***Baker*** factor. Chvala contends there are no judicially manageable standards to prosecute him under WIS. STAT. § 946.12(3). Although not clearly argued by him, Chvala's argument appears to relate to whether the rule prohibiting engaging in political campaign activity is sufficiently ambiguous so as to be non-justiciable. *See* ***United States v. Rostenkowski,*** 59 F.3d 1291, 1306 (D.C. Cir. 1995). To phrase the issue differently, may a court interpret an internal legislative rule to determine criminal liability if, when applied to the facts of the specific case, the rule is not ambiguous? We conclude it can.

¶53 Although we are not bound by ***Rostenkowski***, we consider the analysis employed by the court to be sound, and we adopt it here. Congressman Daniel Rostenkowski was prosecuted for misappropriation of public funds by paying staff members to perform personal services for him. ***Id.*** at 1294. Rostenkowski moved to dismiss these charges because the prosecution was based on an interpretation of the Rules of the House of Representatives, which, he argued, violated the Rulemaking Clause of the United States Constitution and the separation of powers doctrine. ***Id.*** at 1306. The federal Rulemaking Clause is similar to WIS. CONST. art. IV, § 8 in that it empowers Congress to "determine the rules of its proceedings, punish its members for disorderly behaviour, and, with the concurrence of two-thirds, expel a member." U.S. CONST. art. I, § 5. The court noted that the Government would likely rely upon the House Rules to prove the criminal allegations. ***Rostenkowski***, 59 F.3d at 1305. Rostenkowski argued that the House Rules do not provide a "judicially discoverable and manageable standard for" determining whether his use of federal funds was authorized or not, therefore requiring the court to determine policy. ***Id.*** at 1306. The ***Rostenkowski*** court noted, "a sufficiently ambiguous House Rule is non-justiciable." ***Id.***

However, the court determined it would be appropriate for the judiciary to interpret House Rules where "a particular House Rule is sufficiently clear that we can be confident of our interpretation ...." ***Id.*** Thus, where "a court cannot be confident that its interpretation is correct," the court will not interpret the Rule. ***Id.*** The court then proceeded to review the individual counts in the indictment to determine whether the trial court would be required to interpret ambiguous House Rules. ***Id.*** at 1307.

¶54 The situation before us is similar. The State is relying, in part, on a Senate rule as stated in the Senate Policy Manual and a rule stated in the Guidelines to determine whether Chvala violated his discretionary duty as a public official by directing caucus and legislative staff to run political campaigns. Following the analysis in ***Rostenkowski***, we examine Counts Seven through Ten to determine whether the trial court will be required to interpret ambiguous Senate rules.

¶55 Count Seven of the criminal complaint charges Chvala with misconduct in public office because he hired Wendy Kloiber "as a State employee for the purposes of having Wendy Kloiber conduct campaign activities for State Senate Democratic Candidates." Chvala argues "whether a particular activity is political or legislative is a fact issue that would require a jury to consider the interworkings of a senator and a staff member." We disagree. Chvala is charged with having violated his duty to refrain from operating political campaigns on state time with state resources. The Senate Policy Manual and the Guidelines establish a clear duty on the part of legislators to refrain from using state resources on state time for political campaigning. These rules are not ambiguous.

¶56 We now consider whether the activities allegedly performed by Kloiber at Chvala's direction identified in Count Seven can clearly be classified as "conducting campaign activities." Kloiber is alleged to have been hired as a analyst in the SDC in June of 1999 for the specific purpose of running "the re-election race of then State Senator Alice Clausing." Chvala and Andy Gussert, then the Director of the Senate Democratic Caucus, interviewed Kloiber. Chvala, who allegedly retained sole control over the hiring and managing of SDC staff, hired her. Kloiber stated that Gussert and Chvala discussed with her the performance of other duties but that it was made clear that her number one priority would be running Senator Clausing's re-election campaign.

¶57 The complaint alleges that one of Kloiber's first assignments was to set up a fundraiser for Senator Clausing. Gussert confirmed that Kloiber was hired specifically to run Senator Clausing's re-election campaign because Chvala "believed that a woman needed to run Alice Clausing's campaign." Kloiber began working on Clausing's campaign as part of her duties as an employee of the SDC. She claims to have performed legitimate legislative duties, such as constituent relations, but believes, in retrospect, that duties such as fundraising and opposition research were purely political work and improper for state employees.

¶58 The Senate Policy Manual clearly prohibits legislative employees from engaging in political activities on state time using state resources. Senate Chief Clerk Schneider's Guidelines, issued every May of an election year, also clearly prohibit this type of conduct. The criminal complaint unambiguously alleges that Chvala hired Kloiber to conduct a political campaign, which clearly violates both the Senate rule and the Guidelines. However, whether performing "opposition research" is in itself "political activity" is not free from doubt. We therefore conclude that evidence that Kloiber conducted opposition research does

not allege a justiciable violation of WIS. STAT. § 946.12(3). However, in all other respects, Count Seven alleges a violation of § 946.12(3) that is justiciable.

¶59 Count Eight of the criminal complaint charges Chvala with Misconduct in Public Office because he offered state employment in the SDC to Heather Colburn "for the purposes of having Heather Colburn conduct fund-raising activities for State Senate Democratic candidates ...." The facts in the complaint allege that Colburn was recruited to work as a political fundraiser for the SDC during the summer of 1999 by SDC Director Gussert and participated in an interview with Gussert in September or October of 1999. Colburn claims Gussert told her she would be a full-time fundraiser at the SDC. Colburn interviewed with Gussert and eventually with Chvala at his downtown law office. Colburn said that Chvala made it clear that she was to be hired as a full-time fund-raiser for other Democratic candidates while working for the SDC. Chvala explained to her his approach to fundraising as well as how other Democratic candidates raised money. He also explained to her what her role as a fundraiser would be and discussed her fundraising background. Colburn stated it was clear to her that she was being hired as a full-time fundraiser for the SDC and not as a policy analyst. Colburn stated she knew nothing about legislative policy or how to perform other "legitimate" work for the SDC. Her entire background involved political fundraising. Colburn stated Chvala discussed with her how he assisted women in becoming elected. Gussert eventually offered Colburn the job. She rejected the offer.

¶60 Gussert claims he and Chvala discussed hiring a fundraiser for the SDC and interviewed Colburn for the position. Gussert also claims Chvala told Colburn that her first priority was fundraising but that she may have to do some

policy work. Gussert said that Chvala offered Colburn the job and reiterated that Chvala made all hiring decisions at the SDC.

¶61 The Senate Policy Manual and the Guidelines clearly prohibit Chvala from hiring individuals to engage in political campaign activity on state time using state resources. Therefore, Count Eight alleges a violation of WIS. STAT. § 946.12(3) that is justiciable.

¶62 Counts Nine and Ten allege that Chvala, from July 1998 through November 1998 and from July 2000 through November 2000, engaged in Misconduct in Public Office "by directing employees of the Senate Democratic Caucus to participate and manage the campaigns of Democratic candidates for the Wisconsin State Senate on State of Wisconsin time and using State of Wisconsin resources ...." The complaint makes the following relevant factual allegations.

¶63 Joanna Richard was Director of the SDC from November of 1995 until January 3, 1999; Richard was hired by Chvala. Richard was also hired by Chvala to be the Executive Director of the State Senate Democratic Committee, which has the primary purpose of assisting Democratic candidates in becoming elected to the Wisconsin Senate and promoting the Democratic agenda. Richard, as Director of the SDC, managed ten or eleven employees, including a graphics person, some data people, legislative analysts and others to work on computers. When these people were hired, it was made clear that in addition to "working for the State" they would also be working on political campaigns for Democratic candidates.

¶64 Work was divided up by committees and by "targets." "Targets" referred to state senate races that Chvala determined important. Richard explained that Chvala identified the targets for the SDC and that the caucus staff would

monitor the targeted Senator's press clippings and his or her votes. The caucus also was to monitor any committee chaired by the Senator. The caucus would focus on Republican Senators who Chvala deemed to be vulnerable. Whether these facts, if proven, support a conclusion of campaigning on state time with state resources is unclear. It is conceivable that monitoring press clippings, monitoring a Senator's committee and monitoring a Senator's votes may be construed as furthering the legislative process. We therefore conclude these facts do not allege a violation of WIS. STAT. § 946.12(3) that is justiciable.

¶65 Richard further explained that during non-election years, these employees performed legitimate legislative work but also performed some campaign work in their state offices on state time. One example provided was opposition research into an opponent's divorce proceedings. However, as elections drew nearer, "the amount of legitimate policy work being done by the caucus began to diminish and the amount of campaign work began to increase." An SDC staffer would be assigned to run a campaign in an important Senate district and a campaign plan would be established. Eventually, running the campaigns became the primary duty of caucus staffers.

¶66 During the 1998 election season, Chvala was involved in managing the caucus staffers directly and on a daily basis. Chvala approved campaign plans prepared by the SDC staffer, assigned staffers to work on particular campaigns, approved campaign literature prepared by SDC staffers and discussed campaign strategy with SDC staff members. Richard stated she was responsible for ensuring candidates were "doing doors and making fund-raising calls." She also made sure candidates were recruiting volunteers for election day and meeting their goals as provided in the campaign plans. Chvala contacted Richard at her SDC office on a daily basis for an update on the progress of each candidate. This is clearly the

type of "political activity" the Senate Policy Manual and the Guidelines were created to prevent.

¶67 Similar allegations are made with respect to Julie Laundrie, who was hired as an analyst with the SDC in 1995 but also worked on a special election in Stevens Point in 1996 and ran a senate race in Green Bay. In 1998, Chvala assigned Laundrie to Jon Erpenbach's senate campaign. Laundrie confirmed that during the non-election cycle, SDC staffers performed legitimate legislative work. However, according to Laundrie, during the election cycle, caucus employees devoted approximately 90% of their state time to campaign work. Laundrie admits that approximately 90% of her work for Erpenbach was from her office at the SDC on state time. Chvala contacted Laundrie daily at her caucus office to discuss the progress on Erpenbach's campaign, campaign ads and other campaign-related issues. Laundrie stated she believed Chvala expected her to perform campaign work and that she would lose her job should Erpenbach fail to be elected.

¶68 Lance Walter, Deputy Director of the SDC, acknowledged it was routine for SDC staffers to perform campaign work in their offices using state telephones and computers during election cycles. Walter also stated he ran the campaign for State Senator Judy Robson on state time using state resources. Walter created a campaign plan and a budget with Chvala. Chvala kept close tabs on Robson's race by contacting Walter at the SDC office on a periodic basis. Walter did fundraising for Robson based, in part, on fundraising lists produced by Branda Weix, who performed computer data work for the SDC at SDC offices.

¶69 Gussert was hired as the Director of the SDC in 1999 and in early 2000 developed campaign plans and fundraising strategy with Chvala. Gussert's

job during the 2000 campaign cycle was to implement the campaign plan developed by Chvala and him and to be a liaison between Chvala and caucus staff. This happened until July 2000, when Chvala began communicating directly with caucus staff on a daily basis about the campaigns they were working on. Chvala continued to call Gussert at the SDC office about campaign problems and during the height of the campaign season Chvala would call Gussert up to three to four times per day regarding campaign issues. Gussert claims that from July through November 2000, legislators knew not to request work from the caucus because the caucus became primarily a campaign machine and did not perform legitimate legislative policy work.

¶70 Weix communicated regularly with Chvala by memoranda regarding time sensitive campaign data. Weix and Walter developed the databases together at SDC offices. Chvala worked directly with Cindy Maracek, another caucus staffer, on campaign literature that was developed in the SDC office. Chvala approved all campaign literature. Chvala contacted Gussert to discuss the campaign literature and to edit certain literature pieces.

¶71 Chvala regularly communicated with Walter and Carrie Lynch about Senator Clausing's campaign. Kloiber was removed by Chvala from working on Clausing's campaign and was replaced by Carrie Lynch. Walter was assigned to work on David Hansen's campaign in Green Bay. Chvala communicated regularly with both Lynch and Walter regarding these campaigns at the SDC offices, including campaign ads. Lynch performed some of her duties as Clausing's campaign manager from her caucus office, including drafting and approving campaign literature on state computers. Maracek performed the graphics work at caucus offices during state time. Lynch also obtained fundraising contributor lists and other data from Weix and Joel Gratz, who was

another analyst at the caucus during this time. As the November 2000 election approached, Lynch substantially increased her work hours on the Clausing campaign. She regularly communicated with Gussert and Chvala about the campaign. Lynch stated that caucus employees worked on campaigns because nobody else would do it and there was not enough money to hire campaign staff. She described the campaign work as "forced labor." She was also aware of the campaign work performed by Walter and Kloiber and also by a SDC employee named Jay Wadd, who ran Mark Meyer's campaign.

¶72 Gussert stated Chvala never informed him that it was inappropriate to run campaigns on state time using state resources. However, he also said Chvala told him "to make sure that SDC employees took vacation or compensatory time if they were seen by outside people working on campaigns."

¶73 Kloiber stated she did substantial work on the Hansen campaign during the 2000 election while employed by the caucus. Kloiber met with Chvala regarding her concern that Gussert was going to remove her from the Hansen campaign and assign her to work on another campaign. Chvala assured her that she would continue to work on the Hansen campaign. Kloiber moved to Green Bay on a temporary basis so as to devote all her work time on the Hansen campaign. Chvala never assigned her legitimate legislative or caucus work or inquired as to whether she was taking vacation or compensatory time to work on Hansen's campaign while she was in Green Bay. Chvala communicated with Kloiber about events Hansen should attend. Chvala also discussed with Kloiber the campaign ads to be run for Hansen. It was at this time Kloiber became aware of the total control Chvala had over the Hansen campaign.

¶74 At a campaign debriefing at Chvala's law office, Chvala informed Kloiber that she was to receive a 10% raise. Kloiber stated she believed the raise was linked to her performance on the Hansen campaign, based on the absence of discussion on any other topic. Gussert was replaced as Director of the SDC because Clausing lost her election; Kloiber and Chvala began searching for a full-time fundraiser. Shortly after the November 2000 elections, a staff meeting was held at the SDC offices concerning the political campaigns managed by SDC staff and Chvala discussed the successes and failures of these campaigns.

¶75 SDC Deputy Director Walter stated he and Gussert developed a plan for the 2000 campaigns in the SDC offices and identified Hansen's race as an important race. Walter stated he performed substantial work on Hansen's campaign including crafting the central message and general strategy advice. As Election Day approached, the majority of Walter's work performed in caucus offices was on Hansen's campaign. Walter raised funds, developed campaign strategy, and communicated with Chvala regularly about fundraising efforts. Chvala's role was to fill in the money gaps. Walter was directed to go to Chvala's law office to pick up fundraising checks directed to the Hansen race. Chvala approved all literature pieces drafted by Walter for the Hansen campaign. Walter acknowledged that between June and November 2000, 40% of his time at the caucus was devoted to the Hansen campaign. Apparently, Chvala was aware of the amount of time Walter was spending on the Hansen campaign and would ask Walter to do "political things" because Walter worked for Chvala. Walter states that Chvala directed him to work on the Hansen campaign and that Walter had no option of refusing Chvala's request.

¶76 Chvala hired Meghan Bitenc to work on his legislative staff in January 2000. Bitenc had no policy experience and had worked exclusively on

political campaigns. Bitenc performed some legitimate legislative work for Chvala. However, in the spring of 2000, Chvala directed Bitenc to call Barbara Candy, a very experienced Milwaukee-area fundraiser, about fundraising for the November 2000 elections. Bitenc began working with Candy and Chvala on fundraising calls, including calls made by Chvala to raise money for the Hansen campaign. These calls were made during normal work hours at Chvala's law office and Bitenc's job was to assist him and take notes regarding fundraising commitments Chvala received. Bitenc did not take vacation or compensatory time to perform this work. Bitenc also traveled to Green Bay with Candy to meet with Hansen about fundraising for his campaign, without taking any leave or vacation. Bitenc expressed her concerns about mixing campaign and legislative work with Chvala's chief of staff, Douglas Burnett. Burnett told her "that that was the way it was" and that both Democrats and Republicans did it and that the press was aware of it. Senator Hansen indicated that Walter arranged to have Sue Meinholz, who managed Chvala's legislative office, prepare his campaign finance reports and to maintain the books.

¶77 We conclude the allegations in Counts Nine and Ten, except as indicated in paragraph 64, unambiguously state a violation of WIS. STAT. § 946.12(3) and are therefore justiciable. The trial court will not need to speculate as to whether this conduct could include legitimate legislative activity. On the contrary, these allegations show political campaign activity of the most basic type: the preparation and dissemination of campaign literature, political fundraising efforts on behalf of a number of candidates for the Wisconsin Senate, campaign data management on state computers, daily monitoring of campaign progress by Chvala, development and implementation of campaign strategy and debriefing of the 2000 election cycle on state time in state offices. The result is public financing

of private campaigns without the public's permission. There is no reasonable argument that this activity serves any legitimate legislative duty or purpose. No statute, rule or policy sanctions this behavior.

CONCLUSION

¶78 For the foregoing reasons we conclude that WIS. STAT. § 946.12(3) is not vague or overly broad. We also conclude this prosecution does not violate the speech and debate clause of the Wisconsin Constitution and, with the exceptions we have noted in paragraphs 58 and 64, it does not violate the separation of powers doctrine. Accordingly, we modify the circuit court's order denying Chvala's motion to dismiss and, as modified, we affirm.

By the Court.—Order modified and, as modified, affirmed.

Recommended for publication in the official reports.

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DISTRICT IV

April 11, 2003

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You are hereby notified that the Court has entered the following order:

03-0442-CR State of Wisconsin v. Charles Chvala (L.C. # 02CF2451)

Before Vergeront, P.J., Lundsten and Brown, JJ.

Charles Chvala petitions for leave to appeal the trial court's order of February 4, 2003, denying his motion to dismiss the criminal charges pending against him. The petition identifies eleven issues that Chvala wishes this court to review. The petition is granted only as to those issues pertaining to Counts 7 through 10 of the State's complaint. Chvala has not satisfied the criteria for granting leave on the other issues presented in the petition. Therefore,

IT IS ORDERED that Chvala's petition for leave to appeal is granted subject to the limitation on issues set forth in this order. *See* WIS. STAT. RULE 809.50(3) (2001-02).[1] Pursuant to WIS. STAT. RULE 809.11(2), the clerk of the circuit court or responsible court official shall return the copy of the order granting this petition and the trial court case entries maintained pursuant to WIS. STAT. § 59.40, to the clerk of this court within three days of receipt of this order. Entry of this order has the effect of the filing of the notice of appeal, WIS. STAT. RULE 809.50(3). The appellant's shall promptly file a docketing statement and a statement on transcript.

IT IS FURTHER ORDERED that briefing on this appeal shall be expedited. The appellant's brief shall be due within twenty days of the date the appellate record is filed in this court. The respondent's brief shall be filed within twenty days of service of the appellant's brief. The reply brief shall be filed within ten days of service of the respondent's brief.

Cornelia G. Clark
Clerk of Court of Appeals

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[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

State of Wisconsin,	**DECISION AND**
Plaintiff,	**ORDER**
vs.	**RE:**
Charles Chvala,	**DEFENDANT'S MOTIONS TO DISMISS**
Defendant.	
	Case No. 02 CF 2451

1. **Defendant's motion to dismiss counts 1-6 because the prosecutor has failed to allege a threatened injury to a property interest:**

In deciding motions to dismiss a complaint at this stage of the proceeding with respect to whether the complaint is factually sufficient the court's review is limited to the facts alleged in the four corners of the complaint and reasonable inferences drawn from those facts. The court does not decide between competing inferences. If a plausible view of the facts and inferences support a conclusion that the crime charged was committed by the Defendant then the complaint is sufficient from a factual standpoint.

Count 1 charges extortion and involves the allegation that the Defendant told the lobbyist for William Peterson that contributions "better be made" to Senator Plache and Senator Moen to make sure the legislation Peterson was interested in did not "get into trouble." Count 2 charges misconduct in office for this incident.

Count 3 charges extortion and involves the allegation that the Defendant requested a sizeable campaign contribution from the representative of the Wisconsin Realtors Association if the Association wanted a particular bill scheduled. Count 4 charges misconduct in office for this incident.

Count 5 charges extortion and involves the allegation that the Defendant threatened the interests of the Wisconsin Beer Distributors Association because it had contributed to the campaign of the Defendant's opponent and demanded at least matching contributions. Count 6 charges misconduct in office for this incident.

The extortion statute, sec. 943.30(1) Wis. Stats., is violated if one maliciously threatens any injury to the person, property, business, profession, calling or trade with the intent to extort money or any pecuniary advantage or with intent to compel the person so threatened to do any act against the person's will.

The misconduct in office statute, sec. 946.12(2) Wis. Stats., is violated if an official, in his or her official capacity, does an act which the official knows that the officer is forbidden by law to do in the person's official capacity.

The Defendant argues that the threat that the Peterson legislation would be in trouble, that the Wisconsin Realtors Association bill would not be scheduled and that the Wisconsin Beer Distributors Association would incur the Defendant's wrath if it did not at least match the contributions made to Defendant's opponent do not represent threats to the interests which are covered by the statute. The court disagrees. The statute is not limited to property interests. Rather, the applicable jury instruction (1473B) makes it clear that the term "threat of injury" is to be broadly construed to include the type of threats present in our case. The "threat of other harm" includes the threat to punish which would include the threat to punish legislatively.

On January 23, 2003, the Defendant filed a motion to have this court take judicial notice of the following: (1) 2003 Assembly Bill 1 which purports to ban exchanging votes for money, commonly known as "pay to play"; (2) The Wheeler Report dated January 23, 2003, showing that the Assembly Judiciary Committee recommended passage of 2003 Assembly Bill 1 by an 8-0 vote on January 23, 2003; and (3) a press release of the State of Wisconsin Ethics Board which hails 2003 Assembly Bill 1 with the Director of the Ethics Board quoted as saying:

> "It's too bad this law was not in place in recent years. This statute may have prevented the trading of legislative action for campaign contributions that has been alleged or at least provided the Ethics Board with a mechanism to investigate and address the matter."

The implication is that the Defendant could not be charged with extortion and misconduct in office, the "pay to play" charges in counts 1-6, because laws currently do not exist which would apply to the facts alleged in the complaint.

The actions of the Assembly Judiciary Committee and the statements of the Director of the Wisconsin Ethics Board in a press release certainly do not constitute a legal opinion that the current charges against the Defendant are not appropriate. 2003 Assembly Bill 1 may or may not pass and become law in its present form. Some may argue that it does not replace the current statutes but rather supplements them. Some may

argue that the bill is necessary to make it more clear as to what conduct is permitted or not permitted. Some may view the bill as unnecessary or merely an attempt to limit the exposure of and penalties to violators. Some may view it as an important piece of legislation pursued in good faith while others may see it as a political document for the times. Those issues will be addressed as the bill winds its way through the legislative process but whatever its outcome, it cannot reasonably be argued that the allegations in this case, if proven, requiring campaign contributions for favorable action on legislation do not constitute extortion and misconduct in office.

The Defendant's motion to dismiss counts 1, 3 and 5 as well as the companion counts 2, 4 and 6 under the theory that the prosecutor has failed to allege threats covered by the statute is denied.

2. **Defendant's motion to dismiss counts 1-6 because the facts on which said counts are based are legislative activities which are privileged under the Wisconsin Constitution:**

The Wisconsin Constitution, Article 4, Section 16, states that "...No member of the legislature shall be liable in any civil action, or criminal prosecution whatever, for words spoken in debate." The Defendant argues that the actions and words attributed to him with respect to counts 1-6 are an integral part of the legislative process and, therefore, not subject to criminal prosecution.

Both parties rely on **State v. Beno**, 116 Wis. 2d 122 (1984), to support their respective positions. Protection of the integrity and independence of the legislative process is very important but not in such a way that a legislator has unlimited immunity for every action. The protections of privilege are not limited to actual speeches, debates and votes but also include those matters which are integral to the legislative process. Discussions between legislators and lobbyists, representatives and citizens about the pros and cons of legislation and the legislative process are clearly part of the regular legislative process and integral to it. **Beno** clearly protects those types of communications. But **Beno** specifically does not deal with a situation where a legislator has committed a criminal act.

United States v. Brewster, 408 U.S. 501 (1971), is particularly instructive. **Brewster** makes it clear that legislators are not above the criminal law and that they are not "super-citizens, immune from criminal responsibility." Id. At 516.

It is clearly alleged in the complaint that the Defendant was very powerful in the Wisconsin Legislature and that without his assistance and cooperation it was very difficult, if not impossible, for a party's legislative interests to be successful. The Defendant is essentially alleged to have "shaken down" lobbyists and parties who had interest in legislation for campaign contributions if the parties wanted his assistance and cooperation. "Shaking down" parties for campaign contributions is not, by any stretch of the imagination, a material and integral part of the legislative process. There is no legal

precedent which would support the concept that such conduct is protected by the legislative privilege theory.

The Defendant's motion to dismiss counts 1-6 under the legislative privilege theory is denied.

3. **Defendant's motion to dismiss counts 7-10 because (1) the prosecution improperly relies on an ambiguous Senate policy as a basis, (2) the counts present a non-justiciable controversy, (3) the question of who has supervisory powers over caucus employees is a political question to be decided by the legislature, not the courts; (4) the Defendant has immunity under the speech and debate clause of the Wisconsin Constitution; (5) separation of powers principles do not allow the state to prosecute a violation of Senate policies; and (6) the complaint does not allege facts sufficient to support its theory of the case.**

Counts 7-10 essentially allege that the Defendant hired (or attempted to hire) and directed employees to work on state time and use state resources to conduct, manage and participate in partisan Democratic campaigns. These charges are known as misconduct in office and allege a violation of sec. 946.12(3) Wis. Stats. It is alleged that the Defendant exercised his discretionary power in a manner inconsistent with his duties with the intent to obtain a dishonest advantage. The dishonest advantage inferred is the use of taxpayer dollars to promote Democratic candidates and to defeat their opponents.

The Defendant argues that the ambiguity regarding what state employees may or may not do with respect to political work precludes charging the Defendant with misconduct in office for hiring and directing state employees to manage, conduct and participate in partisan campaigns on state time with state resources. The court concedes that there are many activities which could fall into a "gray area" with respect to whether said activities are political or legislative. Speech writing, research, bill drafting, legislative summaries could all fall into this "gray area." However, the allegations which form the basis of the misconduct in office charges against the Defendant are not in the "gray area." Managing, fund-raising, participating in and conducting campaigns are clearly political, not legislative, in nature. Chapters 11 and 19 of the Wisconsin Statutes as well as the Senate Policy Manual make it very clear that political activity of the type involved in this case is not permitted on state time with state resources. The allegations, if proven, constitute a version of public financing of campaigns with one problem---the public did not know about it, did not approve of it and did not consent to their tax dollars being used to promote political candidates.

For the reasons stated in the preceding paragraph, the Defendant's justiciability argument must also fail. There is no reasonable interpretation of the statutes, policies and rules which would authorize the conduct alleged with respect to counts 7-10.

The complaint alleges that the Defendant had near total control over the Senate Democratic Caucus and that its director reported to the Defendant. The allegations are

more than sufficient to support the connection between the Defendant and the caucus employees.

The court discussed the speech and debate privilege issues in the previous section. The decision to hire and direct employees to do political work on state time with state resources is administrative in nature and not protected by the legislative activity privilege. Running campaigns and raising funds are not integral parts of the legislative process. While it is obvious that such activity is very important to incumbents, there is no case law which indicates that this type of purely political activity is entitled to the protections that Defendant seeks.

The court agrees that it would be inappropriate to criminally charge a legislator for moving furniture without the Chief Clerk's permission, smoking in the Capitol Building and parking in another's space. If the Defendant were criminally charged with these violations a reasonable argument could be made, and probably successful, that the charges were a violation of the separation-of-powers principle. But, as discussed above, these principles are not intended to provide all-encompassing immunity for serious criminal charges.

The alleged facts, and reasonable inferences from those facts, are clearly sufficient to find that the Defendant did, in his official capacity, hire or attempt to hire as well as direct employees to manage, conduct and participate in political campaigns on state time with state resources for the purpose of obtaining a dishonest advantage. At first glance, it would appear that count 8 was not a completed act and should be dismissed or charged as an attempt. However, upon careful review, the crime alleged is **offering** the job to the potential employee to do political work on state time.

The Defendant's motion to dismiss counts 7-10 is denied.

4. **Defendant's motion to dismiss count 11 because facts alleged in complaint are insufficient:**

The factual allegations and reasonable inferences with respect to count 11 are that the Defendant had been at a union rally and the group passed the hat to raise campaign contributions for Senator Hansen, who was involved in a campaign for the 30th Senate District. It is not clear who did the passing of the hat and how the envelope containing the five, ten and twenty dollar bills ended up in the Defendant's hands. The envelope contained a total of $1,630. The Defendant gave the envelope to Mr. Walter and told him that the money was for the Hansen campaign. Mr. Walter was assisting on the Hansen campaign and frequently picked up checks from the Defendant for the campaign. There is no indication that the Defendant knew how much money was in the envelope or who the specific individual contributors were and in what amounts. Mr. Walter counted the money and discovered it totaled $1,630. Mr. Walter discussed the situation with Ms. Kloiber and the two of them devised a scheme to get the money to the Hansen campaign without violating the $1,000 contribution limit. There is no allegation that the Defendant

participated in this scheme. The court concludes that the alleged facts and reasonable inferences with respect to count 11 are insufficient to support the allegation of the Defendant making unlawful political contributions.

The Defendant's motion to dismiss count 11 is granted.

5. **Defendant's motion to dismiss counts 12-20 because (1) the complaint fails to show that expenditures made by Independent Citizens for Democracy (ICD) violate campaign laws; (2) campaign expenditures by ICD are entitled to First Amendment protections; (3) restrictions on expenditures impose severe restrictions on freedom of expression and association; (4) and the activities of the Defendant, ICD and the respective campaigns were not in concert, coordinated or involve consultation:**

Counts 12-19 charge, as a party to the crime, exceeding campaign contribution limits and filing false State Election Board reports with respect to those contributions. Count 20 charges a conspiracy to make campaign contributions exceeding the legal limit.

ICD clearly has the right to make independent expenditures on behalf of political candidates with the protections of the First Amendment of the United States Constitution. **Buckley v. Valeo**, 424 U.S. 1 (1976). However, the Defendant is not charged with making truly independent expenditures through ICD, which is an organization he secretly controlled, but rather with making in-kind contributions to various campaigns and not reporting those contributions. **Buckley** distinguished between contributions and expenditures. Contributions, and rules surrounding those contributions, can be limited while truly independent expenditures could not.

The Wisconsin Court of Appeals addressed these issues in **Coalition for Voter Participation v. Elections Bd.** 231 Wis.2d 670 (1999). **Coalition for Voter Participation** ruled that the state had the authority to regulate contributions whether or not the contributions were express advocacy or implied support. The Defendant controlled ICD. The Defendant had substantial control of and involvement in the campaigns involved in counts 12-20. The Defendant was in-consult with those campaigns. The expenditures by ICD meet the coordinated expenditures definition set forth in **Coalition for Voter Participation** and, therefore, are campaign contributions subject to regulation and are required to be accurately reported to the State Elections Board. He consulted with, advised, directed and exercised considerable control over those campaigns and candidates. He frequently communicated, sometimes on almost a daily basis, with the candidates or their campaign managers and workers. These allegations clearly meet the requirements of **Federal Election Commission v. The Christian Coalition**, 52 F. Supp. 2d 45 (1999). The regulation of the ICD contributions does not violate the Constitution in our case.

6. **Defendant's motion to dismiss counts 11-20 because the Milwaukee County District Attorney does not have the authority to prosecute campaign finance law violations that occurred in Dane County:**

Section 11.61(2) of the Wisconsin Statutes states, in part, as follows:

> "All prosecutions under this section shall be conducted by the district attorney of the county where the violation is alleged to have occurred. If the district attorney refuses to act..., or fails to act..., the attorney general may then conduct the prosecution...."

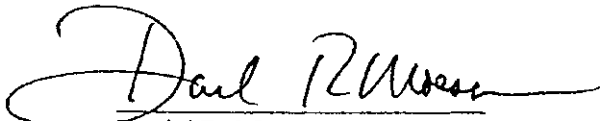
Milwaukee District Attorney, E. Michael McCann, and his designees have been appointed as Special Prosecutors for Dane County by a Dane County Circuit Court judge pursuant to secs. 978.045(1r) and (h) Wis. Stats., at the request of the Dane County District Attorney due to a conflict of interest. The special prosecutor stands in place of the Dane County District Attorney. The two statutes involved in this issue have to be read in conjunction with one another. Section 11.61 (2) of the Wisconsin Statutes gives clear direction as to **where** the prosecution must commence but recognizes that a particular individual may not be able to prosecute an alleged violation or may decline to do so. The statute authorizes the attorney general to prosecute a violation if the district attorney **refuses** to act upon a sworn complaint or **fails** to act upon such a complaint within 60 days. The Dane County District Attorney did not refuse to act nor did he fail to act. The statute cited by the defense provides direction if a complainant cannot obtain the assistance of the district attorney. In those limited situations the attorney general **may** act. There is nothing in sec. 11.61(2) Wis. Stats., which would preclude the appointment of a special prosecutor as was done in this case.

The Defendant's motion to dismiss counts 12-20 is denied (count 11 has been dismissed above for other reasons).

ORDER

The Defendant's motion to dismiss count 11 is GRANTED. The Defendant's motions to dismiss counts 1-10 and 12-20 are DENIED.

Dated: 2/4/03



Daniel R. Moeser
Dane County Circuit Court Judge
Branch 11

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

RECEIVED
JAN - 3 2003
CIRCUIT COURT DANE COUNTY, WI

STATE OF WISCONSIN

Plaintiff,

vs.

Case No. 02CF2451

CHVALA, CHARLES

Defendant.

STATE'S MEMORANDUM OPPOSING DEFENDANT'S MOTION TO DISMISS

KURT BENKLEY
Special Prosecutor for Dane County

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INTRODUCTION

The complaint alleges Defendant Senator Charles Chvala committed crimes constituting a systematic corruption of the democratic process. Defendant has moved to dismiss. This court's decision, and the precedent it sets, will determine the future character of government in the State of Wisconsin. Approval of the criminal complaint will validate the right of the People, through their executive officers, to enforce decency, honesty, and integrity in state government. Dismissal will condemn the People to continuing Tammany Hall style abuse of legislative power.

Defendant raises two fundamental constitutional challenges to the complaint. First, Defendant asserts separation of powers doctrine as grounds to dismiss. Essentially, Defendant argues that legislators are accountable to no one other than the majority electorate, and the prosecution oversteps the boundaries between coordinate branches of government. Second, Defendant claims the First Amendment precludes enforcement of campaign finance statutes. In both areas, Defendant ignores clear precedent authorizing the executive to police legislative misconduct.

In addition, Defendant raises several technical statutory challenges to the sufficiency of the criminal complaint. In State v. Thiel, 183 Wis.2d 505, 542 (1994), the Wisconsin Supreme Court reiterated the standards for evaluating a criminal complaint.

> The document itself must set forth facts which, together with any reasonable inferences therefrom would lead a reasonable person to conclude a crime had probably been committed and that the defendant named in the complaint was probably the culpable party (emphasis added; citing State v. Olson, 75 Wis.2d 575 (1977))
>
> and,
>
> The test applied to assess the sufficiency of a complaint is that it must be minimally adequate in setting forth the essential facts which establish probable cause. Minimal adequacy is evaluated using common sense as opposed to hypertechnical means. (Emphasis added).

When evaluated under this standard, the present criminal complaint states probable cause as to each and every count alleged.

DISCUSSION

I. Counts 1-6: Extortion and Misconduct in Public Office

A. The criminal complaint properly alleges the "threat of injury" element of extortion.

1. The "threat of injury" element of extortion is to be broadly construed.

The crime of extortion, as defined under section 943.30, Wis. Stats., requires the defendant "threatens or commits any injury to the person, property, business, profession calling or trade" of the victim. Defendant wrongly argues the criminal complaint is deficient as to this element. Defendant asserts only threats of injury to "property interests" can constitute extortion. The threat of injury element of extortion is more expansive in scope. Section 943.30(1), Wis. Stats. expressly defines extortion to include threats to injure the "**person**" and the "**property, business, profession, calling or trade**" of the victims. As outlined below, by threatening victims with legislative punishment, Defendant threatened each of these interests.

The Wisconsin Criminal Jury Instructions on extortion, and the official comments thereto, address the threat of injury element. Wis JI-Criminal 1473B provides that "'[t]hreaten' means to express (verbally) (by written communication)(by printed communication) an intention to inflict, pain, injury, <u>or other harm</u>" (emphasis added). The language "or other harm" is a catch-all expressing a liberal definition of "threat." Official comment 3 to Wis JI-Criminal 1473B emphasizes just how broad the element of "threat" is:

> The definition of "threat" is based on the following: "An expression of an intention to inflict <u>pain</u>, <u>injury</u>, <u>evil</u> or <u>punishment</u>." The <u>American Heritage Dictionary of the English Language</u> (3rd Edition (1992). (Emphasis added.)

Thus, official commentary gives a common parlance meaning to the "threat" element of extortion. Threatening to <u>punish</u> someone legislatively, or to visit some other legislative <u>pain</u>, <u>injury</u> or <u>evil</u> upon them, falls squarely within this definition.

The courts have likewise liberally defined the "threat" element of extortion. In <u>State v. Kittilstad</u>, 231 Wis.2d 245 (1999), the court upheld an extortion prosecution where defendant threatened to have international students deported, and thereby to

interfere with their education in the United States. In analyzing the threat of injury element of extortion, the court observed:

> While the legislature set forth specific interests, it began the list with the expansive phrase "any injury to," indicating that the protection of these interests should extend broadly to all injuries. Id. at 267.

The court concluded that the student victims' had a protected interest in pursuing their education. Defendant's threats to their education constituted a threat to their "profession" and to their "calling or trade." This same principle of broadly construing "injury" applies in the present case.

2. Defendant's threat to deny the victims' right to freely petition government constitutes a threat of injury to person.

The Wisconsin Constitution preserves the People's right to freely petition their government. Our constitutional founders provided:

> The right of the people peaceably to assemble, to consult for the common good, and to petition government, or any department thereof, shall never be abridged. (Emphasis added). Wis. Const. art. I, sec. 4.

This right is "of the people," and hence, individually a right of person.

Defendant threatened injury to this right of person. In essence, Defendant told the victims in counts 1, 3 and 5 that if they refused to pay, Defendant would cause their desired legislation never to be enacted. Defendant, through his power as Senate Majority Leader, exercised near absolute control over legislation. Paras. 4-7 of Criminal Complaint. Given such power, Defendant could credibly threaten to deny victims any meaningful voice in the legislature. Put in the terms of our constitution, Defendant threatened to injure the victims' right "to petition government." This threatened denial of access to the democratic process is an injury to person as real, hurtful, and coercive as the physical beating a mobster threatens to extort protection money.

As noted in Thomas B. Merritt, Annotation, *Injury to reputation or mental well-being as within penal extortion statutes requiring threat of "injury to person"*, 87 A.L.R.5th 715 (2001), the weight of modern authority holds threats to intangible personal interests, such as mental well-being and reputation, may constitute extortion. Defendant's

threat to the victims' inherent democratic rights comes within the definition of threat of "injury to person." [1]

3. Defendant threatened injury to the victims' property, business, trade or calling.

Defendant injured victims' inchoate property interests, by denying the victims any opportunity for enactment of their desired legislation. In State v. Manthey, 169 Wis. 2d 673 (Ct. App. 1992), the court held interest in a lawsuit is a property interest subject to extortionate threats. Manthey demanded payment or else she would perjuriously testify against victim's legal malpractice cause of action. The State charged Manthey with extortion under section 943.30, Wis. Stats. The Wisconsin Supreme Court upheld the prosecution theory, finding an interest in a lawsuit qualified as a property interest under the extortion statute. Id. at 689.

An interest in pending legislation is similar to an interest in a lawsuit. While the victims in this case had no vested right to passage of their special interest legislation, they were entitled to an uncorrupted legislative process. Their situation was no different from a civil litigant, such as the victim in Manthey, expecting her lawsuit to proceed uncompromised by threat of perjury. In both instances, the victims have no right to a favorable end result. However, they do have a protected interest in the integrity of legal proceedings which financially impact upon them. As outlined in greater detail below, the threatened legislation had a very direct and real impact upon the present victims' property, profession, business, trade and calling.

State v. Gilkes, 118 Wis.2d 149 (Ct. App. 1984) also addressed whether threatening an intangible property interest can constitute extortion. The prosecution charged Gilkes with extortionately demanding a job. In affirming the conviction, the appellate court broadly interpreted the term "property."

> "Property" as a general term, is not defined in the criminal code... Although statutes do not define property, the definition of personal property include[s] intangibles such as things in action and energy. Sec. 990.01(27), Stats. The intangible nature of a job therefore does not prevent it from being property. Id. at 150-151.

---

[1] The ALR article cites to Schultz v. State, 135 Wis. 644 (1908)(threat to accuse victim of a crime is not an injury to person supporting extortion charge). However, the subsequent decision by the Wisconsin Supreme Court in Kittlestad establishes a modern and expansive interpretation of "injury" in Wisconsin.

So too, threat to "property," as used in section 943.30, Wis. Stats., extends to the present Defendant's threats to foreclose economically beneficial legislation.

Bearing the above general principles in mind, counts 1, 3, and 5 are now addressed in turn.

4. Defendant threatened injury to William Peterson (Count 1).

The criminal complaint alleges sufficient facts supporting the "threat of injury" element in count 1 (extortion of William Peterson). Mr. Peterson desired to donate his historic summer home and grounds, Black Point Estate, to the State of Wisconsin. Legislation facilitating this donation was pending before the Wisconsin State Senate. Paragraph 14 of the criminal complaint alleges Defendant stated if the victim's lobbyist "wanted to make sure his bill didn't get into trouble, he had better have some of his people contribute to some of the defendant's candidates." Defendant was unmistakably threatening the victim. Defendant would legislatively punish the victim if he did not make a political payoff.

Defendant's threat to kill the Black Point Estate legislation may be characterized as a threat to Mr. Peterson's "calling" within the meaning of section 943.30(1), Wis. Stats. By disjunctively listing "calling" among the protected interests of "person, property, business, profession, calling or trade" in section 943.30(1), Wis. Stats., the legislature expressed a distinction. The term "calling" is something different from business or professional interest. "Calling" has been defined as "an occupation, a profession, or a career." Kittlestad, 231 Wis.2d at 268. Mr. Peterson's occupation, in the twilight of his life, was establishing Black Point Estate as his legacy to the people of Wisconsin. This philanthropic occupation is his "calling."

Furthermore, Defendant's threat to kill Mr. Peterson's special interest legislation unless Mr. Peterson made political payoffs violated Mr. Peterson's constitutional right to freely petition government. This was a threat of injury to "person." The legislative process had been functioning in a free and constitutional manner when the Black Point Legislation passed by a 15-1 margin in the Joint Finance Committee of the legislature. Para. 12 of Criminal Complaint. At this point, however, Defendant threatened the legislation would "get into trouble" unless victim made two $500.00 campaign contributions. Para. 14 of Criminal Complaint. In other words, Defendant would close

the legislative process to the victim unless the victim made payoffs to Defendant's political allies.

This threat is fundamentally different, in nature, from the common practice of legislators giving greater "access" to generous campaign donors. In the present case, Defendant tied specific legislation to specific payments. Defendant was selling legislation.

5. Defendant threatened injury to the Wisconsin Realtors Association (Count 3).

Defendant committed extortion in count 3 by threatening the "business, profession, calling or trade" of the Wisconsin Realtors Association. The Wisconsin Realtors Association represents the professional, business and trade interests of the realtors' industry. In March 1998, Assembly Bill 334 was ripe for scheduling for vote in the Wisconsin State Senate. The bill mandated regulation of home inspectors. As paragraph 24 of the criminal complaint alleges, the Wisconsin Realtors Association desired such regulation because:

> if a consumer was not happy with a home inspector's failure to identify a defect in a house being sold, consumers would often turn to the realtors and attack them for the poor performance of the home inspectors...

When Defendant threatened to stall Assembly Bill 334, he threatened economic injury within the purview of section 943.30(1), Wis. Stats.

The threatened injury was also to the "person" of the individuals who formed the association. The Wisconsin Realtors Association had no right to passage of the bill, but they did have the right to an uncorrupted opportunity for passage of their special interest legislation. An association of persons joined for the purpose of lobbying has a protected right to petition government no less than does an individual person. In N.A.A.C.P. v. Alabama, 357 U.S. 449, 460 (1958), the United States Supreme Court recognized "association for the advancement of beliefs and ideas" is essential to the exercise of democratic rights. Threatening injury to this right constitutes a threat of injury to person.

6. Defendant threatened injury to the Wholesale Beer Distributors Association (Count 5).

Defendant's threat to the Wholesale Beer Distributors Association differs from his threat to the Wisconsin Realtors Association in its level of specificity, but not in its

level of coercion and scienter. Rather than threatening to kill a specific pending bill, Defendant threatened generally to punish the Wholesale Beer Distributors Association in the legislature. Both situations are equally extortionate.

Defendant casts the extortion allegations as merely describing the Wholesale Beer Distributors Association's "desire not to have Senator Chvala angry at them." Defendant's Brief at pg. 3. In fact, Defendant did much more than express anger. He directly threatened the Wholesale Beer Distributors Association with legislative punishment. No other reason explains why Defendant repeatedly rattled the saber of his his legislative powers when he demanded campaign contributions. In paragraph 35 of the criminal complaint, Defendant blusters:

> What the hell are you doing...you guys are contributing to my opponent... Don't you realize who I am? (emphasis added.)

In paragraph 36, the criminal complaint alleges:

> The defendant was again angry and told Mr. Sheforgen [lobbyist for Wholesale Beer Distributors Association] that his people had made a mistake and again reminded Mr. Sheforegen that he was the Majority Leader of the Wisconsin State Senate and told Mr. Sheforgen that his organization better at least come up with matching funds for the defendant's campaign... (emphasis added.)

As Thiel, 183 Wis.2d 505, provides, the court may draw all reasonable inferences from facts alleged in the criminal complaint. The inference in the above exchange is clear. Defendant referred to his legislative power for patently obvious reasons. He was threatening legislative retribution against the business, profession and trade of the Wholesale Beer Distributors Association.

B. The State may assert alternative prosecution theories to support the misconduct in public office charges (Counts 2, 4 and 6).

Were the extortion charges (counts 1, 3, and 5) found somehow defective, the parallel misconduct in public office charges (counts 2, 4, and 6) would still survive. For the purpose of stating probable cause in the criminal complaint, the State may validly rely on alternative charging theories for the same factual misconduct. The State need only put Defendant on notice as to the facts of the criminal misconduct with which he is charged. See, Robinson v. State, 100 Wis.2d 152, (1981)(change in prosecution legal theory at trial did not violate defendant's due process rights of notice and fairness).

Counts 2, 4, and 6 allege misconduct by committing an act which Defendant knew "he was forbidden by law in his official capacity." As an alternative to extortion, a government ethics violation of section 19.45, Wis. Stats., may serve as the basis for the misconduct in public office counts. Such a violation satisfies the "act forbidden by law in his official capacity" element.

Defendant was forbidden from using his public office to forcibly extract money for his political party or for himself. Section 19.45(2), Wis. Stats. provides as follows.

> No state of public official may use his or her public position to or office to obtain financial gain or anything of substantial value for himself or herself or his or her immediate family or for an organization with which he or she is associated (emphasis added).

Defendant violated this ethical standard by using his public office as Senate Majority Leader to coerce campaign contributions for his political party.

Defendant was a member of the Democratic Party. He served as the director of both the Senate Democratic Caucus and the Senate Democratic Campaign Committee. Paras. 8-9 of Criminal Complaint. The criminal complaint extensively describes Defendant's association with election campaigns of Democratic Party candidates for Wisconsin State Senate. Defendant was "associated" with these organizations within the meaning of section 19.45(2), Wis. Stats.

Defendant corruptly used his public position to obtain "financial gain" and "substantial value" for these partisan organizations. As to count 2, Defendant coerced payoffs when fundraising for the campaigns of his Democratic colleagues, Senator Rodney Moen and Senator Kimberly Plache. Para.19 of Criminal Complaint. As to count 4, Defendant corruptly extracted funds for the Senate Democratic Campaign Committee. Paras. 30-31. As to count 6, Defendant coercively demanded funds for his own personal campaign. Para. 36 of Criminal Complaint. In each instance, Defendant abused his public office as Senate Majority Leader to extract payoffs for his political organizations.

Defendant's corruption also indirectly provided Defendant with "substantial value for himself." By helping members of his political party gain election to the Senate, Defendant perpetuated his own position as Senate Majority Leader. The power and

prestige of that favored position were the "something of value" which Defendant obtained by violating section 19.45(2), Wis. Stats. In the end analysis, it is this hunger for power which best explains Defendant's criminal conduct.

C. The Speech and Debate Clause does not empower Defendant to commit common crimes under the mantle of his legislative office.

1. State v. Beno

In State v. Beno, 116 Wis. 2d 122 (1984), the Wisconsin Supreme Court extensively discussed the Speech and Debate Clause of Article IV, Section 16 of the Wisconsin Constitution. Defendant's brief correctly outlines the facts in Beno, but fails to convey fairly the spirit and holding of the case. Beno first emphasizes Wisconsin must independently read our unique constitution. The text of the Speech and Debate Clause of the United States Constitution differs, and decisions interpreting the federal provision do not constrain criminal prosecutions in Wisconsin courts. In contrast to the federal perspective, Beno stresses the Speech and Debate Clause of the Wisconsin Constitution must not be used to obstruct valid criminal prosecution of legislators. Indeed, Beno exhorts the judiciary and executive to uphold their duty as coordinate branches of government. Judges and prosecutors have constitutional authority reasonably to police legislators. Id. at 142-143.

The Speech and Debate Clause is grounded in separation of powers doctrine. Article IV, section 16 of the Wisconsin Constitution provides the following legislative privilege:

> No member of the legislature shall be liable in any civil action, or criminal prosecution whatever, for words spoken in debate.

The executive may not persecute a legislator for the legislator's speech on the Senate or Assembly floor.

The limited holding of Beno is that a legislative aide may not be compelled by subpoena to answer questions about the investigative work the aide did for a legislator. In reaching this conclusion, however, Justice Shirley Abrahamson and the majority in the Wisconsin Supreme Court emphasized the Wisconsin Constitution is our own independent organic law.

In interpreting article IV, sections 15 and 16 of the state constitution,

> we are not bound by the construction given the speech and debate clause of the United States Constitution by the United States Supreme Court...Id. at 134.

The court also stressed the language of the Speech and Debate Clause of the Wisconsin Constitution differs markedly from the federal version.[2] It was presumably with great forethought that Justice Abrahamson specifically chose to disassociate Wisconsin from case law interpreting the federal Speech and Debate Clause. The State of Wisconsin must construe its constitution in a manner consistent with its own history and values

States relying on federal opinions have reached absurd results which would offend Wisconsin's tradition of ethical government. For example, in State v. Neufeld, 260 Kan. 930 (1996), the Kansas Supreme Court dismissed a blackmail prosecution on Speech and Debate Clause grounds. Representative Melvin Neufeld approached a fellow legislator in the lobby outside the House chambers. Representative Neufeld threatened to expose the legislator's marital infidelity unless the legislator voted in favor of a pending bill. The legislator refused, and so, Representative Neufeld informed the legislator's wife of the legislator's philandering. The State charged blackmail. Relying on federal holdings, the Kansas Supreme Court ruled Representative Neufeld's conduct was absolutely protected under the Speech and Debate Clause. Cases like this one may have been what prompted the Wisconsin Supreme Court to reject the federal viewpoint on the Speech and Debate Clause.

In contrast to Neufeld, the Wisconsin Supreme Court repeatedly stressed in Beno that legislative misconduct is not beyond the constitutional reach of prosecutors and judges.

> The court must ensure that legislative privileges are broad enough to protect the integrity of the legislative process, but not so broad as to endow a legislator with unlimited absolute personal immunity from substantive liability or from any obligation to testify in a judicial proceeding (emphasis added). Beno, 116 Wis.2d at 142-143.

Indeed, the court urged judges to assert their constitutional prerogative of policing legislative excess.

> Judicial action may be needed to serve the broad public interests, as when the court acts not in derogation of the separation of powers but to maintain

[2] "...for any speech or debate in either house, they [legislators] shall not be questioned in any other place." U.S. Const. art. I, sec. 6, clause 2.

> the proper checks and balances or to vindicate the public interest (emphasis added). Id. at 143.

This call for judicial action is emphatic and intentional.

Even more compelling, the Beno court expressly left the door open for prosecuting crimes committed under mantle of legislative office in Wisconsin.

> We are not concerned in this case with the situation in which the legislator has committed a criminal or unconstitutional act in the course of legislative duties, or the case in which the disclosure of words or acts within the legislative functions is sought in a criminal case. These issues, as well as many others, are not now before the court. Id at 143 n. 6.

In leaving this door open, the Beno opinion seems almost prescient. Footnote 6 may be read as an invitation to the present prosecution to enter that open door.

The above invitation strikes a balance in favor of government accountability. This constitutional balance derives, in part, from Wisconsin's proud heritage of clean government. Our constitution was not drafted in a vacuum. Article IV, section 16 is imbued with the framers' values and aspirations.

> ...in drafting the Wisconsin Constitution the framers sought guidance not merely in the Federal Constitution but also in the common law, the experiences, the tradition, and the values of the people of the territory of Wisconsin (citations omitted; emphasis added) Id. at 134-135.

The State of Wisconsin has enjoyed a tradition and experience of clean government which differ from that of our neighbors. Our constitution must be interpreted in a manner upholding that honorable heritage.

2. The Speech and Debate Clause does not give Defendant a constitutional privilege to extort campaign contributions from lobbyists.

Defendant makes the startling argument that legislators' discussions with lobbyists are "an integral part of the legislative process," and consequently, a legislator is free to extort money from a lobbyist in the course of those discussions. Defendant writes:

> Irrespective of one's opinion of the appropriateness of Senator Chvala's allegedly threatening communications with lobbyists, those communications were inextricably related to the Senate's consideration of proposed legislation. Defendant's brief at pg. 8-9.

In other words, legislators and lobbyists are above the criminal law when they conspire to buy and sell legislation. This argument is not only morally offensive, it fails to cite a

single supporting case.

As noted above, Beno counsels that federal Speech and Debate Clause cases are not determinative of the Wisconsin Constitution. However, were the State of Wisconsin to look to federal authority, even that authority is directly contrary to Defendant's position. In United States v. Brewster, 408 U.S. 501 (1971), United States Senator Daniel Brewster was charged with accepting bribes from persons lobbying for his favorable official action on postal rates. The trial court dismissed the bribery counts on Speech and Debate Clause grounds. On appeal, the United States Supreme Court reversed, finding the bribery counts did not rest on proof of legislative acts.

Brewster distinguishes between a legislator's corrupt **promise** to pass a bill, and that legislator's subsequent **vote or other official legislative act** in passing that bill. Proof of the corrupt promise is admissible. Proof of the corrupt vote is not. This distinction arises because the Speech and Debate Clause protects only those acts which are part of the legislative process.

> The question is whether it is necessary to inquire into how appellee [legislator] spoke, how he debated, how he voted, or anything he did in chamber or in committee in order to make out a violation of this statute [accepting bribes]. The illegal conduct is taking or agreeing to take money for a promise to act in a certain way...Taking a bribe is, obviously, no part of the legislative process or function; it is not a legislative act (emphasis added). Id. at 526.

The crime of soliciting a bribe occurs when the corrupt promise is made. The crime is completed before the legislator votes in consummation of the bribery agreement. Consequently, a bribery charge may be alleged and proved without evidence of a legislative vote or act. Id.

In so ruling, the United States Supreme Court carefully weighed the competing interests of protecting legislative independence versus enforcing legislative honesty. The Court rejected Senator Brewster's assertion of broad sweeping legislative privilege, finding such claims would render legislators "virtually immune from a wide range of crimes simply because the acts in question were peripherally related to their holding office." Id. at 520. Rather, the Court found the criminal prosecution to be constitutionally permissible.

> ...the purpose of the Speech or Debate Clause is to protect the individual legislator, not simply for his own sake, but to preserve the independence and thereby the integrity of the legislative process. But financial abuses by way of bribes, perhaps even greater than Executive power, would gravely undermine legislative integrity and defeat the right of the public to honest representation (emphasis added). Id. at 524.

Legislators are not above the criminal law. They are not "super-citizens, immune from criminal responsibility." Id. at 516.

See, also, United States v. Helstoski, 442 U.S. 477, 490 (1979)("A [legislator's] promise to deliver a speech, to vote, or to solicit other votes at some future date is not 'speech or debate'").

3. The criminal complaint may properly refer to the legislative power of the Senate Majority Leader.

Defendant argues the extortion and misconduct in public office allegations (counts 1-6) are deficient because they implicate Defendant's legislative power and reputation. The Defendant writes:

> [t]o prove his absolute power, the prosecution would have to show how Senator Chvala had wielded that power in the past...the constitution prevents the prosecution from establishing why the lobbyists sought out Senator Chvala in furtherance of the legislation that was discussed: his purported power over proposed legislation. Defendant's brief at pg. 12.

This argument is both legally and factually wrong.

First, Defendant is wrong on the law. The crime of extortion (and the related charge of misconduct in public office) has no element requiring a defendant actually have the ability to effectuate the threatened injury. Nor does the offense contain an element requiring a victim believe a defendant has such ability. The two elements of extortion are:

1. the defendant threatened to injure the person , property, profession, business, calling or trade of the victim;

2. the defendant acted with intent to extort.

Section 943.30(1), Wis. Stats.; WIS JI-CRIMINAL 1473B.

There is no third element that Defendant had the power to follow through on his threat, or that the victims believed Defendant had such power. Thus, Defendant is challenging the

criminal complaint on grounds it fails to allege an element which the law does not require.

Second, Defendant is wrong on the facts. Even if extortion included an element requiring an ability to effectuate the threatened injury, the criminal complaint does validly allege such facts. Defendant suggests the criminal complaint recites a history of Defendant's legislative acts in violation of the Speech and Debate Clause. Defendant misreads the criminal complaint. The criminal complaint alleges Defendant's legislative status by other constitutionally competent facts.

The criminal complaint establishes Defendant's legislative reputation and power by three types of factual allegations:

1. Lobbyists statements as to their subjective beliefs about Defendant's legilsative power (paras. 7, 22, 33, and 36 of Criminal Complaint);

2. Expert opinion by Defendant's chief of staff, Doug Burnett, as to a Senate Majority Leader's general legislative powers (para. 257); and

3. Recitation of the laws and procedural rules which empower the position of Senate Majority Leader (paras. 4-6 of Criminal Complaint).

None of these three forms of evidence tread on Defendant's privileges under the Speech and Debate Clause. They do not focus on any legislative act of Defendant, and are not constitutionally taboo.

While not binding on Wisconsin, United States v. McDade, 827 F.Supp. 1153 (E.D. Pa. 1993) holds the federal Speech and Debate Clause does not prohibit introduction of legislative status in a public corruption prosecution. The criminal indictment alleged that Senator McDade's status as a legislative committee member in the United States Senate made him a more attractive target for potential bribers. Id. at 1164. Senator McDade objected on Speech and Debate Clause grounds. The District Court disagreed and upheld the criminal indictment.

> Given the act-based analysis applied by the Supreme Court in such cases as Johnson, Gravel, Brewster, and Helstoski, I believe that the Court would hold that committee membership, and legislative status in general, are not "legislative acts" and that, therefore, legislative status is not protected by the Speech or Debate Clause (emphasis added). Id. at 1168.

Even under the federal rule, then, a criminal complaint may refer to a defendant's legislative status.

II. Counts 7-10: Misconduct in Public Office

Counts 7-10 (misconduct in public office) allege Defendant used public resources of the Senate Democratic Caucus (SDC) to run partisan political campaigns. This abuse of public resources violated Defendant's "duties of office" within the meaning of section 946.12(3), Wis. Stats. Contrary to Defendant's assertions, separation of powers doctrine does not protect legislators who commit such malfeasance in public office. The charges are supported by constitutionally permissible facts.

A. Defendant violated his duties of public office by using public resources of the Senate Democratic Caucus for partisan election campaigns.

The misconduct in public office charges (counts 7-10) allege Defendant exercised a discretionary power "in a manner inconsistent with the duties of the official's or employees office..." in violation of section 946.12(3), Wis. Stats. Defendant's concerted use of the SDC as a political campaign organization violated several distinct duties of his public office. A State Senator must not use his public office for private gain. Sections 19.45(2) and 19.46(1)(b), Wis. Stats. He must not allow his public office spaces to be used for election campaign purposes. Section 11.36(3), Wis. Stats. He may not require his subordinates to do election campaign work as a condition of their public employment. Section 12.08, Wis. Stats. A State Senator must abide by internal legislative policy prohibiting use of public resources for political purposes. Senate Policy Manual. Defendant violated every one of these official duties.

First, Defendant violated sections 19.45(2) and 19.46(1)(b), Wis. Stats. by using SDC employees and resources for election campaigns. As more extensively discussed at pages 10-12 above, our code of government ethics prohibits using public position for private gain. Section 19.45(2) prohibits corrupt private advantages for the public official or for "an organization with which he or she is associated." Section 19.46(1)(b) likewise extends to the public official's own private organizations. As Senate Majority Leader, Defendant used his control of the SDC to corruptly benefit the private interest of his own political party. In doing so, Defendant violated his official duty to uphold the ethical standards of Chapter 19 of Wisconsin Statutes.

Second, the misconduct in public office counts may be founded on Defendant's violations of section 11.36(3), Wis. Stats. Section 11.36(3) prohibits a person who "has charge or control" of a government office from allowing persons to enter that office "for the purpose of making or receiving a political contribution." Defendant controlled the government offices of the SDC. Defendant had an official duty, under section 11.36(3), not to allow political contributions within these government offices. However, Defendant allowed, and even directed, SDC employees to enter their government offices in order to work on election campaigns. This work constituted an in-kind campaign contribution, and as such, constituted the "making...a political contribution" in violation of section 11.36(3), Wis. Stats. Defendant violated his duty to keep his government offices free from election campaign activity.

Third, all of the SDC misconduct counts, and more particularly count 7 (hiring Wendy Kloiber) and count 8 (attempting to hire Heather Colburn), are violations of Defendant's duty to abide by section 12.08, Wis. Stats. Section 12.08 forbids a government official from requiring a person to perform political work "by means of the denial or threat of denial of any payment or other benefit" from the state. Defendant conditioned SDC employment upon willingness, and success, in performing election campaign work. For example, Defendant hired Wendy Kloiber for the purpose of running Senator Alice Clausing's reelection campaign. Paras. 50 and 92 of Criminal Complaint. Likewise, he offered SDC employment to Heather Colburn for the express purpose of political fundraising. Para. 56 of Criminal Complaint. He also threatened to fire Andrew Gussert from his position as director of the SDC if Mr. Gussert failed to secure the reelection of Senator Clausing. Para. 93 of Criminal Complaint. These acts violated Defendant's official duty to hire government employees without regard to their willingness to run election campaigns.

Finally, Defendant's misuse of SDC directly violated the unambiguous standards of the Senate Policy Manual. Section I of the Senate Policy Manual provides as follows.

> No political activity is permitted during working hours. No state facility, office equipment, supplies, etc. may be used for political purposes at any time. During non-office time, employees may exercise their citizenship rights by political activity and community involvement (emphasis added.)

The prohibition is clear and absolute. No political activity on state time. No political use of state resources at any time. Notwithstanding this straightforward language, Defendant believes the court will somehow find this Senate policy puzzling or ambiguous.

B. Defendant unambiguously violated the Senate Policy Manual proscription against using public time and resources for political purposes.

Invoking the doctrine of "justiciablity," Defendant asserts the State may not prosecute violations of an allegedly ambiguous Senate Policy Manual. As the argument goes, "political activity" is indistinguishable from "legislative activity." Defendant claims the court may not clarify this alleged ambiguity of internal legislative rules. Defendant's brief at pgs. 16-17.

Defendant's argument misapplies justiciability doctrine. In United States v. Rostenkowski, 59 F.3d 1291 (D.C. Cir. 1995), a prosecution of a United States congressman for misappropriation of public funds, the court discussed whether interpretation of certain internal congressional rules was justiciable. In other words, was the matter proper for judicial determination. The issue turned not on the Speech and Debate Clause, but on the Rulemaking Clause of article I, section 5 of the United States Constitution. The Rulemaking Clause empowers congress to "determine the rules of its proceedings." Rostenkowski held that, when internal legislative rules are overly ambiguous, the courts may not invade the legislature's constitutional rulemaking authority by judicial improvisation. Such questions about internal legislative rules are not justiciable. Id. at 1304-1306.

Rostenkowski then examined how ambiguous a rule must be before it becomes no longer susceptible to judicial enforcement. In answering this question, the court wrote as follows.

> "In the absence of any discernible legal standard - or even of a congressional policy determination - that would aid consideration and decision of the question...we are loathe to give the [statute] an interpretation that would require the judiciary to develop rules of behavior for the Legislative Branch [citing United States v. Cannon, 642 F.2d1373 (D.C. Cir. 1981)]. If a particular House Rule is sufficiently clear that we can be confident of our interpretation, however, then that risk is acceptably low and preferable to the alternative risk that an ordinary crime will escape the reach of the law merely because the malefactor holds legislative office (emphasis added). Id. at 1306.

Thus, a court may interpret an internal legislative rule if there is a reasonably "discernible legal standard."

Rostenkowski further explained that internal legislative rules are not to be viewed in the abstract. Justiciability depends upon whether a rule is clear when applied to the specific facts of a particular case.

> In sum, unless we can determine the facts set out in a particular allegation could not be authorized under any reasonable interpretation of the House Rules, we must find that allegation non-justiciable (emphasis added). Id. at 1310.

A rule is not defective just because a defendant can imagine hypothetical facts which fall in some gray area at the periphery of the disputed rule. The rule is non-justiciable only if it is ambiguous as to the specific factual allegations of the criminal complaint.

Defendant also cites United States v. Cannon, 642 F.2d1373 (D.C. Cir. 1981) as supporting their position. Senator Daniel Cannon was charged with fraud for using a legislative aide to run his reelection campaign. Senator Cannon claimed internal congressional rules failed clearly to prohibit such activity. The court first looked for "judicially discoverable and manageable standards for resolving" what the congressional rules were. The Cannon court did not find the standards to be ambiguous. Rather, the court found no standards existed at all, and refused to make them up.

> We perceive no "textually demonstrable commitment" of the issue before us to any other branch of the Federal Government. Nor do we believe that judicial review of congressional employment decisions necessarily involves a "lack of the respect due for coordinate branches of government" We do find, however, a complete absence "of judicially discoverable and manageable standards for resolving" the question whether Senators may use paid staff members in their campaign activities. Id., 642 F.2d at 1379.

Courts need not forsake their role as interpreters of the law in the area of internal legislative rules. Cannon holds that, in this area, the courts may search for, and apply, "judicially discoverable and manageable standards."

The Wisconsin Constitution has a Rulemaking Clause identical in language to the federal constitution. Article IV, section 8, Wis. Const., states "[e]ach house may determine the rules of its own proceedings..." Thus, federal precedent discussing the need for a "judicially discoverable and manageable standards" is relevant.

In the present case, a judicially discoverable and manageable standard exists. The Senate Policy Manual expressly forbids SDC employees from "political activity" using state time or resources. The term "political activity" is readily discernible when applied to the facts of the criminal complaint. Defendant would be hard pressed to deny that running partisan election campaigns, as is alleged in counts 7-10, constitutes political activity. Producing campaign literature asking the electorate to vote for a particular candidate is, by any definition of the term, "political activity." Fundraising for partisan election campaigns, which Defendant asked Heather Colburn to do, is unambiguous political activity. When applied to these facts, the Senate Policy Manual prohibition against political activity is clear.

What is more, the legislature itself has statutorily defined what constitutes activity for "political purpose." The campaign finance code provides:

> An act is for "political purpose" when it is done for the purpose of influencing the election or nomination for election of any individual to state or local office... Section 11.01(16)(a), Wis. Stats.;
>
> and
>
> Acts which are for political purpose include but are not limited to... the making of a communication which expressly advocates the election, defeat, recall, or retention of a clearly defined candidate... Section 11.01(16)(b), Wis. Stats.

Given that Defendant is a member of the legislature which enacted these definitions of "political activity," it seems disingenuous for him to claim not to understand their plain meaning.

Defendant seeks to create ambiguity by introducing extrinsic sources into the criminal complaint. As Defendant acknowledges in his own brief, the sufficiency of a criminal complaint is based upon the facts "within the four corners of the document." State v. Haugen, 52 Wis.2d 791, 793 (1971). Notwithstanding this rule, Defendant tries to graft in a policy letter from the Senate Clerk, Don Schneider. Defendant's brief quotes Mr. Schneider's letter at length, and relies heavily upon the letter in making the non-justiciability argument. However, as the court must recognize, the criminal complaint stands or falls upon its own factual allegations.

The date that Mr. Schneider's wrote his letter underscores the letter's irrelevance. Mr. Schneider wrote the letter on October 11, 2001. This post-dates all of the misconduct in public office counts. Mr. Schneider's letter did not exist when Defendant violated the Senate Policy Manual as alleged in counts 7-10. The letter, then, can have no possible bearing upon the sufficiency of counts 7-10.

Defendant scoffs at the State's assertion that violations of the Senate Policy Manual can constitute the crime of misconduct in public office. Defendant's brief at pg. 20. Trying to extend the State's position ad absurdum, Defendant argues minor violations of the Senate Policy Manual - such as smoking in a nonsmoking area - are potential felonies. Once again, Defendant ignores the elements of the crime with which he is charged. Misconduct in public office requires a defendant violate a public duty for the purpose of obtaining "a dishonest advantage." Section 946.12(3),Wis. Stats.; WIS JI-CRIM 1732. Defendant's absurd examples do not meet the "dishonest advantage" element, and hence, would not be crimes.

Moreover, the law entrusts prosecutors with discretion to bring only just and reasonable charges. As seen in the present case, a prosecutor can differentiate between minor infractions and gross malfeasance.

C. The Rulemaking Clause does not undermine the factual allegations that Defendant directed the illicit SDC political activities.

Defendant further presses his faulty Rulemaking Clause analysis by arguing that Senate rules are ambiguous as to whether he had supervisory authority over the SDC. Defendant fails to make clear how this alleged ambiguity impacts the sufficiency of the criminal complaint. The State assumes Defendant is asserting justiciability doctrine. Defendant apparently objects to an allegedly ambiguous Senate Rules 88 serving to show Defendant directed illicit SDC political activity. If this indeed is Defendant's argument, it is irrelevant.

Counts 7-10 are not based on the existence of some theoretical administrative responsibility. Rather, the criminal complaint states Defendant did, in actual practice, supervise SDC employees. In fact, Defendant hired SDC employees. Paras. 50, 64, and 88 of Criminal Complaint. In fact, the SDC directors reported to Defendant. Paras. 68 and 94 of Criminal Complaint. In fact, Defendant supervised campaign work by SDC

employees. Paras. 67-68, 72, 79, 84, and 95 of Criminal Complaint. According to SDC Director Andrew Gussert, "the defendant was really the one who did the supervising and was in complete control of the Senate Democratic Caucus." Para. 89 of Criminal Complaint. These factual allegations amply support the misconduct in public office counts relating to the SDC.

See, eg., State v. Tronca, 84 Wis.2d 68, 80 (1978)("the powers of a public official, which are subject to control by various types of misconduct statutes, are not limited to expressly conferred powers but apply to de facto powers which arise by custom and usage.")

D. Defendant's hiring SDC employees to run partisan election campaigns is not protected by the Speech and Debate Clause.

The Speech and Debate Clause does not render Defendant's corrupt hiring decisions immune from prosecution. As Beno emphasized, the Speech and Debate Clause of the Wisconsin Constitution does not prevent the judiciary from asserting "the proper checks and balances" on the legislature. Id., 116 Wis.2d at 143. In the present case, Defendant's hiring SDC employees to do election campaign work was part of a systemic abuse of legislative power. Such institutional corruption is just the circumstance, anticipated in Beno, where the judiciary should exercise its constitutional "checks and balances" authority.

To the extent federal authority is relevant to the Speech and Debate Clause of the Wisconsin Constitution, Defendant misconstrues it. Defendant relies heavily on Browning v. Clerk, 789 F.2d 923 (D.C. Cir. 1986) for the proposition that a legislator's employment decisions are privileged. As the following review of federal case law shows, Browning has been implicitly overruled. The modern trend is to view legislator's employment decisions as administrative, rather than legislative, in nature. They are not protected by the Speech and Debate Clause.

Some lower courts have held the Speech and Debate Clause renders legislators immune to civil suits for wrongfully firing legislative employees. See, e.g., Browning, supra, (Speech and Debate Clause shielded Congress from wrongful dismissal suit by Official Reporter of House of Representatives); Agromayor v. Colberg, 738 F.2d 55, 60 (1st Cir. 1984)(legislative press officer's wrongful dismissal suit precluded by Speech and

Debate Clause because he had "opportunity for 'meaningful input' into the legislative process such that the employee decision should be immunized").

Forrester v. White, 484 U.S. 219 (1988) is a United States Supreme Court case casting doubt on the Browning and Agromayor decisions. In Forrester, a probation officer sued the judge who employed him for wrongful dismissal. Separation of powers concerns did not foreclose the suit. The Court determined hiring and firing decisions are administrative in nature, and so not entitled to immunity. The focus is not on how the public employee contributes to the governmental process. Rather, immunity turns on whether the act of hiring or firing itself constitutes an administrative versus a judicial (or legislative) act.

Courts have extended the reasoning of Forrester to the legislative branch. See, e.g., West v. Phillips, 883 F. Supp. 308, 316 (S.D. Ind. 1994)("The court must ascertain whether the decision to terminate West's employment [as a legislative assistant] arose out of or constituted 'an integral part of the deliberative and communicative process' that characterizes legislative activity."); Gross v. Winter, 876 F.2d 165, 172 (D.C. Cir. 1989)("...under Forrester, the functions judges and legislators exercise in making personnel decisions affecting such employees are administrative, not judicial or legislative"). Under this reading of Forrester, the federal Speech and Debate Clause would not preclude prosecuting a legislator for hiring public employees to do campaign work.

E. The factual allegations in the criminal complaint fully support Counts 7-10 (misconduct in public office).

Notwithstanding Defendant's claims, sufficient factual allegations do support the misconduct in public office counts related to the SDC. Defendant asserts the State fails to substantiate its "theory of the case." As to counts 7, Defendant argues he was lawfully entitled both to hire Wendy Kloiber and to ask her to do campaign work, and consequently, he committed no crime. Defendant's brief at pg. 21. Defendant makes a similar argument as to Heather Colburn in count 8. Defendant's analysis falls short. He never reaches the gravamen of the charged offenses. The crux of the SDC misconduct charges is Defendant asked Ms. Kloiber and Ms. Colburn to perform election campaign

work as a condition of their public employment. The criminal complaint adequately presents this prohibited demand. Paras. 50 and 56 of Criminal Complaint.

As to counts 9 and 10, Defendant claims the criminal complaint fails to establish Defendant "instructed any SDC staffers to work on campaigns during business hours." Defendant's brief at pg. 22. Every reasonable inference must be drawn when evaluating the sufficiency of a criminal complaint. Thiel, 183 Wis.2d at 542. Over twenty pages of the criminal complaint (pgs. 19-41) detail Defendant's continuous and comprehensive supervision of the SDC. The criminal complaint alleges that Defendant ran the SDC, and that SDC employees performed extensive campaign work using public resources and time. These facts, both directly and circumstantially, show Defendant's responsibility for the SDC political abuses.

III. Count 11: Unlawful Political Contribution

The criminal complaint alleges ample facts supporting count 11 (unlawful political contribution). The crime of making an unlawful political contribution has the following three elements:

1. defendant furnished funds to another;

2. defendant furnished the funds for the purpose of making a political contribution; and

3. defendant intended the political contribution be made in other than defendant's name. Section 11.24(1) Wis. Stats; State v. Dreske, 88 Wis.2d 324 (Ct. App. 1979). In meeting these elements, the criminal complaint alleges Defendant gave "over $1,500 in cash" to Lance Walter (element 1). Defendant told Mr. Walter to get the money to the campaign of Senate candidate Dave Hansen (element 2). Defendant knew the money would not be contributed in Defendant's name alone because the money exceeded the $1,000.00 limit Defendant could lawfully give to a Senate candidate (element 3). See, section 11.26(2)(b), Wis. Stats.

Defendant denies these factual allegations are sufficient. However, the defense analysis refuses to draw an obvious inference from the factual allegations. Defendant had to know Mr. Walter would contribute at least some portion of the $1,500 under some name other than Defendant. Defendant was an experienced campaigner. He knew section 11.26(2)(b), Wis. Stats., limited his individual contributions to Senator Hansen to not

more than $1,000.00. Consequently, Defendant had to realize Mr. Walter could not name Defendant as the source of the entire $1,500 contribution.

Defendant's general laxity about the $1,500 shows he just did not care about complying with campaign finance laws. For example, section 11.12(2), Wis. Stats., prohibits anonymous cash contributions exceeding ten dollars. Yet Defendant accepted anonymous twenty dollar bills, and put them in the envelope for Mr. Walter to forward to the Hansen campaign. Para. 126 of the Criminal Complaint. Defendant's generally cavalier attitude towards campaign contributions is consistent with his intent to violate section 11.26(2)(b), Wis. Stats.

IV. Counts 12-20: Illicit Campaign Coordination

Counts 12-20 allege that Defendant, as party to a crime, engaged in illicit campaign coordination. The general prosecution theory for these charges is as follows. Defendant simultaneously controlled Senate candidate campaigns and a purportedly "independent" organization advertising in favor of those same Senate candidates. Because of this coordination, the "independent" organization's advertising became "in-kind" contributions to the Senate candidate campaigns. These in-kind contributions involved hundred of thousands of dollars in television advertisements. Such huge in-kind contributions violate the $1,000 limit on individual contributions to a Senate candidate. Section 11.26(2)(b), Wis. Stats. Defendant violated the campaign finance code by causing the "independent" organization both to make these unlawful in-kind campaign contributions (counts 12), and to lie about making them (counts 13-19). The same general prosecution theory also applies to count 20 (conspiracy to make campaign contributions exceeding lawful limits).

The State carefully drafted these charges to conform with the prosecution theory expressly approved in Coalition for Voter Participation vs. Elections Bd., 231 Wis.2d 670 (Ct. App. 1999). Indeed, Coalition for Voter Participation served as a blueprint for counts 12-20.

A. Coalition for Voter Participation v. Elections Bd.

The Coalition for Voter Participation case involved the 1997 election contest between Jon Wilcox and Walter Kelly for the Wisconsin Supreme Court. The appellant, Coalition for Voter Participation, did a postcard mailing which candidate Kelly construed

as pro-Wilcox. Kelly complained to the Wisconsin State Elections Board, claiming Coalition for Voter Participation improperly consulted with the Wilcox campaign in producing the postcard mailing. The Elections Board began investigating, and issued subpoenas for Coalition for Voter Participation telephone records. Coalition for Voter Participation sued, asking the courts to stop the Elections Board investigation and to declare the postcard mailing was lawful. The trial court dismissed Coalition for Voter Participation's suit, and allowed the Election Board investigation to proceed. The Court of Appeals affirmed.

In affirming, the Court of Appeals identified potential criminal violations which the Elections Board could rightfully investigate. The court noted section 11.26(1)(a), Wis. Stats., limits contributions to Wisconsin Supreme Court races to $10,000. Id. at 677 n. 2. If Coalition for Voter Participation mailings were coordinated with the Wilcox campaign, the mailings constituted a contribution to the Wilcox campaign. As the court further explained

> ...if it [the postcard mailing] could be considered a contribution to Wilcox's campaign, it would far exceed the legal contribution limit for supreme court elections. Id. at 679.

This approved charging theory, violation of the contribution limits in section 11.26, Wis Stats., is the basis for counts 12 and 20 of the present complaint.

The Court of Appeals also rejected Coalition for Voter Participation's First Amendment arguments. Coalition for Voter Participation argued that, even if they coordinated the postcard mailing with the Wilcox campaign, the State could not regulate the effort. The postcard mailing only implicitly favored Wilcox. It did not constitute "express advocacy," meaning the postcard mailing did not directly ask voters to vote for Wilcox. Coalition for Voter Participation read Buckley v. Valeo, 424 U.S. 1, 44 n. 52 (1976) to mean the State could only regulate their postcard mailing if the mailing constituted "express advocacy." The Court of Appeals disagreed, finding Coalition for Voter Participation's argument misapplied Buckley.

The Court of Appeals found Buckley distinguishes between "expenditures" by an independent organization, and "contributions" to a candidate's campaign. The government may not regulate truly independent expenditures. However, when an

organization's expenditure is coordinated with a candidate campaign, the expenditure effectively becomes an in-kind campaign contribution to a candidate. The government may regulate in-kind campaign contributions.

Coalition for Voter Participation further holds coordinated expenditures are campaign contributions whether they involve "express advocacy" or merely implied support.

> Plaintiffs [Coalition for Voter Participation] are correct in their reference to Buckley as holding that independent expenditures that do not constitute express advocacy of a candidate are not subject to regulation, and 11.04, Stats., says pretty much the same thing. But, neither Buckley nor 11.04 limit the state's authority to regulate or restrict campaign contributions... [C]ontributions to a candidate's campaign must be reported *whether or not* they constitute express advocacy (underlining added; italics in original). Coalition for Voter Participation, 231 Wis.2d at 679

Consequently, the Court of Appeals observed the Coalition for Voter Participation mailing could represent a contribution to the Wilcox campaign even though the postcards did not expressly ask the electorate to vote for Wilcox. Id.

Coalition for Voter Participation also considered whether clear standards exist for determining if an expenditure is "coordinated" with a candidate campaign. The Court of Appeals found the Wisconsin Elections Board rules (Wis. Adm. Code, section ElBd 1.42) to be adequate.

> Under Wis. Adm. Code ElBd 1.42(2), a voluntary committee such as the Coalition is prohibited from making expenditures in support of, or in opposition to, a candidate if those expenditures are made "in cooperation or consultation with any candidate or...committee of a candidate...and in concert with, or at the request or suggestion of, any any candidate...or committee" and are not reported as a contribution to the candidate. These provisions are consistent with the federal campaign laws approved by the Supreme Court in *Buckley* - laws which, like our own, treat expenditures that are "coordinated" with, or made "in cooperation with or with the consent of a candidate...or an authorized committee" as campaign contributions (footnote omitted; emphasis added). Coalition for Voter Participation, 231 Wis.2d at 681.

The Court of Appeals identified specific criteria for assessing campaign coordination. Quoting Federal Elections Commision v. The Christian Coalition, 52 F.Supp.2d 45, 92 (1999), the court listed the following standards for determining whether a political

advertisement was coordinated with a candidate campaign: "(1) timing; (2) contents; (3) location, mode or intended audience; (4) volume (eg. number of copies of printed materials or frequency of media spots)" Coalition for Voter Participation at 686 n. 10. Thus, a defendant may not fairly argue he lacks fair notice as to the meaning of the term "campaign coordination." Id.

B. Wisconsin Elections Board rules

As Coalition for Voter Participation holds, the Wisconsin State Elections Board has set clear standards for what constitutes campaign coordination. Section ElBd 1.42(6)(a)(1) of the Wisconsin Administrative Rules provides coordination will be presumed if:

> [the expenditure] is made as a result of a decision in which any of the following persons take part:
>
> a. A person who is authorized to raise funds for, to spend the campaign funds of or to incur obligations for the candidate's personal campaign committee;
>
> b. An officer of the candidate's personal campaign committee;
>
> c. A campaign worker who is reimbursed for expenses or compensated for work by the candidate's personal campaign committee;
>
> d. A volunteer who is operating in a position within a campaign organization that would make the person aware of campaign needs and useful expenditures.

These rules were in place when Defendant used Independent Citizens for Democracy to run Senate candidate campaigns

C. Defendant had no First Amendment right illicitly to coordinate political campaigns.

Defendant argues counts 12-20 are invalid because "the right of the ICD [Independent Citizens for Democracy] to spend money on political campaigns is protected by the First Amendment." Defendant's brief at pg. 26. In support of this argument, Defendant quotes Buckley for rhetorical purposes, but chooses to ignore the specific holding of the case. Buckley found "independent" expenditures are subject to government regulation if, through coordination with a candidate, they effectively become campaign contributions.

> [S]uch controlled or coordinated expenditures are treated as contributions rather than expenditures under the Act [Federal Election Campaign Act]. Section 608(b)'s contribution ceilings rather than 608(e)(1)'s independent expenditure limitation prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions (emphasis added). Buckley, 424 U.S. at 46-47.

These federal regulations against playing a campaign finance shell game do not violate the First Amendment.

In the present case, the campaign finance laws which Defendant violated are likewise valid. Indeed, when discussing the sections of Chapter 11, Wis. Stats., which prohibit campaign coordination, the Court of Appeals wrote "[t]hese provisions are consistent with the federal campaign laws approved by the Supreme Court in Buckley." Coalition for Voter Participation, 231 Wis.2d at 681. The First Amendment, then, is no blanket defense to counts 12-20.

D. Independent Citizen's for Democracy's advertising constituted campaign contributions to Senate candidates.

As alleged in counts 12-19, Defendant coordinated Independent Citizens for Democracy's election efforts with Senate candidate campaign committees. Application of Wis. Adm. Rules ElBd 1.42(6) shows Defendant did illicitly coordinate political activities. Defendant's expenditures through Independent Citizen Citizens for Democracy are presumed to be coordinated with candidates because:

1. Defendant was a "person authorized to raise funds for [or] to spend the campaign funds of" the candidates. ElBd. 1.42(6)(a)(1)(a); or

2.Defendant was in a position within candidate campaigns such that he was "aware of campaign needs and useful expenditures." ElBd. 1.42(6)(a)(1)(d).

Under both these criteria, Defendant engaged in illicit campaign coordination with the Mark Meyer, Dave Hansen, and Alice Clausing campaigns.

As to the 2000 Mark Meyer campaign (count 12), the criminal complaint alleges Defendant did the following: ran the overall campaign (Para.133 of Criminal Complaint), fundraised for the campaign (Para.134 of Criminal Complaint), reviewed and approved campaign advertising (Para.140 of Criminal Complaint), and knew of the campaign's television advertising strategy (Para.140 of Criminal Complaint). Having this insider position in, and knowledge of, the Meyer campaign, Defendant coordinated Independent

Citizens for Democracy's efforts to complement the Meyer campaign. For example, paragraph 239 of the criminal complaint alleges Defendant knew the Meyer campaign lacked adequate funds to buy television advertising early in the campaign. Consequently, Defendant directed Independent Citizens for Democracy to air early pro-Meyer television advertising to meet the shortfall.

As to the 2000 Dave Hansen campaign (count 17), the criminal complaint alleges Defendant reviewed the Hansen campaign budget (para. 241 of Criminal Complaint), and "approved and directed expenditure of Sen. Hansen's campaign monies on television advertising" (Para. 241 of Criminal Complaint). Once again, his insider position allowed Defendant to craft Independent Citizens for Democracy's advertising to bolster the Hansen campaign's own efforts. For example, Defendant directed Independent Citizens for Democracy to counter an anti-Hansen television advertisement when the Hansen campaign itself "could not do a response advertisement for either financial or strategic reasons." Para. 243 of Criminal Complaint.

As to the 2000 Alice Clausing campaign (count 19), Defendant likewise directed and approved the candidate's campaign expenditures. Para. 248 of Criminal Complaint. At the same time, Defendant arranged for a huge pro-Clausing mailing through Independent Citizens for Democracy. Para 249 of Criminal Complaint. Defendant directed these expenditures based upon a single coordinated campaign strategy to reelect Alice Clausing.

The above facts paint the picture of a completely unified campaign effort. Defendant orchestrated the reelection bids of Senate candidates, using one arm to run the candidates' own campaigns and the other arm to run the coordinated campaign efforts of Independent Citizen for Democracy. Defendant did not simply coordinate between the two efforts. Defendant was the effective head of both efforts.

Most damning of all, Defendant's own chief of staff, Douglas Burnett, stated he and Defendant expressly conspired to coordinate Independent Citizens for Democracy's efforts with Senate candidate campaigns. Defendant and Mr. Burnett discussed amongst themselves that they were breaking the law. Indeed, Defendant purposely used Mr. Burnett as an intermediary to hide Defendant's illegal control of Independent Citizens for

Democracy. Paras. 238 and 250 of Criminal Complaint. The State can hardly conceive of more powerful facts to support a prosecution for unlawful campaign coordination.

As a final observation, the name "Independent Citizens for Democracy" ironically belies the organization's true role in Wisconsin politics. As seen above, it was not "Independent." Defendant unlawfully coordinated the organization's efforts with candidate campaigns. Nor was the organization composed of "Citizens." Rather, corporate special interests funded the organization, and Defendant controlled it. Lastly, the group surely did not function "for Democracy." The organization was fundamentally anti-democratic in nature. In essence, it enabled corporate money, rather than the popular will, to determine the outcome of elections.

E. Defendant conspired to unlawfully coordinate expenditures with 2002 Senate election campaigns.

As to count 20 (conspiracy to make unlawful campaign contributions), Defendant asserts "the prosecutor never even alleges that the expenditures would have been made in concert, coordination or consultation with agents of the campaign[s]" of 2002 Senate candidates. Here once again, Defendant simply fails to read the criminal complaint. Paragraph 250 of the criminal complaint alleges as follows.

> Defendant and Mr. Burnett planned to spend ICD-Issues Inc. (2001) monies in coordination with Democratic candidates, and to use SDC [Senate Democratic Caucus] employees as agents within the Democratic candidate campaigns to assist in coordinating the Senate campaigns with ICD-Issues Inc. (2001).

The allegations that Defendant planned to coordinate campaigns could not be more plainly stated. Moreover, as a conspiracy charge requires, Defendant took overt acts to realize the object of the conspiracy. The criminal complaint alleges Defendant established Independent Citizens for Democracy-Issues Inc. (2001) and raised funds for the organization. Paras. 181-209 and 251-252 of Criminal Complaint. Count 20 is amply supported by factual allegations in the criminal complaint.

F. The State has a compelling interest in enforcing campaign finance laws.

The State of Wisconsin has a compelling interest in enforcing the campaign finance code of Chapter 11, Wis. Stats. This interest underlies all constitutional analysis regarding counts 12-20. Defendant must agree illicit campaign coordination and sham

issue advertisements threaten our representational form of government. Defendant's own affidavit, in Wisconsin Realtor's Association v. Steven V. Ponto (W.D. Wis.; Case No. 02-C-0424 C), mouths the following words:

> The corrosive effect of the exponential increase in spending on sham issue advocacy campaign activity has resulted in the appearance of corruption and undue influence on the political process by narrow special interests. This situation provides the state with a compelling interest in regulating these activities. Chvala affidavit at para. 4.

It is shameful Defendant would claim these sentiments while, at the same time, violate their dictates for clean government. However, the hypocrisy of Defendant's conduct does not diminish the truthfulness of his words. Illicit campaign coordination, such as Defendant perpetrated in counts 12-20 of the criminal complaint, grievously corrodes and corrupts the political process.

V. Special Prosecutor Authority

As special prosecutors, E. Michael McCann, David Feiss, and Kurt Benkley, stand in the shoes of the Brian Blanchard, District Attorney for Dane County. We may prosecute all crimes, within the scope of our special prosecutor appointment, on behalf of the Dane County District Attorney. The special prosecutor statute, section 978.045(1r), Wis. Stats., provides a special prosecutor is appointed **"to perform the duties of the district attorney"** and **"shall have all of the powers of the district attorney."** The statute does not, in any way, qualify or limit the grant of special prosecutor authority. Curiously, Defendant's brief fails to cite or discuss section 978.045(1r).

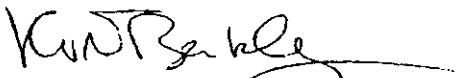
Defendant's failure to consider the broad grant of special prosecution powers specified in section 978.045(1r) causes Defendant to misinterpret section 11.61(2), Wis. Stats. Section 11.61(2) states "all prosecutions under this section shall be conducted by the district attorney of the county where the violation is alleged to have occurred." Defendant wrongly views this language as voiding special prosecutions of Chapter 11 violations. Statutes must be interpreted and harmonized in a manner which avoids "absurd or unreasonable results." Peters v. Menard, Inc., 224 Wis.2d 174. 189 (1998). Defendant's wooden interpretation would lead to absurdities. For example, extending Defendant's theory, an assistant district attorney could not prosecute chapter 11 violations

because section 11.61(2) says the "district attorney" is to conduct such prosecutions. Defendant's argument verges on the frivolous, and must be rejected.

CONCLUSION

For the above stated reasons, this court should deny Defendant's motion to dismiss, and allow the criminal complaint to be tried upon its merits.

Respectfully submitted this 30 day of January, 2003,



Kurt Benkley
Special Prosecutor for Dane County
State Bar. No.1021096

STATE OF WISCONSIN	CIRCUIT COURT	DANE COUNTY
STATE OF WISCONSIN –	Plaintiff	CRIMINAL COMPLAINT
vs.		
Chvala, Charles 1 Coach House Drive Madison, WI 53714 (DOB: 12-05-54)	Defendant(s)	Complaining Witness: Bradley Kust

THE ABOVE NAMED COMPLAINING WITNESS BEING DULY SWORN SAYS THAT THE ABOVE NAMED DEFENDANT(S) IN THE COUNTY OF DANE, STATE OF WISCONSIN.

COUNT 01: EXTORTION
In May of 1997, in Dane County, the above-named defendant did by verbal communication maliciously threaten an injury to the person, business, profession, calling or trade of William Peterson with the intent thereby to extort money from William Peterson, contrary to Wisconsin Statutes section 943.30(1).

COUNT 02: MISCONDUCT IN PUBLIC OFFICE
In May of 1997, in Dane County, the above named defendant in his capacity as a public officer did an act which the defendant knew he was forbidden by law to do in his official capacity, contrary to Wisconsin Statutes section 946.12(2).

COUNT 03: EXTORTION
In March of 1998, in Dane County, the above-named defendant did by verbal communication maliciously threaten an injury to the business, profession, calling or trade of the Wisconsin Realtors Association with the intent thereby to extort money from the Wisconsin Realtors Association, contrary to Wisconsin Statutes section 943.30(1).

COUNT 04: MISCONDUCT IN PUBLIC OFFICE
In March of 1998 in Dane County, the above named defendant, in his capacity as a public officer did an act which the defendant knew he was forbidden by law to do in his official capacity, contrary to Wisconsin Statutes section 946.12(2).

COUNT 05: EXTORTION
In July of 2000, in Dane County, the above-named defendant did by verbal communication maliciously threaten an injury to the business, profession, calling or trade of Wisconsin Wholesale Beer Distributors Association with the intent thereby to extort money, contrary to Wisconsin Statutes section 943.30(1).

COUNT 06: MISCONDUCT IN PUBLIC OFFICE
In July of 2000 in Dane County, the above named defendant, in his capacity as a public officer did an act which the defendant knew he was forbidden by law to

do in his official capacity, contrary to Wisconsin Statutes section 946.12(2).

COUNT 07: MISCONDUCT IN PUBLIC OFFICE
In June of 1999, in Dane County, the above-named defendant while acting as a public officer did exercise a discretionary power in a manner inconsistent with the duties of the defendant's public office and with the intent to obtain a dishonest advantage for another by hiring Wendy Kloiber as a State employee for the purposes of having Wendy Kloiber conduct campaign activities for State Senate Democratic Candidates, contrary to Wisconsin Statutes section 946.12(3).

COUNT 08: MISCONDUCT IN PUBLIC OFFICE
In October of 1999, in Dane County, the above-named defendant while acting as a public officer did exercise a discretionary power in a manner inconsistent with the duties of his office and with the intent to obtain a dishonest advantage for another by offering State employment to Heather Colburn for the purposes of having Heather Colburn conduct fund-raising activities for State Senate Democratic candidates, contrary to Wisconsin Statutes section 946.12(3).

COUNT 09: MISCONDUCT IN PUBLIC OFFICE
From July 1998 through November 1998, in Dane County, the above-named defendant while acting as a public officer did exercise a discretionary power in a manner inconsistent with the duties of his office and with the intent to obtain a dishonest advantage for another by directing employees of the Senate Democratic Caucus to participate and manage the campaigns of Democratic candidates for the Wisconsin State Senate on State of Wisconsin time and using State of Wisconsin resources, contrary to Wisconsin Statutes section 946.12(3).

COUNT 10: MISCONDUCT IN PUBLIC OFFICE
From July 2000 through November 2000, in Dane County, the above-named defendant while acting as a public officer did exercise a discretionary power in a manner inconsistent with the duties of his office and with the intent to obtain a dishonest advantage for another by directing employees of the Senate Democratic Caucus to participate and manage the campaigns of Democratic candidates for the Wisconsin State Senate on State of Wisconsin time and using State of Wisconsin resources, contrary to Wisconsin Statutes section 946.12(3).

COUNT 11: UNLAWFUL POLITICAL CONTRIBUTIONS
In June of 2000, at 44 E Mifflin Street, City of Madison, Dane County, the above-named defendant did intentionally furnish funds to Lance Walter for the purpose of making a political contribution in other than the defendant's own name, contrary to Wisconsin Statutes sections 11.24(1) and 11.61(1).

COUNT 12: CAMPAIGN CONTRIBUTION EXCEEDING LAWFUL LIMITS (AS A

PARTY TO A CRIME)
On or about Fall 2000, at or near 1314 E. Wilson Street, City of Madison, County of Dane, and other locations within County of Dane, the above-named defendant did, as a party to a crime, intentionally make a contribution to a candidate for Wisconsin State Senate, to wit: Mark Meyer, exceeding the maximum contribution of $1,000 per Wisconsin State Senate candidate allowed under section 11.26(2)(b), contrary to sections 11.26(2)(b), 11.61(1)(b), and 939.05.

COUNT 13: FILING A FALSE REPORT WITH STATE ELECTIONS BOARD (AS A PARTY TO A CRIME)
On or about September 14, 2000, at or near 132 E. Wilson Street, City of Madison, County of Dane, the above-named defendant did, as a party to a crime, intentionally submit a false report, concerning a figure exceeding $100.00, to a filing officer under Chapter 11 of Wisconsin Statutes, to wit: a form EB-7 relating to a $50,000 expenditure paid to Media Strategies Research, a copy of which is attached hereto and incorporated herein by reference, contrary to Wisconsin Statutes sections 11.27(1), 11.61(1)(b), and 939.05.

COUNT 14: FILING A FALSE REPORT WITH STATE ELECTIONS BOARD (AS A PARTY TO A CRIME)
On or about October 27, 2000, at or near 132 E. Wilson Street, City of Madison, County of Dane, the above-named defendant did, as a party to a crime, intentionally submit a false report, concerning a figure exceeding $100.00, to a filing officer under Chapter 11 of Wisconsin Statutes, to wit: a form EB-7 relating to a $25,000 expenditure paid to Media Strategies Research, a copy of which is attached hereto and incorporated herein by reference, contrary to Wisconsin Statutes sections 11.27(1), 11.61(1)(b), and 939.05.

COUNT 15: FILING A FALSE REPORT WITH STATE ELECTIONS BOARD (AS A PARTY TO A CRIME)
On or about November 2, 2000, at or near 132 E. Wilson Street, City of Madison, County of Dane, the above-named defendant did, as a party to a crime, intentionally submit a false report, concerning a figure exceeding $100.00, to a filing officer under Chapter 11 of Wisconsin Statutes, to wit: a form EB-7 relating to a $17,308 expenditure paid to Dixon Media Group, a copy of which is attached hereto and incorporated herein by reference, contrary to Wisconsin Statutes sections 11.27(1), 11.61(1)(b), and 939.05.

COUNT 16: FILING A FALSE REPORT WITH STATE ELECTIONS BOARD (AS A PARTY TO A CRIME)
On or about November 2, 2000, at or near 132 E. Wilson Street, City of Madison, County of Dane, the above-named defendant did, as a party to a crime, intentionally submit a false report, concerning a figure exceeding $100.00, to a filing officer under Chapter 11 of Wisconsin Statutes, to wit: a form EB-7 relating to a $274.30 expenditure paid to Deanna Williams and a $13,450.99

expenditure to Litho Productions, a copy of which is attached hereto and incorporated herein by reference, contrary to Wisconsin Statutes sections 11.27(1), 11.61(1)(b), and 939.05.

COUNT 17: CAMPAIGN CONTRIBUTION EXCEEDING LAWFUL LIMITS (AS A PARTY TO A CRIME)

On or about Fall 2000, at or near 1314 E. Wilson Street, City of Madison, County of Dane, and other locations within County of Dane, the above-named defendant did, as a party to a crime, intentionally make a contribution to a candidate for Wisconsin State Senate, to wit: Dave Hansen, exceeding the maximum contribution of $1,000 per Wisconsin State Senate candidate allowed under section 11.26(2)(b), contrary to sections 11.26(2)(b), 11.61(1)(b), and 939.05.

COUNT 18: FILING A FALSE REPORT WITH STATE ELECTIONS BOARD (AS A PARTY TO A CRIME)

On or about November 2, 2000, at or near 132 E. Wilson Street, City of Madison, County of Dane, the above-named defendant did, as a party to a crime, intentionally submit a false report, concerning a figure exceeding $100.00, to a filing officer under Chapter 11 of Wisconsin Statutes, to wit: a form EB-7 relating to a $4,908.75 expenditure paid to WFRV-TV, a $3,591.25 expenditure to WGBA-TV, and a $9,137.50 expenditure to WBAY-TV, a copy of which is attached hereto and incorporated herein by reference, contrary to Wisconsin Statutes sections 11.27(1), 11.61(1)(b), and 939.05.

COUNT 19: CAMPAIGN CONTRIBUTION EXCEEDING LAWFUL LIMITS (AS A PARTY TO A CRIME)

On or about Fall 2000, at or near 1314 E. Wilson Street, City of Madison, County of Dane, and other locations within County of Dane, the above-named defendant did, as a party to a crime, intentionally make a contribution to a candidate for Wisconsin State Senate, to wit: Alice Clausing, exceeding the maximum contribution of $1,000 per Wisconsin State Senate candidate allowed under section 11.26(2)(b), contrary to sections 11.26(2)(b), 11.61(1)(b), and 939.05.

COUNT 20: CONSPIRACY TO MAKE CAMPAIGN CONTRIBUTIONS EXCEEDING LAWFUL LIMITS

On or about April 24, 2001 to present, at or near 1314 E. Wilson Street, City of Madison, County of Dane, and other locations within County of Dane, the above-named defendant did, conspire or agree with another to commit a felony, to wit: intentionally making contributions to candidates for Wisconsin State Senate, exceeding the maximum contribution of $1,000 per Wisconsin State Senate candidate allowed under section 11.26(2)(b), and did an act in furtherance of said agreement to commit a felony, contrary to sections

11.26(2)(b), 11.61(1)(b), and 939.31.

AS TO COUNTS 01 AND 03:
Upon conviction of these charges, Class D Felonies, the maximum possible penalty is imprisonment for not more than five years or a fine of not more than $10,000 or both, for each count.

AS TO COUNT 02, 04, 07, 08 AND 09:
Upon conviction of these charges, Class E Felonies, the maximum possible penalty is imprisonment for not more than two years or a fine of not more than $10,000 or both, as to each count.

AS TO COUNT 05:
Upon conviction of this charge, a Class D Felony, the maximum possible penalty is imprisonment for not more than ten years or a fine of not more than $10,000 or both.

AS TO COUNT 06 AND 10:
Upon conviction of these charges, Class E Felonies, the maximum possible penalty is imprisonment for not more than five years or a fine of not more than $10,000 or both, as to each count.

AS TO COUNT 11-20:
Upon conviction of these charges, unclassified Felonies, the maximum possible penalty is imprisonment for not more than four years, six months or a fine of not more than $10,000 or both, as to each count.

1. Your complaining witness states that he is a Special Agent employed by the State of Wisconsin Department of Justice, Division of Criminal Investigation (DCI). Your complaining witness makes this complaint based upon his own investigation, based upon his review of transcripts of a John Doe proceeding which occurred before the Honorable Sarah O'Brien, based upon statements made by adult citizens whom your complaining witness believes to be reliable and based upon his review of reports prepared by fellow DCI agents as well as investigators employed by the Milwaukee County District Attorney's Office, acting as special prosecutors for Dane County. He has reviewed these types of reports in the past and has found them to be accurate and reliable. Your complaining witness states that he believes the individuals who testified at the John Doe to be reliable because their testimony was under oath.

2. Your complaining witness states that during the course of his investigation he learned that the defendant, Charles Chvala, is a Democratic State Senator representing the 16th District in the Wisconsin State Senate. The defendant has been a State Senator since 1984. In 1995, the defendant

was elected by his fellow Democrats as the Minority Leader of the State Senate and in 1996 he became the Majority Leader of the State Senate. The defendant has continued to act as the Majority Leader of the State Senate except for a time period between April of 1998 and January of 1999 when he again acted as the Minority Leader.

3. Your complaining witness learned that Douglas Burnett, is employed as the defendant's chief of staff. Mr. Burnett has worked in that capacity for more than eight years. Mr. Burnett served as the defendant's campaign manager during his 1994 gubernatorial campaign.

4. During the course of his investigation, your complaining witness learned that as the Majority Leader of the State Senate, the defendant has a large number of both de facto and de jure powers. Some of these powers are noted in the Wisconsin Blue Book 2001-2002 edition, an official compilation prepared by the Legislative Reference Bureau which states, "Appointments to standing committees are made by the Senate upon nomination by the Chairperson of the Organization Committee, who is also the Majority Leader . . ."

5. Your complaining witness states that during the course of his investigation he learned that as the Chair of the Committee on Senate Organization, the defendant had complete control over scheduling of bills in the Wisconsin State Senate. The 2001-2002 Blue Book at page 266 states, "Both the Senate and Assembly have systematic procedures for scheduling proposals on the house daily calendars. In the 2001 legislature, all proposals reported by Senate standing committees are referred to the Committee on Senate Organization; in the Assembly they are referred to the Committee on Rules. These committees schedule all business for floor debate."

6. This authority is also confirmed by the rules of the Senate. Senate Rule 18(1) provides that, "All proposals, appointments or other business referred to a committee and reported by it to the senate or withdrawn from it by the senate, all proposals or amendments received from the assembly for senate concurrence and all reports from Conference Committee and veto messages received from the Senate, shall be placed in the Committee on Senate Organization." Rule 18(1) also provides that "The chairperson of the Committee on Senate Organization may place a proposal, appointment or other business that is in the Committee on Senate Organization on a calendar that has been established by the committee." The amount of authority vested in Committee on Senate Organization and its Chair is made clear by Senate Rule 1M(2) which states, "Every officer of the Senate is subordinate to the Committee on Senate Organization and in all that relates to the discharge of that officer's several duties, is under the supervision of the Committee on Senate Organization."

7. During the course of his investigation your complaining witness, along with other agents from DCI and investigators from the Milwaukee County District Attorney's Office, interviewed more than 40 lobbyists, State senators, State employees and political activists and defendant's Chief of Staff, Douglas Burnette. As a result of these interviews, your complaining witness states that he learned that during the time period that the defendant acted as the Majority Leader of the Wisconsin State Senate, it has become virtually impossible for legislation to be passed by that body without his approval.

8. Your complaining witness learned that, in addition to his official duties as the Majority Leader, the defendant also was in charge of fundraising for the State Senate Democratic Committee as well as Democratic State Senators and Democratic Senate candidates in numerous high profile races. Your complaining witness spoke to numerous lobbyists, including Michael Bright, Patrick Essie, William Broydrick and Sharon Cook who reported participating in election year "cattle calls" where they were summoned to the defendant's law offices, often in 15 minute intervals, and requested by the defendant to solicit their clients for contributions to candidates that the defendant identified. These lobbyists stated that at these meetings the defendant would produce records or notes showing what contributions the lobbyists clients had made in the past. The defendant would often suggest target amounts for contributions.

9. Your complaining witness states that during the course of his investigation he learned that from the mid to late 1960s until the end of 2001, the legislature employed individuals in party caucuses which were authorized by Wisconsin Statutes section 13.20(1). Four such caucuses existed, one for each party in each house of the legislature. In the defendant's position as the Majority Leader and, for a brief time, the Minority Leader, the director of the Senate Democratic Caucus (SDC) was hired and fired by the defendant and reported directly to him. The defendant was also directly involved in the hiring of SDC staffers and at all times exercised final decision making authority over this process. The Senate Democratic Caucus during the relevant time periods maintained State leased office space at One South Pickney Street in the City of Madison, Dane County, as well as other locations in the City of Madison. The SDC staff consisted of a director, a deputy director, two analysts responsible for maintaining data bases, a graphic artist and approximately five policy analysts, and a receptionist. All of these individuals were State employees who worked in State leased offices on State owned or leased equipment.

10. Your complaining witness states that Milwaukee County District Attorney's Office Investigator Heidi Bisswurm spoke to Donald Schneider who is the Clerk of the Wisconsin State Senate, and Mr. Schneider informed Investigator Bisswurm that as of October of 2000, the gross monthly payroll

for SDC employees was approximately $46,000. During an earlier interview with DCI Agents Deborah Strauss and Amy Blackwood, Mr. Schneider provided the agents with a copy of the Senate policy manual which addressed political activity stating, "No political activity is permitted during working hours. No State facility, office, office equipment, supplies, etc. may be used for political purposes at any time. During non-office time employees may exercise their citizenship rights by political activity in community involvement." Mr. Schneider also provided the agents with a document called the Wisconsin State Senate Guidelines for Incumbents, which Mr. Schneider indicates he distributes in May of each election year. This document indicates that in November of 1977, the Senate established a written policy that State equipment and supplies are strictly for conducting official State business and are not to be used at all for political campaign activities.

Probable Cause as to Counts 1-2: (Extortion Of William Peterson)

11. Your complaining witness was present at a John Doe proceeding before the Honorable Sarah O'Brien, Circuit Court Judge for Dane County when an adult citizen named William O'Connor appeared and testified. Mr. O'Connor stated he is an attorney with the law firm of Wheeler, Van Sickle and Anderson in Madison. Mr. O'Connor testified that he was also a registered lobbyist in the State of Wisconsin and had been so since about 1981. In 1997, he was retained by the Lake Geneva Historical Society to lobby the legislature with respect to a property known as Black Point Estate on Lake Geneva. Mr. O'Connor testified that Black Point Estate was owned by Mr. William Peterson, and that Mr. Peterson and his wife wished to donate the property to the State of Wisconsin and preserve the undeveloped shore land. Mr. O'Connor stated that a proposal was made to donate Black Point Estate to the State of Wisconsin and to have the property managed by a non-profit corporation. The State would then establish an endowment fund to support the operation of the site. This proposal would grant Mr. Peterson tax benefits for the donation of the property and allow him to avoid having to destroy Black Point Estate and sell the property in pieces.

12. During the course of lobbying on this matter, Mr. O'Connor met with the defendant to explain the specifics of the planned preservation effort. Mr. O'Connor stated that during May of 1997, the legislature was working on the biennial budget bill and the budget bill was pending before the Joint Committee on Finance. In May of 1997, a motion was made before the Joint Committee on Finance to approve the acceptance of the Petersons' donation of the property to the people of the State. Mr. O'Connor recalled that the vote at the Joint Finance Committee was fifteen in favor and one against. Mr. O'Connor had invited his client, William Peterson, to come to Madison that day for the meeting because he felt that the Joint Finance

Committee would be considering the Black Point Estate matter. After the vote, he and Mr. Peterson had lunch at a restaurant in Madison and discussed what the next step was. The motion regarding Black Point Estate called for Mr. Peterson to donate the property and authorized the State Department of Administration to accept the gift.

13. After lunch, Mr. Peterson drove back to Chicago, and Mr. O'Connor walked back to his office. Mr. O'Connor stated that in May of 1997, certain portions of the State Capitol were being renovated, and the Joint Finance Committee was meeting outside the Capitol in a building located on the 100 block of South Martin Luther King Jr. Drive in the city of Madison, Dane County. Mr. O'Connor stopped at this building to obtain a copy of the motion which had been passed by the Joint Finance Committee. After obtaining a copy of the motion, he stated he encountered the defendant on the sidewalk. Mr. O'Connor stated that he spoke to the defendant and told him that the Black Point historic preservation initiative, that he had described to the defendant in a meeting earlier, had been approved that morning by the Joint Finance Committee on a vote of 15 to 1. Mr. O'Connor told the defendant that he was delighted by the vote and assumed with such a strong vote that the proposal would have smooth sailing in both houses of the legislature as the budget bill went forward.

14. **Mr. O'Connor stated that the defendant responded by telling him that if Mr. O'Connor wanted to make sure that his bill didn't get into trouble, he had better have some of his people contribute to some of the defendant's candidates.** The defendant went on to tell Mr. O'Connor that Mr. O'Connor should come to the defendant's legislative office at a later date and that the defendant would provide more information on where the contributions should be directed. The defendant directed Mr. O'Connor to make contact with a member of the defendant's staff concerning the contributions. The **defendant said that the contributions should be made to Senator Rod Moen and Senator Kim Plache. The defendant indicated that Mr. O'Connor's client should make a contribution in the amount of $500 for each of these candidates.**

15. Mr. O'Connor stated that at the time these requests were made by the defendant, he had no reason to believe that Senator Moen or Senator Plache even knew the Black Point Estate legislation existed. He had never spoken to either senator and had no reason to believe that they were opposed to the proposal.

16. Mr. O'Connor stated that he then contacted Mr. Peterson and told him that he was sickened by the need to make the phone call. Mr. O'Connor explained to Mr. Peterson the conversation with the defendant and the defendant's request for campaign contributions in exchange for assuring that the Black Point proposal would not run into problems. Mr. Peterson

reacted by stating that he was from Chicago, and he was familiar with such requests and joked to the effect that only the dollar amounts were smaller in Wisconsin. Mr. Peterson indicated that he felt he would have to make the contribution.

17. Mr. O'Connor stated that after relaying this information to Mr. Peterson, within the next few days, he went to the defendant's State office, which had also been moved out of the Capitol due to renovation, and spoke to a member of the defendant's staff who gave him information on the campaign committees for Senator Moen and Senator Plache.

18. Mr. O'Connor provided investigators with the Milwaukee County District Attorney's Office a copy of a letter dated June 4, 1997 that he wrote to Mr. Peterson regarding Black Point. This letter states, "Today I saw Senator Chvala who asked 'Are the checks in the mail?' I advised that they would be as soon as I get the correct names for the campaign committees of Senator Moen and Senator Plache. They are: Friends of Rod Moen and Friends of Kim Plache. I suggest that you get the two checks ($500 each) in the mail at your earliest convenience. I will deliver them directly to Senator Chvala."

19. William Peterson was interviewed by Investigator Bisswurm and informed Investigator Bisswurm that he was in Madison the day the Joint Finance Committee met regarding funding for the Black Point Estate. Mr. Peterson stated that the day after the meeting he received a phone call from Mr. O'Connor. Mr. O'Connor told him that he had a conversation with the defendant in which the defendant had stated that if they wanted to have the Black Point legislation passed, then Peterson better donate some money to the Moen and Plache campaigns. Mr. Peterson stated that Mr. O'Connor told him that he had never seen such a demand before. Mr. Peterson told Mr. O'Connor that this is a typical Chicago alderman tactic and he felt that they needed to make the contribution. He then wrote two checks, one payable to the Friends to Kim Plache for $500 and one payable to the Friends of Rod Moen for $500. Mr. Peterson indicated that he was not familiar with either of these state senators and would not have made any contributions but for the demands made by the defendant.

20. Your complaining witness states that campaign finance records maintained by the Elections Board confirmed the receipt of a $500 contribution from Mr. Peterson to Kim Plache campaign in June of 1997 and a $500 contribution from Mr. Peterson to Rod Moen campaign in June 1997.

21. Senator Moen told Milwaukee County District Attorneys Office Investigator Aaron Weiss that he was unaware of the contribution made by Mr. Peterson until a recent newspaper article. He was never opposed to the Black Point Legislation. A representative of Senator Plache informed the Milwaukee County District Attorney's office that Senator Plache had no knowledge of the

request for contribution made by the defendant. Senator Plache was not on the Joint Finance Committee in 1997 and had no recollection of being aware of the existence of the Black Point Estate proposal at the time.

22. Your complaining witness states that during his investigation he spoke to numerous lobbyists and State Senators who informed him that after the state budget bill is passed by the Joint Finance Committee, it is then considered by each house of the legislature. The majority party of each house meets, often in closed caucus sessions, and makes whatever changes they wish. Your complaining witness was informed that, in the State Senate, the defendant has almost total control over what is produced by his caucus and passed by the Senate. Therefore Mr. O'Connor knew that even though the Black Point Estate provision had passed by a 15-1 vote, the defendant could block the provision in his caucus and force its removal from the Senate version of the budget. (It should be noted that the term "caucus" in this section refers to a meeting of senators of the same party and is different than the Senate Democratic Caucus). After the contributions were made by William Peterson, the Black Point legislation remained in the State Budget bill passed during the Summer of 1997.

23. Your complaining Witness learned that after the Black Point Estate legislation passed, a group of neighbors who were opposed to the legislation retained lobbyist Eric Peterson. Eric Peterson lobbied the defendant on this issue. Eric Peterson testified that, as part of that lobbying effort, he personally handed contribution checks from the Black Point Estate neighbors made payable to Senate Democratic candidates to the defendant. Your complaining witness states Elections Board records show that in 1999 and 2000 at least three of the neighbors made $1,000 contributions to State Senator Alice Clausing. A repeal of the Black Point Estate funding was inserted into the State Budget during the Summer of 2001 via an amendment proposed by the defendant and others, but ultimately was vetoed by the Governor.

Probable Cause as to Counts 3-4: (Extortion of Wisconsin Realtors)

24. Investigator Bisswurm spoke to an adult citizen, William Malkasian. Mr. Malkasian identified himself as the President of the Wisconsin Realtors Association. Mr. Malkasian indicated he had worked for the organization for a total of 27 years and has served as the Executive Vice President for 25 years. He stated that he is a registered lobbyist but does most of his work on a federal or national level rather than the local level. Mr. Malkasian stated that in 1998 the Wisconsin Realtors Association had devoted a large amount of effort to lobbying on a bill known as Assembly Bill 334 (AB 334) which dealt with the regulation of home inspectors. Mr. Malkasian stated that his organization wanted home inspectors to be regulated because if a consumer was not happy with a home inspector's failure to identify a defect

in a house being sold, consumers would often turn to the realtors and attack them for the poor performance of the home inspectors because they had no other place to go. The Wisconsin Realtors Association had been working on the piece of legislation for six years prior to the 1998 budget cycle. Mr. Malkasian stated it had taken six years because the legislation was difficult to draft and as a general rule, legislators do not like to increase regulation upon any industry.

25. Mr. Malkasian stated in 1998 the Wisconsin Realtors Association continued to do a lot of work on the bill, and it appeared that everything had been done to line up the necessary votes in both the Assembly and the Senate to get the bill passed. Legislative records show that AB 334 passed the Assembly on February 11, 1998 by a vote of ninety-one in favor, five opposed. Mr. Malkasian stated that he knew from experience that if one branch of the legislature had already passed a bill with at least two weeks left in a session, then there was a good chance of getting the bill scheduled for a vote in the other branch. The joint resolution, which set the schedule for the legislative session, showed that the legislature would be adjourning on March 26, 1998. Mr. Malkasian stated that after the bill passed the Assembly, the normal procedure would be to make a request that the bill be scheduled in the Senate. If the bill was not scheduled, then the Wisconsin Realtors Association would have to start over.

26. Mr. Malkasian stated that it was getting near the end of the 1998 legislative session and AB 334 had still not been scheduled for a vote in the Senate. Mr. Malkasian knew that, as the Chair of the Committee on Senate Organization, the defendant had absolute control over the scheduling of AB 334 for a vote in the Senate. Because it was crunch time in Mid March of 1998, Mr. Malkasian stated that he approached the defendant after a floor session and asked him why the bill had not been scheduled for a vote in the Senate. When Mr. Malkasian approached the defendant to ask him about the scheduling of Assembly Bill 334, the defendant indicated that he could not talk to him about it immediately but they should talk a little bit later.

27. Mr. Malkasian indicated that shortly after he approached the defendant, he and the defendant had a meeting to discuss this matter. Mr. Malkasian's sole purpose for meeting with the defendant was to discuss the scheduling of Assembly Bill 334, which was extremely important to his organization. During this meeting, he asked the defendant what the problem was in getting the bill scheduled for a vote. **The defendant responded, "Bill, you're asking for something but you have not earned it. You have not done anything to show me that it is in my best interest to work with you on this issue." Thereafter, the defendant made a request for a sizable campaign contribution. The defendant indicated that this campaign contribution would be of benefit to the Wisconsin Realtors Association and allow the association and the defendant to work on their agendas together.** Before

leaving the meeting, the defendant said words to the effect of, "Are we clear? Do you have any questions about this." Mr. Malkasian stated that there was no question in his mind that the defendant had linked a sizable campaign contribution from the Wisconsin Realtors Association to the scheduling of AB 334 for a vote. Mr. Malkasian knew that if the realtors failed to make the contribution, then the bill would not be scheduled and would die.

28. Mr. Malkasian stated that after meeting with the defendant, he spoke to the political director of the Wisconsin Realtors Association, Earl Joe Murray. Mr. Murray was in charge of the Wisconsin Realtors Association Political Action Committee money and would have had to have been involved in making the contribution. Mr. Malkasian further stated that nothing like this has ever happened to him again with anyone else. He knew that tying money to legislation was not legal but he really wanted the bill to pass. Mr. Malkasian stated that he felt that the money was squeezed out of him in order to get the legislation passed and did feel victimized. Mr. Malkasian indicated that he currently was on speaking terms with the defendant and had access to the defendant's office. He stated that he feared retribution from the defendant if he had told authorities about what had happened in 1998 and that he did not want to destroy his association's ability to get anything done in the legislature.

29. Mr. Malkasian further stated that in addition to discussing this request with Mr. Murray, he also discussed the request with then State Senator Joseph Wineke. Mr. Malkasian stated that he did this because Senator Wineke was the chief sponsor of the bill in the Senate.

30. Your complaining witness spoke to Earl Joseph Murray who is a lobbyist and political affairs officer for the Wisconsin Realtors Association. Mr. Murray indicated that he had served in that capacity for approximately 15 years. Mr. Murray stated that in 1996 the Wisconsin Realtors Association had opposed the defendant in his election and that in the spring of 1998 they were still attempting to repair their relationship with the defendant. In the spring of 1998, the Wisconsin Realtors Association was working on a home inspector bill and the defendant had requested that the Realtors Association make a contribution to the Senate Democratic Campaign Committee in the amount of $6,000. Mr. Murray stated that the Realtors Association had given the Senate Democratic Campaign Committee only $3,000 instead of the entire $6,000. Mr. Murray then had a conversation with William Malkasian, and that Mr. Malkasian informed him that he had gone to the defendant to ask the defendant why he was blocking the home inspector's bill. The defendant had told Malkasian that the Realtors Association had not come up with the extra $3,000, and now the defendant wanted $4,500. Mr. Murray said that after receiving this information from Mr. Malkasian, he managed to come up with the $4,500 contribution by making an additional $3,000 contribution from the Wisconsin Realtors Association

Political Action Committee and obtaining an additional $1,500 from a local real estate PAC. After the payment was made, AB 334 was then scheduled in the Senate and passed.

31. Regarding the additional $1,500 contribution beyond the allowed $6,000, Mr. Murray stated that he first contacted the Milwaukee Concerned Realtors Committee and they turned him down so then he had to go to the Madison Realtors PAC. Campaign finance reports filed by the Senate Democratic Campaign Committee confirm that a $3,000 contribution had been made by the Realtors PAC on or about February 16, 1998 and that on or about March 20, 1998, an additional $3,000 was received along with a $1,500 contribution from the Madison Realtors. Legislative records show that AB 334 was read a second and third time by the Senate on March 19, 1998 and passed.

32. Milwaukee County District Attorney's Office Investigator Aaron Weiss spoke to former State Senator Joseph Wineke, and Mr. Wineke explained that in 1997, as a member of the Senate, he was the Senate author of a bill that required home inspectors to meet standards and obtain a license from the State. The bill had very little opposition and passed the Assembly without much controversy. The bill also passed a Senate committee without much opposition. Mr. Wineke knew the bill would pass once scheduled for a vote in the Senate. Mr. Wineke stated that sometime during 1998, when the bill was awaiting to be scheduled for a vote in the Senate, he received a telephone call from William Malkasian who he knows as the Executive Director of the Wisconsin Realtors Association. Mr. Malkasian told him that the defendant had demanded that the Realtors Association make an additional contribution of $4,500 to the Democrats and that the defendant had stated, "This bill will not get scheduled unless I get another $4,500." Mr. Wineke stated that he remembered the event because it made him very angry. He knows that the Realtors Association then made the contribution and the bill was scheduled.

33. Mr. Wineke stated that the bill passed by a consensus in the Senate, which demonstrated the lack of any real opposition. Mr. Wineke stated that if the bill had not been scheduled, it would have effectively been killed for the session. Mr. Wineke further stated that as Senate Majority Leader, the defendant had virtual absolute control over the scheduling of bills because he served as the chairman of the Senate Committee on Organization. Mr. Wineke stated that the majority party has a majority of seats on the committee and that the other Democrats have to follow the defendant's plan or they face being removed from the committee. Mr. Wineke further stated that the bill passed in the "ninth inning" of the legislative session of March of 1998, and that bills that do not pass during the session are dead, which gives the Majority Leader tremendous power at the end of the session because of the ability to control what gets scheduled and what gets killed.

Probable Cause as to Count 5-6: (Extortion of Wisconsin Wholesale Beer Distributors Association)

34. Your complaining witness was present when an adult citizen, Thomas Sheforgen, appeared in John Doe proceedings before the Honorable Sarah O'Brien, Circuit Court Judge for Dane County. Mr. Sheforgen stated that from 1980 until December 11, 2001 he had worked as the President of the Wisconsin Wholesale Beer Distributors Association. As President of the Wisconsin Wholesale Beer Distributors Association, one of his responsibilities was lobbying along with government relations and a number of other duties. Mr. Sheforgen stated that working as a lobbyist for the association, he came to know the defendant and had met with him on a number of occasions. Mr. Sheforgen indicated that during the last several years the biggest piece of legislation that he had worked on was referred to as the "Tied House" Laws. Tied House laws govern the relationship that wholesalers and brewers have with retailers. Mr. Sheforgen met with the defendant from time to time to discuss issues related to the Tied House provisions. At other times he had met with the defendant at the defendant 's request for the purposes of discussing campaign contributions that the defendant wished to be made by the association.

35. Mr. Sheforgen stated that he and the defendant got along fine until approximately July of 2000. In July of 2000, he received a telephone call at his office in Madison from the defendant. The defendant was very angry and asked Mr. Sheforgen, **"What the hell are you guys doing?"** Mr. Sheforgen did not know what the defendant was referring to and the defendant said, **"Well, you guys are contributing to my opponent."** The defendant continued, saying, **"Don't you realize who I am?"** Mr. Sheforgen indicated that he did not know what the defendant was talking about. The defendant told him that Don Carrig and George Colletti, both of whom Mr. Sheforgen knows to be members of the association, had made contributions to the defendant's opponent. The defendant continued to be very angry and stated that he was the Senate Majority Leader and questioned what kind of brains the association had to give money to his opponent. Mr. Sheforgen stated that this was not any official policy of the association or any official action of the association and that he assumed it happened because he believed Lisa Nelson who was the defendant's opponent had been Mr. Carrig's campaign manager when Mr. Carrig had previously run for congress in the district now represented by Tammy Baldwin. Mr. Sheforgen also informed the defendant that he knew that Mr. Carrig and Mr. Colletti were good friends.

36. Mr. Sheforgen stated that he subsequently contacted Mr. Carrig and Mr. Colletti and confirmed that they had both given a contribution to Lisa Nelson because they did not like the defendant. Mr. Sheforgen stated that he called

the defendant back and told him why the contributions had been made, confirming what Mr. Sheforgen had told the defendant earlier. **The defendant was again angry and told Mr. Sheforgen that his people had made a big mistake and again reminded Mr. Sheforgen that he was the Majority Leader of the Wisconsin State Senate and told Mr. Sheforgen that his organization better at least come up with matching funds for the defendant's campaign to make up for the contributions to the defendant's opponent**. Mr. Sheforgen stated that he perceived this as a threat because the defendant kept reminding him in an very angry fashion that the defendant was the Senate Majority Leader. Mr. Sheforgen knew that as the Majority Leader, the defendant had control over any legislation that was going to go through the Senate. If he was opposed to your legislation, you were not going to be successful. Mr. Sheforgen stated that numerous times during his career as a lobbyist while the defendant was Senate Majority Leader, he had spoken to other senators and had been told that if the defendant was opposed to legislation Sheforgen wanted, there was nothing that the other Senators could do about it.

37. After Mr. Sheforgen spoke to the defendant a second time, he contacted Sharon Cook who was another lobbyist for the association. They decided that the organization should attempt to make additional contributions to Senator Chvala. Mr. Sheforgen believed that the organization did make additional contributions but did not match the amount of money that Mr. Carrig and Mr. Colletti had given to Lisa Nelson. Mr. Sheforgen and the defendant then had several telephone conversations centering around campaign contributions. During these conversations, the defendant would continually ask Mr. Sheforgen whether he had done anything yet to match the contribution given to Lisa Nelson. In a phone conversation that occurred at the end of September, Mr. Sheforgen informed the defendant that his board had declined to make a matching contribution. The defendant responded by stating that Mr. Sheforgen had better think about it again and call him back when he had a better answer. In November, shortly before the election, the defendant called Mr. Sheforgen and again asked what his organization was doing. Mr. Sheforgen responded that the board had said they would not do anything. The defendant responded by asking, "Is that all you're going to say?" Mr. Sheforgen told the defendant that that was all he had to tell him and the defendant then slammed down the telephone.

38. Mr. Sheforgen stated that after the November 2000 election he saw the defendant in the Capitol and approached him and indicated that he would like to talk to him. The defendant responded by saying, "You had your chance" and walked away. Mr. Sheforgen stated that thereafter he attempted to make an appointment to see the defendant but was unable to receive an appointment. In February of 2001 he attended a fund-raiser for the Senate Democratic Campaign Committee at the Argus Bar in Madison. He approached the defendant along with Steve Johnson and Pierre

McCormick, two of the officers in the Wholesale Beer Distributors Association. When he introduced his officers to the defendant, the defendant refused to acknowledge Mr. Sheforgen. When one of the officers indicated that they understood there was a problem and wanted to know what they could do about it, the defendant pointed at Mr. Sheforgen and said, "That's your problem. You have a huge mountain to climb and that's your main problem." Mr. Sheforgen stated that several months after this encounter with the defendant, he was approached by the officers of the association and given the choice of resigning or being fired. Mr. Sheforgen further stated that prior to this incident, in which he failed to secure funds to match the campaign contributions made to Lisa Nelson, he had never had any problems with the defendant and had met with him on numerous occasions.

39. Your complaining witness states that reports maintained by the State Elections Board show that in the 2000 election Lisa Nelson was a Republican candidate for Senate against the defendant in the 16th Senate District. Those records further show that, on or about June 29, 2000, Ms. Nelson received a $1,000 campaign contribution from Don Carrig and, on or about June 24, 2000, Ms. Nelson received a $500 campaign contribution from George Colletti.

Other Acts Evidence Relevant to Counts 1-6:

40. Your complaining witness is aware of other incidents where the defendant threatened to block legislation unless campaign contributions were made by lobbyists and their clients. Milwaukee County District Attorney's Office Investigator Heidi Bisswurm spoke to adult citizen Dismas P. Becker. Mr. Becker informed Investigator Bisswurm that he is a former member of the clergy and former representative in the State Assembly. He indicated that he was the Assembly Majority Leader from 1985 until 1986. Mr. Becker stated that sometime after leaving the legislature he became a lobbyist and when he spoke to Ms. Bisswurm in 2002, he indicated that he was a registered lobbyist for the Golden Rule Insurance Company along with a number of other clients. Mr. Becker stated that he heavily lobbied issues on behalf of Golden Rule Insurance regarding HMO reform. He stated that the last time he had contact with the defendant was in 1996 because he has essentially been barred from the defendant's office.

41. Mr. Becker stated that sometime in the summer of 1996 he received a telephone call from the defendant. Mr. Becker recalled that the defendant was very angry during the call based on the defendant's tone of voice and the way the he was acting. The defendant asked Mr. Becker what was going on and Mr. Becker asked the defendant what he meant. The defendant then stated that Mr. Becker's clients, Golden Rule Insurance had contributed money to the his opponent. In 1996 the defendant was up for reelection in

the 16th Senate District and was opposed by Tom Metcalfe. Mr. Becker indicated that he had been unaware of any contribution made by Golden Rule Insurance to Mr. Metcalfe prior to the defendant's phone call. Mr. Becker stated that during the phone call, he told the defendant that his clients give to their friends first and then to people who at least open their door to them. He told the defendant that he did not fall into either of those categories. Mr. Becker further told the defendant that his clients did not give money to people who make public statements against them like the he had recently done.

42. The defendant then stated, "**Well, you tell them if they think they had a hard time during this biennium, wait and see what happens in the next biennium if they don't match that contribution.**" Mr. Becker stated that he believed the statement by the defendant meant that the defendant was acknowledging that he had opposed legislation sought by Golden Rule Insurance during the last legislative session, and that legislation sought by Golden Rule Insurance would be opposed and the company treated even worse during the next legislative session if they did not give the defendant a campaign contribution. Mr. Becker believed that this opposition was not to be based on the merits of any such legislation, but rather on the refusal to make campaign contributions. Mr. Becker further informed Investigator Bisswurm that this telephone conversation was placed to him at his office, which was located in the City of Madison in Dane County.

43. Investigator Bisswurm spoke to Brent Embrey who stated that in 1996 he was working in Wisconsin in the Government Relations Department for Golden Rule Insurance Company. He stated at the time the company had retained Dismas Becker as a contract lobbyist. Mr. Embrey could not recall any specifics about Mr. Becker telling him about a 1996 phone call but he did recall that he knew the defendant had become very angry about a campaign contribution that was made to his opponent by someone at Golden Rule Insurance. Mr. Embrey stated that after 1996, the company had to bring in another lobbyist in order to obtain access to the defendant. During this meeting, the defendant expressed to Mr. Embrey that Mr. Becker was not the best lobbyist for Golden Rule Insurance Company. Mr. Embrey stated he did not recall the defendant directly stating that Golden Rule Insurance should fire Mr. Becker, but it was clear that the defendant was angry with Mr. Becker.

44. Your complaining witness has reviewed certified records maintained by the Wisconsin Elections Board and those Elections Board records show that in the September 1996 pre-primary filing for Tom Metcalfe, a contribution was listed from Patrick Carr of Golden Rule Insurance Company in the amount of $500.00. This contribution is listed as having been made on August 2, 1996. Your complaining witness states that based upon the fact that this contribution was not made until August 2, 1996, the defendant's

conversation in which he threatened Mr. Becker could not have occurred until on or after August 2, 1996.

45. Investigator Bisswurm spoke to Michael Bright who told her that he had worked in government and public affairs for 14 years and is currently a registered lobbyist. Mr. Bright stated that he has had numerous contacts with the defendant over the years. Bright stated that one of the defendant's classic lines was" I don't have a relationship with them," which Bright stated means that the person or group in question hasn't given the defendant money. Your complaining witness states that he has spoken to other lobbyists who also stated the defendant's use of the term " relationship" primarily means giving money.

46. Mr. Bright told Investigator Bisswurm that he first learned what the defendant meant by speaking of a lack of a "relationship" in April or May of 1996. At that time, Mr. Bright represented Fair Liquidation of Waste (FLOW). Fair Liquidation of Waste was an association of Milwaukee suburban interests who desired that sewerage fees be based upon per capita sewerage use rather than upon property values. Legislation was necessary to achieve this goal.

47. Mr. Bright met with the defendant to lobby on behalf of Fair Liquidation of Waste. **During this meeting, the defendant stated words to the effect, "Your client may be right on the issues. In fact they are right on the issues. But it doesn't matter because they [FLOW] have all the "toys'" and that "unless they put $30,000 on the table" the defendant would not help FLOW legislatively.** Mr. Bright was shocked by how blatant the defendant was in demanding money in exchange for legislation.

48. Mr. Bright indicated that he had a similar experience with the defendant's chief of Staff, Mr. Burnett. Mr. Bright stated that he was retained by Midwest Express Airlines to attempt to change that law on how airplanes stored in the state of Wisconsin were taxed. During his lobbying efforts on the tax provision Mr. Bright met several times with the defendant. The provision had been supported by the Assembly, but was having trouble getting through the Senate. During these meetings, the defendant continually told Mr. Bright that he had no relationship with Midwest Express. Mr. Bright believed that what the defendant meant was that Midwest Express had not made campaign contributions to the defendant or other Democratic Senators.

49. Mr. Bright said this conclusion was strengthened by a meeting that he had with Mr. Burnett to discuss the issue. Mr. Bright indicated that within the Capitol it is well known that the defendant works very closely with Mr. Burnett and talking to Mr. Burnett is the same as talking to the defendant. Mr.

Burnett indicated that there was opposition to the bill from smaller airports and that was delaying the bill. Mr. Bright corrected him, pointing out that a compromise had been reached on that issue. Mr. Burnett then told him that Midwest Express needed to make a $10,000 contribution. Mr. Bright told Mr. Burnett that the airline couldn't do that and that the request was inappropriate. Mr. Burnett told Mr. Bright that he was not doing his job and would have to help Midwest Express understand that they had to be a part of the political process. Mr. Burnett then turned red and insisted that the demand was not a quid pro quo. Your complaining witness states that Mr. Burnett appeared before the John Doe and acknowledged making the request for a $10,000 campaign contribution during a discussion of the Midwest Express tax issue, but insisted that this was not a quid pro quo.

Probable Cause as to Count 7: (HIRING WENDY KLOIBER)

50. Your complaining witness states that he was present when an adult citizen, Wendy Kloiber, testified in a John Doe Proceeding before the Honorable Sarah O'Brien, and he was also present when follow-up interviews were conducted with Ms. Kloiber. Ms. Kloiber stated that she was hired by the Senate Democratic Caucus as a State employee in June of 1999. **Ms. Kloiber stated that prior to being hired by the Senate Democratic Caucus she interviewed with Andy Gussert, who was the Director of the Senate Democratic Caucus, and with the defendant. Ms. Kloiber stated that she was told by both Mr. Gussert and by the defendant that she was being hired to run the reelection race of then State Senator Alice Clausing.** Mr. Kloiber stated at the time that she was hired to run the Alice Clausing reelection campaign, she knew that she was being hired as a State employee but did not realize that it was illegal for her to work as a State employee and run Senator Clausing's campaign. Ms. Kloiber stated that when she spoke to Mr. Gussert and when she spoke to the defendant, there was some discussion of other duties that she would have but that it was made clear by both individuals that her number one job would be to run Senator Clausing's reelection campaign. Ms. Kloiber stated that one of the first things she was assigned to do when she was hired as a State employee was to set up a fund-raiser for Senator Clausing. Ms. Kloiber stated that this fund-raiser ended up not taking place because of the legislative calendar.

51. Ms. Kloiber stated that prior to being hired at the Senate Democratic Caucus she did not know the defendant, but that during the interview process she met twice with Mr. Gussert and once with the defendant. During the interview with the defendant, Ms. Kloiber indicated that there was a direct discussion of the fact that Ms. Kloiber was being hired to help with Alice Clausing's campaign. Ms. Kloiber indicated that the defendant made a statement to the effect of that they were pleased to have found such a smart woman to work with another smart woman on her reelection.

52. This was confirmed at a lunch meeting that took place with the defendant at a restaurant in downtown Madison two or three weeks after Ms. Kloiber was hired. Ms. Kloiber stated that during this conversation the defendant discussed with Ms. Kloiber how important Alice Clausing was and how important winning that race was. During this lunch meeting, Ms. Kloiber expressed concerns to the defendant that she had no experience running campaigns and needed training. The defendant told her that she should contact Mr. Burnett, who the defendant identified as his chief of staff, because Mr. Burnett knows more about running a campaign than anyone. Ms. Kloiber stated that she then began to work on the Alice Clausing reelection campaign as part of her duties as a State employee at the Senate Democratic Caucus. She said that some of these duties were legitimate constituent relation duties, but others, such as fund-raising and opposition research, she now understands to be purely political and improper for State employees.

53. Your complaining witness states that during the course of this investigation Andrew Gussert spoke to Investigator Bisswurm and confirmed that during the time period in June of 1999 he was employed as the Director of the Senate Democratic Caucus. Mr. Gussert indicated that in that position he reported directly to the defendant. Mr. Gussert stated his office was located in the bank building at One South Pinckney and that he was aware that the office of the Senate Democratic Caucus was a State office and that all its employees were State employees. Mr. Gussert stated that Wendy Kloiber was hired as a State employee specifically to run Alice Clausing's reelection campaign because the defendant believed that a woman needed to run Alice Clausing's campaign. Mr. Gussert stated that eventually Wendy Kloiber ran into some conflict with other members of Alice Clausing's campaign staff and another SDC employee, Carrie Lynch, was assigned to run Senator Clausing's campaign.

54. Mr. Gussert also identified a memo that he had sent to the defendant on or about April 27, 1999. The fax cover sheet for this memo stated, "I've included a resume for Wendy Kloiber for the open analyst position. I met with her yesterday and she would be a good hire. We spoke extensively about the political nature of the job. I'm ready to offer her $36,000. Do you want to meet with her?" Mr. Gussert further stated that all decisions regarding who was hired at the Senate Democratic Caucus were ultimately made by the defendant. Mr. Gussert in fact indicated that when he interviewed for the job, he asked for and was promised authority to make hiring decisions. However, Mr. Gussert worked until the end of 2000 and during that time period all hiring decisions were made by the defendant.

Probable Cause as to Count 8: **(OFFER OF EMPLOYMENT TO HEATHER COLBURN)**

55. Your complaining witness states that Investigator Bisswurm spoke to an adult citizen, Heather Colburn. Ms. Colburn stated that she currently works for Emily's List in Washington, D.C. She stated that during the summer of 1999 she was recruited to work for the Senate Democratic Caucus. She stated that she was an acquaintance of Andrew Gussert and knew him when she worked in Democratic politics in Wisconsin. Ms. Colburn stated that she had worked on Tammy Baldwin's 1998 Congressional campaign and that she was looking for another job and that while she was living out of state she had let a lot of people know she was interested in coming back to Wisconsin. She stated that Mr. Gussert contacted her and discussed a job opening with the Senate Democratic Caucus working as a fund-raiser. She stated that Mr. Gussert gave her some information about the job over the phone and via e-mail but she eventually came back to Madison meet with Mr. Gussert in person. Ms. Colburn stated that she believed that this meeting took place in September or October of 1999 but was not sure of the exact date. She stated that in her meeting with Mr. Gussert it was clearly laid out that she would be a full-time fund-raiser working at the Senate Democratic Caucus. She stated that she was taken around the SDC office and introduced to the people who worked there. She said that the only person she knew besides Mr. Gussert was Cindy Maracek because she had worked with Ms. Maracek in the past on graphics projects.

56. Ms. Colburn stated that she interviewed with Mr. Gussert in person and then she interviewed with the defendant. She stated that the interview with the defendant took place at the defendant's law office in downtown Madison, Dane County and that she, Mr. Gussert and the defendant were the only people present at the meeting. Ms. Colburn stated she knew the defendant from her previous work in Madison but did not know him well. **She stated that during this meeting it was clear that the defendant wanted to hire her as a full-time fund-raiser. The defendant explained to her how he approached fund-raising and told her how other Democratic candidates raise money. He also told her what her role as a fund-raiser would be and discussed her fund-raising background. Ms. Colburn stated it was clear during that she this conversation was being a offered a position as a full-time fund-raiser working for the Senate Democratic Caucus.** She stated that no other entity was ever mentioned to her by the defendant and that there was no mention of working part-time for the Senate Democratic Caucus and part-time for the campaign committee.

57. Ms. Colburn stated that the defendant specifically mentioned that she would be an SDC employee and she knew that as the Majority Leader, he was the head of the Senate Democratic Caucus and it would only make sense that she would interview with him for a job with the Senate Democratic Caucus. Ms. Colburn went on to state that she does not know anything about

legislative policy or any other legitimate work at the Senate Democratic Caucus. Her entire background involved fund-raising and that was her career. It was clear to her that putting money into the bank would be her sole job with the SDC. She knew that it was a full-time position and she had discussions with Mr. Gussert regarding health benefits.

58. Ms. Colburn stated that she remembered the interview with the defendant because she remembered thinking that the defendant had done his homework prior to interviewing her. The defendant hit on the points that she finds important such as electing women and having them hold leadership roles in the Democratic Party. In the interview the defendant discussed how he was helping women get elected and pitched the importance of women in the Democratic Party. She remembers thinking how he really tried to sell her on the job by focusing on her important issues. Ms. Colburn stated that she was ultimately offered the job by Mr. Gussert after her interview with the defendant. She stated she ultimately contacted Mr. Gussert and turned the job down.

59. **Your complaining witness states that Investigator Bisswurm spoke to Mr. Gussert and Mr. Gussert acknowledged that he and the defendant spoke of hiring a fund-raiser for the Senate Democratic Caucus and in fact interviewed Ms. Colburn for the job.** Mr. Gussert stated that he knew Ms. Colburn worked for Emily's List in Washington, D.C. and had worked as a fund-raiser in Madison prior to that. He knew Ms. Colburn from her days in Madison and set up a meeting for her with the defendant in Madison to discuss the fund-raising job for the SDC.

60. Mr. Gussert stated he was present for the interview between the defendant and Ms. Colburn which took place in the defendant's law office which is located at 44 East Mifflin Street in the City of Madison, County of Dane. At the interview, the defendant discussed that Ms. Colburn would be doing mainly doing fund-raising work, but the defendant did say that she may have to do some policy work. The defendant offered Ms. Colburn a job as a fund-raiser for the SDC. Mr. Gussert stated that Ms. Colburn ultimately turned down the job.

61. Mr. Gussert also identified several e-mails, as well as a memo, that he had sent to the defendant and Mr. Burnett who is the defendant's chief of staff. This memo, which is misdated August 26, 01, contains an e-mail sent by Ms. Colburn to Mr. Gussert dated August 23, 1999. In the e-mail, Ms. Colburn indicates that she is looking to make around $35,000+ and states that experienced fund-raisers make about $3,000 to $5,000 per month so that's the low end and that her starting date is negotiable. Mr. Gussert added in the memo to the defendant that Ms. Colburn is scheduled to meet with the defendant on Friday, October 8. Mr. Gussert also reiterated that all hiring decisions at the Senate Democratic Caucus were made by the

defendant.

Probable Cause as to Count 9: (USE OF CAUCUS EMPLOYEES 1998 ELECTION)

62. Your complaining witness states that during the course of his investigation he has reviewed a transcripts from John Doe appearances on October 31, 2001 and December 11, 2001 made by an adult citizen, Joanna Richard, as well as a follow-up interview report dated July 2, 2002 with Ms. Richard prepared by Investigator Bisswurm. Ms. Richard stated that from late November of 1995 until January 3, of 1999, she was employed by the Senate Democratic Caucus as the Director of the Caucus. Ms. Richard stated that the defendant was the individual who hired her to be the Director. Ms. Richard stated at the same time that she was hired by the defendant as the Director of the Senate Democratic Caucus she was also given the title of Executive Director of the State Senate Democratic Committee by the defendant. Ms. Richard stated that during the entire time period that she worked for the caucus, the caucus had offices in the City of Madison, Dane County but at three different locations due to renovations in and around the Capitol. Ms. Richard indicated that as the Director of the Caucus, she was a State employee.

63. Ms. Richard stated that in her capacity as Director of the Caucus, she would have almost daily contact with the defendant. Ms. Richard stated that at the time she was hired as the Director of the caucus she believed there were 10 or 11 other employees at the caucus. These included a graphics person, some data people, some computer people and legislative analysts. Ms. Richard stated that during her time period as Director of the Caucus she was involved in hiring a number of individuals and that people who were hired understood that in addition to working for the State they would also be doing work for Democratic candidates. Specifically, Ms. Richard stated that the individuals who worked as analysts at the caucus had their workload divided up by committees and by "targets". Ms. Richard stated that the term "targets" or targeted races referred to State Senate races that the defendant determined would likely be highly contested. Ms. Richard explained that the defendant determined who would be targets for the Senate Democratic Caucus and that if a particular Senator was picked, the caucus would monitor press clippings and votes that the Senator had taken and if the Senator chaired a committee, they would monitor that committee. During this process particular attention would be paid to Republican Senators who the defendant deemed to be vulnerable.

64. Ms. Richard stated that during the time period she worked as the director of the Caucus, the defendant was responsible for hiring decisions. She stated that she would make recommendations on who she wanted to hire and then she would have to argue with the defendant to convince the

defendant that the person that she wanted was the right person to hire. Ultimately the defendant had the final decision making authority. During her tenure, the defendant also had the ultimate decision making authority on wage increases granted to staff members.

65. Ms. Richard informed investigators that she was the Director of the Senate Democratic Caucus during both the 1996 and 1998 campaign seasons. She indicated that during the years when no elections were scheduled, employees of the Senate Democratic Caucus primarily did policy work but also performed some pure campaign work in their State offices on State time. She indicated that one such task was opposition research. Ms. Richard identified a research file maintained by the Senate Democratic Caucus, which contained information about divorce proceedings, involving a potential Republican candidate in the 1998 election against an incumbent Democratic senator. Ms. Richard acknowledged that this type of material would have been obtained and analyzed by State employees on state time.

66. Ms. Richard further stated that as elections drew nearer, the amount of legitimate policy work being done by the caucus began to diminish and the amount of campaign work began to increase. She stated that the planning for election campaigns would start in the January of the election year and by the spring of the election year an SDC staffer would be assigned to run the campaign in each important State Senate district and a campaign plan would be established. From the spring of each election year through the summer, the majority of the Senate Democratic Caucus staff work and their first priority was campaign work. Ms. Richard stated that from September until the election in November, SDC staffers would be working almost exclusively on campaign and that very little policy work would be done during those months.

67. Ms. Richard stated that during the 1996 campaign a chain of command existed in which the defendant would come to her to discuss campaigns and she would then provide the defendant's direction to individual Senate Democratic Caucus staffers who were running campaigns. **However, in 1998, Ms. Richard stated there was a dramatic increase in the defendant's involvement in daily activities during the election cycle. She stated that the defendant would call her everyday several times on her State phone and would question every judgment that was made on campaigns. In addition, the defendant would have to approve all the campaign plans for the candidates.**

68. The Senate Democratic Caucus staff member, who was assigned to run the campaign, would run create a campaign plan and Ms. Richard stated she would edit it and come up with a final version. She would then give her finalized version to the defendant who would revise it and edit it before giving his final approval of the plan. Ms. Richard stated that when she

discussed these campaign plans with the defendant, they did discuss which members of the Senate Democratic Caucus staff would be running the particular campaigns. Ms. Richard further stated that in addition to reviewing the campaign plans the defendant needed to approve campaign literature. Ms. Richard stated that the campaign literature was put together by the staff member, who was the graphics person at the Senate Democratic Caucus, and then it would either be faxed to the defendant or someone from his staff would pick it up at the Senate Democratic Caucus offices.

69. Ms. Richard stated that in 1998 there were three State senate races that were targeted by the defendant: the 15th Senate District involving Judy Robson, the 27th Senate District involving Jon Erpenbach and the 9th Senate District involving Jim Baumgart. Ms. Richard stated that Lance Walter was the SDC employee who ran the Robson race and Julie Laundrie from the SDC ran the Erpenbach race. She stated there were three SDC employees who did work on the Baumgart race: Tara Vasby, Jay Wadd and Scott Ross. Ms. Richard stated that none of these campaign candidates were incumbents at the time the SDC employees worked on their campaigns.

70. Ms. Richard stated that Senator Baumgart did not want help from the Senate Democratic Caucus and from Madison in general. She stated that Senator Baumgart had refused to speak to her about campaign related issues while she was working on the clock for the Senate Democratic Caucus and that he preferred to run his campaign his own way. She indicated that the Senate Democratic Caucus staff members, who went to Mr. Baumgart's district, did so on their own and not because Senator Baumgart directed them to do it.

71. With regard to the Senate race in the 27th District, Ms. Richard stated that Jon Erpenbach was an SDC employee before he ran for the Senate. She stated that he took a leave of absence when he ran and that a number of SDC employees wanted to work on his campaign but that Ms. Richard felt that Julie Laundrie would be the best fit for the job. She discussed this with the defendant and the defendant did not want Ms. Laundrie to be assigned, but Ms. Richard fought hard on the issue until the defendant agreed to allow Ms. Laundrie to run the campaign.

72. Ms. Richard stated that the defendant was obsessed with people's loyalty to him, and the defendant was not sure that Laundrie would be loyal to him. The defendant was concerned because Mr. Erpenbach is the brother-in-law of Senator Russ Feingold and the defendant was concerned that Erpenbach would be more loyal to Senator Feingold than to the defendant. Ms. Richard stated that Ms. Laundrie spent a great deal of her time during the summer and fall working on the Erpenbach campaign. Ms. Richard stated that Ms. Laundrie did take some vacation and compensatory time to

work on the campaign but that Ms. Laundrie would not have had enough vacation or compensatory time to cover the amount of time that she worked on the Erpenbach campaign. Ms. Richard stated that during the 1998 campaign she and the defendant had numerous arguments about the Erpenbach race regarding strategy and other issues. Ms. Richard stated that over time the defendant began to contact SDC staff members directly instead of continuing to argue with her. Ms. Richard stated that these discussions occurred on a very regular basis and occurred in her State office and on her State phone.

73. Ms. Richard stated that due to her numerous disagreements with the defendant, the defendant began calling other SDC staff members such as Ms. Laundrie to discuss campaign strategy directly with them. She stated that she also had conversations with Branda Weix, who was a data person at the caucus, who was responsible for creating fund-raising lists for campaigns during the campaign season. Weix told Ms. Richard that she was receiving direct calls from the defendant about the fund-raising lists. Ms. Richard stated that she also knows that the defendant called Lance Walter and Tara Vasby about the campaigns that they were working on.

74. **Ms. Richard stated that her role with the campaigns as the Senate Democratic Caucus Director included making sure the candidates were doing doors and making fund-raising calls. She also made sure that the candidates were lining up volunteers for election day and that they were meeting the goals for their campaign plans. The defendant would call her on a daily basis at the SDC office on her State phone to ask for an update on each candidate.** She stated that defendant's role with the campaigns was to raise big donor money. Ms. Richard stated that the defendant made fund-raising calls based on lists that were prepared by Branda Weix. She stated that the defendant raised money for individual candidates, the Senate Democratic Campaign Committee and the Democratic Party. She also stated that she believed that the defendant was raising money for independent expenditure groups because there were times when the Senate Democratic Campaign Committee received PAC money after the SDCC had received its maximum amount of contributions and the defendant would tell her to send the check back to the donor. She believes that the defendant would then direct the donor to contribute the money in some other way like an independent expenditure group.

75. Ms. Richard stated that in 1998 the main democratic independent expenditure group used by the defendant as run by an individual named Tom Boeder. She stated that Tom Boeder was placed in this position because he was a close friend of the defendant's chief of staff, Mr. Burnett. It was her belief that Mr. Burnett was giving Boeder information regarding campaigns and, therefore, she did not want to have anything to do with Mr. Burnett. She stated that she believed that Mr. Burnett was giving Boeder

information because Mr. Burnett was very involved with the campaigns and kept a close eye on what was happening. Mr. Burnett would regularly ask her for detailed information on the candidates and for campaign brochures. The types of details he was asking for were things that would not be necessary for him to know if he was simply overseeing the campaign. She stated that Mr. Burnett had access to all of the Senate Democratic Caucus polling information.

76. Your complaining witness states that he spoke with Julie Laundrie. Ms. Laundrie stated that she was hired as an analyst with the Senate Democratic Caucus in 1995 and worked on higher education issues and special elections. She stated that she worked on a special election in the 24th District in Stevens Point and then in 1996 she was put in charge of a State Senate race in Green Bay. **Ms. Laundrie stated that during the 1996 campaign she did not have a great deal of contact with the defendant but that it was her understanding that campaign materials, which she provided to Joanna Richard, were then forwarded to the defendant for his approval.** Ms. Laundrie stated that during the 1998 campaign the defendant was much more hands on.

77. Ms. Laundrie stated that she ran the campaign for Jon Erpenbach who was a former co-worker of hers at the caucus. **She said that the defendant was very involved because this was a significant race and also because the defendant had wanted another candidate to run instead of Erpenbach. Ms. Laundrie stated that when she ran Erpenbach's campaign, she did so from her Senate Democratic Caucus State office and that she did not take a leave of absence to do so.** She stated that she managed the campaign, did get out the vote plans and assisted radio ads and lists.

78. Ms. Laundrie discussed a continuum indicating during the time period in off election years Senate Democratic Caucus workers concentrated primarily on policy and budget work and then when the election cycle returned, the continuum shifted until the caucus workers devoted approximately 90% of their time to campaign work. **Ms. Laundrie agreed that she worked at least 90% of her time for Erpenbach during his election from her State office and on State time. She stated that the defendant was very involved in this process and was very hands on. She stated that Joanna Richard, who was the director of the caucus at the time, was cut out from the process and that the defendant would contact her directly.**

79. **Ms. Laundrie stated that during the Erpenbach campaign she sometimes spoke to the defendant everal times a day especially just before any television ad aired or before a filing deadline. Ms. Laundrie stated that she did her campaign work from her State office and from her home at night. However, she stated that the defendant only called her at her State office, never at home.** Ms. Laundrie stated that the defendant had to sign

off on all of the literature pieces for the Erpenbach campaign and that she delivered the literature pieces to the defendant's State office as well as perhaps to his law office. She stated that sometimes one of the defendant's State paid staffers would bring the pieces back to Ms. Laundrie or sometimes Ms. Laundrie went to get them herself from the defendant. Ms. Laundrie stated that after the election she received a thank you note from the defendant.

80. Ms. Laundrie stated that all of her contacts with the defendant regarding campaign ads and other issues occurred over the phone when he called her in her State office. Ms. Laundrie stated that she didn't recall the defendant ever coming to the caucus office during the campaign but she understood and knew that the defendant was the Senate Democratic Caucus boss.

81. **Ms. Laundrie stated the defendant never cautioned her about doing campaign work in her State office, and she said that she felt that the defendant expected her to do the campaign work. Ms. Laundrie stated that based upon the number of contacts she had with the defendant, the nature of those contacts and where those contacts occurred, it was not possible that the defendant did not know that she was doing campaign work in her State office on State time. Ms. Laundrie stated that she felt she would have lost her job in the caucus office if Erpenbach had not won his election.** Ms. Laundrie further stated that during the 1998 election campaign she knew that Lance Walter was working on the Robson campaign and that he was working the same amount of hours on the Robson campaign that she was working on the Erpenbach campaign.

82. Your complaining witness states that Lance Walter testified before the John Doe in this matter and stated that he was hired by the Senate Democratic Caucus as an analyst in 1997 and ultimately became the Deputy Director of the caucus. **Mr. Walter acknowledged that during election cycles it was a matter of routine for Senate Democratic Caucus staffers to perform campaign work in their offices using State phones and computers.** Mr. Walter acknowledged that in 1998 he ran the campaign of current State Senator Judy Robson. Mr. Walter acknowledged that he was involved in a number of different areas of the Robson campaign including attempting to plan a budget.

83. Mr. Walter stated that he consulted with the defendant in connection with fund-raising and budget issues for the Robson campaign. **Mr. Walter stated that at the beginning of the race a campaign plan and budget was created and shared with the defendant. During the course of the race, there were further discussions between Mr. Walter and the defendant because the defendant's role was to step in and raise money for Senator Robson in an attempt to complete the campaign plan. Mr. Walter stated**

that the defendant would periodically check in with him to find out how much money had come into the campaign, how much money the campaign had on hand and to determine how much money the defendant needed to raise in order to help Senator Robson.

84. Mr. Walter stated that as part of these fund-raising efforts he would have contact with Branda Weix at the State offices of the Senate Democratic Caucus who would produce fund-raising lists for the campaign. These requests would be given to Ms. Weix at her State office and the information would be received back from her at her State office. **Mr. Walter further stated that some discussions with the defendant regarding the budget and fund-raising for the Robson campaign would have occurred during normal business hours while Mr. Walter was in his State office and others would have occurred after hours. Walter received no pay beyond his regular state salary.**

85. Your complaining witness states that Investigator Bisswurm spoke to State Senator Judy Robson and **Senator Robson acknowledged that in 1998, when she ran for the State Senate, she was told by the defendant that she would have someone assigned to help her with media buys, campaign literature and other campaign related activities.** She stated that Lance Walter was the person assigned by the defendant to consult or coordinate with her campaign.

86. Senator Robson stated that she knew Lance Walter worked with the Senate Democratic Caucus but that she assumed that his assistance came through the Senate Democratic Campaign Committee. Senator Robson stated that it was her understanding that Walter's services were being paid for by the Senate Democratic Campaign Committee, but she never asked or checked to see who actually paid his salary. She stated that her campaign did not pay Walter's salary. She stated that she had previously run assembly campaigns and that she had received assistance from the Assembly Democratic Campaign Committee and that she assumed that individuals who provided that assistance had taken leaves of absence, vacation or compensatory time. Senator Robson stated that she assumed that the defendant got SDC workers to volunteer to take time off to work on campaigns but does not know that for sure.

87. Senator Robson stated that in her 1998 campaign she received some of the graphics work for her campaign literature from Lance Walter but did not know where Walter received the graphics work. Senator Robson stated that her contacts with Walter were infrequent except for the last couple weeks prior to the election when he was around all the time. She stated that Mr. Walter did not help her with fund-raising but that she does know that Walter would meet with the defendant to talk about campaign strategy and what issues they should run on during the campaign. She acknowledged that

she had discussions with the defendant about needing the defendant's assistance to raise money and that the defendant did raise some monies for her.

Probable Cause as to Count 10 (USE OF CAUCUS EMPLOYEES 2000 ELECTION)

88. Your complaining witness states that as set forth above, Andrew Gussert spoke to Investigator Bisswurm and informed Investigator Bisswurm that he was hired as the Director of the Senate Democratic Caucus in late January or early February of 1999. Mr. Gussert stated that prior to working at the Senate Democratic Caucus he had worked at the Assembly Democratic Caucus. He stated that sometime during mid to late January of 1999 he had a conversation with Mr. Burnett who he knew was the defendant's chief of staff. Mr. Gussert stated that he had met Mr. Burnett when Mr. Burnett managed the defendant's 1994 gubernatorial campaign. After discussing the position with Mr. Burnett and telling Mr. Burnett that he would take the job if he was offered, Mr. Gussert met with the defendant toward the end of January 1999. Mr. Gussert stated that this meeting took place at the defendant's law office off the square and lasted approximately 15 to 20 minutes. During this conversation, Mr. Gussert asked the defendant if Mr. Gussert would have the power to hire and fire people and the defendant responded, "You will have the same power that Joanna Richard had." Mr. Gussert stated that he was happy with that response because he thought at that point that Joanna Richard had the power to hire and fire people. He did not find out until after he accepted the position that Richard did not have hiring and firing power and that the defendant made all those decisions.

89. Mr. Gussert stated that it became clear after a short time that the defendant was really the one who did the supervising and was in complete control of the Senate Democratic Caucus. Mr. Gussert stated he was told by the defendant after four months on the job that he might be replaced as director by a woman from Pennsylvania named Mary Eisenhower. Mr. Gussert stated that Eisenhower never came to work for the Senate Democratic Caucus but her friend, Brett Cott, was hired as an SDC employee by the defendant over Mr. Gussert's objection. Mr. Gussert stated that he soon learned that the defendant also controlled salary decisions at the Senate Democratic Caucus because there were employees that were denied raises even though he felt they deserved them and others who were given raises over his objection. Mr. Gussert stated that he found it difficult to manage the SDC employees from the start because they were all people who were hired when Joanna Richard was the director. Mr. Gussert stated that when Ms. Richard left, she had wanted Lance Walter to be named as the SDC director and when Mr. Gussert got the job, other SDC employees were not happy about it. Mr. Gussert stated that while he was the director there were a number of employees that were hired including Wendy Kloiber,

Carrie Lynch, Andy Engel and Cindy Maracek.

90. Mr. Gussert stated that he began a campaign plan in October of 1999 and listed those races that he thought might be targeted in the 2000 election. Mr. Gussert stated that he went through that list with the defendant and discussed with the defendant what those candidates would expect from the SDC. The defendant's main concerns were the office budget and fund-raising plans. The defendant was always concerned about how much money each candidate had raised. Mr. Gussert stated he did not create the actual fund-raising plans, but it was part of his job to make sure that the plans were completed.

91. In January of 2000, Mr. Gussert stated that he and the defendant began to discuss candidate recruitment for open seats. He indicated that they were trying to find a candidate to oppose Senator Gary Drzewiecki. He stated that he took one trip to Green Bay with Lance Walter to do candidate recruitment and that they did a literature drop with Brown County Supervisor Dave Hansen and his family. He also spoke with other potential candidates who were referred to him. Mr. Gussert stated he would then send the defendant people he thought would make good candidates. He also tried to recruit candidates for other races, but it soon became clear that Brett Cott would do that job. Mr. Gussert stated that he would often times make decisions or recommendations and the defendant would comment on them and then make the final decision as to which candidate would be picked.

92. With regard to the race against Gary Drzewiecki, Mr. Gussert stated that once it was decided that Dave Hansen would run against Drzewiecki, Lance Walter stepped forward and volunteered to work on the campaign. By February of 2000, the defendant was communicating directly with Lance Walter about the Hansen campaign. Mr. Gussert stated that Wendy Kloiber had been hired to run the Alice Clausing campaign but that Kloiber ran into some conflicts with Clausing's campaign staff and ultimately Carrie Lynch was assigned to run Clausing's campaign. Mr. Gussert stated that Lynch had originally been hired to do media relations but got the Clausing campaign by default because she was the only other woman at the SDC who was available to do the race. Mr. Gussert stated that Ms. Kloiber ended up working full-time on the Hansen campaign along with Lance Walter and spent a good deal of time in Green Bay prior to the election.

93. Mr. Gussert said there continued to be problems with the Alice Clausing campaign because there were a number of people who were involved in the campaign all of whom had the impression that they were in charge. Mr. Gussert stated that he recalled being in a meeting in July or August of 2000 with the defendant along with Senator Clausing, Carrie Lynch and a number of other individuals where they discussed the Clausing campaign. The meeting took place in the SDC conference room during the workday. At the

meeting, the defendant defined each person's role in the campaign and reminded them that they needed to work together. **Mr. Gussert recalled the defendant telling everyone at the meeting, "If we don't win this, Andy is the one who will get fired."**

94. **Mr. Gussert stated that as SDC Director during the 2000 campaign cycle, he believed his job was to implement whatever plan the defendant wanted him to and also act as a liaison between the defendant and the SDC staff. Up until July of 2000 the defendant worked through him if he needed something from a SDC staff member who was working on a campaign. After that time, the defendant contacted SDC staff members directly about the particular campaign they were working on.**

95. Mr. Gussert stated that from time to time he would ask staff members why they did something without his knowledge and the staff member would tell Mr. Gussert that the defendant had told them to do it. **Mr. Gussert stated that he knows the defendant communicated with SDC staffers on a daily basis about the campaigns.** He often heard them calling the defendant and answering questions about campaigns for him. The defendant would also call Mr. Gussert at Mr. Gussert's State office and tell him of a particular problem on a campaign and expect him to fix the problem. **During the height of the campaign season, the defendant would call Mr. Gussert three or four times a day regarding campaigns.** Mr. Gussert stated that from July through November of an election year other legislators knew not to request things from the SDC because the organization switched over to a campaign machine at that time.

96. Mr. Gussert stated that he knew that the defendant was aware of what SDC employees were doing because the defendant communicated with those employees on a daily basis regarding their campaign activities. Mr. Gussert stated that he knew that Branda Weix would regularly communicate with the defendant because she would send the defendant memos and would carbon copy Mr. Gussert on the memos. Mr. Gussert stated that he knows that the data programs that Branda Weix developed for campaigns were extremely time intensive, but that he was not involved in the details of those programs. Mr. Gussert stated the defendant, Ms. Weix and Lance Walter worked together to develop those databases.

97. Mr. Gussert stated that he also knew that the defendant was working directly with Cindy Maracek on campaign literature because there were times when campaign literature was sent to the printer without Mr. Gussert ever seeing it. Cindy Maracek told him that the defendant had approved the literature so it was sent to the printer. In addition, Mr. Gussert said that he knew the defendant approved all campaign literature because the defendant had told him, "I don't want anything to go out without my seeing it." Mr. Gussert stated the defendant was referring to campaign literature from the top tier

races and his own campaign. Mr. Gussert stated that the defendant would call him on a regular basis to discuss campaign literature and to make edits to particular pieces. Ms. Maracek also told Mr. Gussert that the defendant had called her and made various edits to the literature so she'd change it to reflect the defendant's changes. Mr. Gussert stated that the defendant micro-managed the way that literature was written and scrutinized the language that was used in the pieces.

98. Mr. Gussert further stated that he knows that the defendant directly contacted Carrie Lynch about the Clausing campaign and Lance Walter about the Hansen campaign. He knows that the defendant, Walter and some media consultants would meet to discuss campaign ads that would then be produced without Mr. Gussert's knowledge or input. Mr. Gussert stated that he believed the defendant also spoke with Jay Wadd regarding the Mark Meyer campaign but not as often as he spoke with Lynch and Walter because the Meyer campaign was not as high a priority as the Clausing and Hansen campaigns. Mr. Gussert stated that the defendant never told him that the SDC employees could not use State resources or time to run campaigns. The only thing that the defendant told him was to make sure that SDC employees took vacation or compensatory time if they were seen by outside people working on campaigns. The defendant was concerned about getting caught and did not appear to be concerned about the fact that it was wrong to have State employees working on campaigns while on State time.

99. Your complaining witness states that he spoke with Wendy Kloiber and Wendy Kloiber told him that she did a substantial amount of work on the Hansen campaign in the 2000 election while she was employed by the Senate Democratic Caucus. She stated that she had originally been hired by the caucus to work on Alice Clausing's campaign but that eventually she moved to the Hansen campaign. She stated that she had a meeting with the defendant regarding her campaign work when she was working with Lance Walter on the Hansen race. She stated that she went to the defendant because she was concerned that Mr. Gussert was going to try to move her to another campaign. She stated that she had been told by another employee of the SDC that Gussert was thinking of moving Ms. Kloiber off the Hansen campaign and to the campaign of Kathleen Arciszewski. She stated that she was very upset at the prospect of moving to the Arciszewski campaign because there was no way that that race could be won, but that they had a chance to win the Hansen race.

100. Ms. Kloiber stated that the defendant met with her and assured her that she would be kept on the Hansen race. Ms. Kloiber stated that she moved to Green Bay for several weeks before the election to work on the Hansen race. She stated that she did have contact with the defendant while she was in Green Bay and knows that the defendant was yelling at people to get

out and do doors on the weekend. The defendant never asked her or anyone else about legitimate caucus work they were doing during this time and never asked her if she was taking vacation or compensatory time to cover the time she was living in Green Bay. She stated that she remembered calling the defendant during the Hansen campaign because Lance Walter had a death in the family, and there was an issue as to which of a number of competing events Mr. Hansen should appear at. She contacted the defendant, and the defendant made the decision as to what events Hansen should attend. **Ms. Kloiber stated that there was no question that the defendant knew that she was working full time on the Hansen campaign. She stated it was during this time when she was working full time on the Hansen campaign that she started to realize how much control the defendant had over the Hansen race.** She stated that she remembers there was an ad that focused on an abortion issue that was produced and paid for by an independent expenditure group in favor of Mark Meyer. When the ad aired, there were people who were concerned that this independent group was doing something that would take the Meyer campaign down the wrong track. She stated she knew nothing like that would ever happen with the Hansen campaign because the defendant had control over all the ads and approved them before they were aired. She further stated that she had conversations with the defendant about ads and she knew that he had some pull in the area in terms of what ads were run.

101. Ms. Kloiber confirmed that Andy Gussert knew he would be fired if Alice Clausing lost her race because winning her race was one of the conditions of his employment. She stated that after Gussert left the caucus, she and Gussert were in competition for a job with the Democratic Party of Wisconsin. Ms. Kloiber stated the defendant called the party and pushed for her to get the job because of how well she had done on the Hansen campaign.

102. Ms. Kloiber stated that sometime after the campaign she met with the defendant in his law office for a campaign debriefing. The defendant asked her what they could have done better and how she would rate her overall experience. Ms. Kloiber stated at the conclusion of this meeting the defendant informed her that she was being given a 10% raise. Ms. Kloiber stated that she believed that her raise was linked to her performance on the political campaigns. She stated that during this discussion, in which she was given her raise, there was never any discussion about anything other than campaign related work. During the debriefing, the defendant spoke to Ms. Kloiber about his fund-raising efforts for the Hansen campaign and apologized for failing to raise more funds. A short time later, after Andy Gussert was replaced as the director of the SDC by Jon Carson, Mr. Carson told Ms. Kloiber that he and the defendant were looking to hire a full-time fund-raiser.

103. Ms. Kloiber stated that sometime shortly after the November 2000 elections, the defendant came to a staff meeting at the SDC offices. The defendant brought Mr. Burnett and Mike Brown who was another member of the defendant's staff. Ms. Kloiber stated that an individual named Darcy Luoma was also present at that meeting because she was interviewing for the job as the SDC director. At this meeting the defendant discussed in detail the political campaigns that had been run by the SDC staff and discussed with the SDC staff what they had done well and what they could do differently next time.

104. Your complaining witness states that Investigator Bisswurm spoke to Darcy Luoma who informed Investigator Bisswurm that in December of 2000 she was contacted by the defendant about becoming the director of the SDC. Ms. Luoma stated that the defendant invited her to attend a SDC staff meeting so she could meet the staff and get a feel for what the job was all about. The defendant also wanted her at the meeting so she could give the staff a debriefing as to what she had done for the Gore campaign. Ms. Luoma stated that she has reviewed her calendar and handwritten notes and has determined that the meeting took place on January 16, 2001 during regular business hours. The meeting took place in the Caucus State office in the Firstar Bank building.

105. Ms. Luoma stated that the focus of the meeting was debriefing campaigns. She stated that at the meeting a SDC staff member, who she did not know, later determined to be Carrie Lynch, prepared a handout regarding the Alice Clausing campaign entitled "Why We Lost the 10th". Ms. Luoma turned over to Investigator Bisswurm a copy of handwritten notes dated January 16, 2001 entitled "Senate Dem Caucus Election Debriefing Meeting". These notes were reflect a discussion about the Clausing campaign weaknesses and a discussion about the fact that in particular areas of Senator Meyer's district, Senator Meyer garnered 1,600 votes while Al Gore obtained 6,000 votes. Ms. Luoma stated that she did not take the job as director of the SDC because the job appeared to be too political for her.

106. Your complaining witness states that he spoke with Carrie Lynch and Ms. Lynch informed him that she worked for the Senate Democratic Caucus from September 1999 until October 2001. Ms. Lynch stated that when she was hired at the caucus, she was hired to work as a communications director. She stated that she does not recall being told that the caucus did campaign work. Ms. Lynch stated that she was approached by the defendant at a fund-raiser at the Argus bar in the early part of 2000 and asked if she wanted to work on Senator Alice Clausing's campaign. Ms. Lynch said that the defendant told her that Clausing liked Lynch and wanted to work with Lynch. The defendant told Ms. Lynch that Alice Clausing was the top target in the 2000 campaign.

107. Ms. Lynch stated that she took over as the campaign manager for Alice Clausing in June of 2000 because the campaign was disorganized and there were too many bosses. She stated that she performed some of her duties as manager of Clausing's campaign from her State caucus office in Madison. Ms. Lynch stated that during the last two weeks of the campaign she used vacation time and stayed in Menomonie, Wisconsin. Ms. Lynch stated that among her duties as campaign manager were to draft and approve literature that she described as "Vote For" literature and Ms. Lynch stated that she wrote most of Senator Clausing's campaign literature. Ms. Lynch acknowledged that the majority of Senator Clausing's campaign literature was probably written by Lynch at her State office on her State computer. Ms. Lynch said that the graphics work for the campaign was done by Cindy Maracek and that she would hand Maracek a rough draft of what she wanted and Maracek would come back to her with any questions and then Maracek would complete the work and bring it back to Lynch for editing. Ms. Lynch said that the majority of these transfers occurred in the caucus during regular business hours.

108. Regarding contacts with the defendant during the campaign, Ms. Lynch said that the defendant knew that Lynch controlled the Clausing staff and that Ms. Lynch reported to the defendant on a regular basis. Ms. Lynch said that the defendant called her often on her cell phone and that she met with the defendant once in awhile. Ms. Lynch stated that two days rarely went by without talking to the defendant about the campaign.

109. Ms. Lynch stated that from June of 2000 forward her work on the campaign of Senator Clausing became more intense as the election neared. Ms. Lynch stated that first she worked on the campaign on a weekly basis and then daily during the last few weeks before the election. Ms. Lynch stated that in addition to having graphics work done at the caucus by Ms. Maracek she obtained contributor lists and other data from Branda Weix and Joel Gratz who was another data analyst at the caucus. Ms. Lynch stated that she worked day hours Monday through Friday on the campaign approximately 10 to 20 hours per week during the summertime.

110. **Ms. Lynch stated that the campaign time went up in August and then again significantly in September to approximately 30 hours per week. She stated that she had regular contact with both Mr. Gussert and the defendant and the defendant was aware of the amount of time and commitment spent on the Clausing campaign by Ms. Lynch. Ms. Lynch stated that SDC employees did campaign work because nobody wanted to do it and there wasn't enough money. She further described the campaign work as "forced labor."** Ms. Lynch stated that she also knew that SDC employee Lance Walter managed Senator Hansen's campaign and that Wendy Kloiber worked with Walter on Hansen's campaign and that

SDC employee Jay Wadd ran Mark Meyer's campaign.

111. Your complaining witness states that he was present when Cindy Maracek testified in a John Doe proceeding before the Honorable Sarah O'Brien. During that proceeding, Ms. Maracek acknowledged that during the 2000 election campaign she received requests from Lance Walter and Wendy Kloiber to produce campaign pieces for the Hansen campaign, requests from Jay Wadd to produce pieces for the Mark Meyer campaign and requests from Carrie Lynch to produce pieces for the Clausing campaign. Ms. Maracek further testified that Carrie Lynch told her that the campaign pieces that were being produced for the Clausing campaign were being signed off or approved by the defendant.

112. Your complaining witness states that he has reviewed testimony provided by Lance Walter in a John Doe proceeding presided over by the Honorable Sarah O'Brien. Mr. Walter testified that in approximately January of 2000 he returned from a family leave and had a discussion with Andy Gussert in Senate Democratic Caucus office about targeted races for the 2000 campaign. During this conversation Mr. Gussert and Mr. Walter discussed a plan to target Senate District 30 which was then held by State Senator Gary Drzewiecki. During this conversation, the two of them decided that the Lambeau Field issue could be very effective against Senator Drzewiecki. Mr. Walter acknowledged that he ended up doing a significant amount of work on the campaign in the 30th Senate District including crafting the central message of the campaign and general strategy advice.

113. Mr. Walter testified that when he became involved in the campaign which was eventually won by Brown County Supervisor Dave Hansen, he began working off a campaign that had previously been prepared by Senate Democratic Caucus analyst Brett Cott. Complaining witness states that he had previously been informed by Mr. Gussert that Brett Cott was hired at the SDC by the defendant over the objections of Mr. Gussert. Mr. Walter further testified that after a period of time Wendy Kloiber was assigned to assist him on the campaign and devoted increasingly large amounts of time to the Hansen campaign. Mr. Walter acknowledged that as election day approached the majority of the work done in the caucus office by himself and Ms. Kloiber was in furtherance of the Hansen campaign.

114. Mr. Walter indicated that his involvement with the Green Bay race began in approximately January of 2000 when he started to make some calls in the Green Bay area to see if they could find a potential candidate. Mr. Walter indicated that he knew some people in Green Bay, and he would call them up and tell them that they were looking for a candidate and ask for names. His intention was to try to flush out a candidate or a least a small group of candidates that the defendant and Mr. Walter could meet with to talk about running for office. Mr. Walter stated that he made contact with several

individuals one of which was Dave Hansen. Mr. Walter indicated that he traveled to Green Bay with the defendant for the purposes of attending a public hearing. Thereafter, he and the defendant met with the individuals that Mr. Walter had identified. Mr. Walter stated that shortly thereafter it became clear that both Mr. Walter and the defendant's preference was that Dave Hansen would be their candidate.

115. Mr. Walter indicated that Mr. Hansen eventually agreed to run for State Senate and Mr. Walter began to work on a campaign plan and a budget. Mr. Walter indicated that there were frequent discussions with the defendant about how much the race would cost. Mr. Walter stated he discussed with the defendant his concerns that the Green Bay media market was an expensive market and that Mr. Hansen had no financial means and no history of raising money. The defendant assured both Mr. Walter and Mr. Hansen that the defendant would raise the funds necessary to run the campaign. Mr. Walter stated that he continued to act as an intermediary between Mr. Hansen and the defendant in order to insure that Mr. Hansen continued his campaign.

116. Mr. Walter stated that in general when he is running a campaign, he identifies a target figure of funds that need to be raised and attempts to identify various sources that are available to the candidate to raise money. Mr. Walter stated that generally a hole would be left, sometimes large, sometimes as much as half of the money, where there was no clear source as to where the money would come from. Mr. Walter stated that the defendant's role was then to come in and fill that hole as best he could. Mr. Walter stated that this was the defendant's role in the Hansen campaign. Mr. Walter stated that throughout the course of the campaign he would talk to the campaign and determine how much money had come in and compare that to what was needed and when the money was needed. If Mr. Walter determined that there was a cash flow problem, he would relay that information to the defendant. Mr. Walter stated that he was not directly involved in raising money by the defendant but often times the defendant would call Mr. Walter and ask Mr. Walter to come by the defendant's law office and pick up checks that were to go to the Green Bay race.

117. Mr. Walter also indicated that the defendant was involved in approving literature pieces for the Hansen campaign. Mr. Walter indicated that he would write text for the Hansen literature pieces and bounce ideas off of other campaign workers. After they got the literature to a certain point the defendant felt that it was important because of the critical importance of the race that the defendant himself sign off on the literature pieces. Mr. Walter stated that the literature pieces for the Hansen campaign would be run by the defendant before they would be sent to the printer.

118. Mr. Walter stated that at one point in time during the campaign it was clear that there were difficulties raising money and the defendant

approached Mr. Walter and told him that the defendant wanted Mr. Walter to meet with a fund-raiser that could help fund-raising on the Hansen campaign. The defendant asked Mr. Walter to go to Milwaukee and meet with Barb Candy who the defendant indicated would help raise money for the Hansen campaign. Mr. Walter did meet with Ms. Candy who agreed to provide assistance to the Hansen campaign. Complaining witness states that his investigation revealed that Ms. Candy along with Meghan Bitenc, who was employed in the defendant's State office, performed fund-raising tasks for the Hansen campaign.

119. **Mr. Walter testified that going forward from June of 2000, approximately 40% of his time at the caucus was spent working on the Hansen campaign. Mr. Walter further testified that the defendant was aware of what he was doing for the Hansen campaign and aware of the kind of time it takes to do those things. Mr. Walter testified that it was understood that the defendant knew that Mr. Walter was working at the caucus and that the reason that the defendant could essentially talk to Mr. Walter and ask him to do political things was because Mr. Walter worked for the defendant.** Mr. Walter further testified that the defendant was aware of the amount of data work being done by Branda Weix at the caucus and the amount of graphics work being done by Cindy Maracek at the caucus. Mr. Walter went on to clarify that he knew that the defendant was the leader of the caucus because Mr. Walter had previously lost a job at another caucus when there was a change in leadership. It was clear to Mr. Walter that when the defendant directed him to take steps to convince Dave Hansen to run for State Senate, Mr. Walter had no option of refusing the defendant's request.

120. Your complaining witness states that Investigator Bisswurm spoke to Meghan Bitenc who informed her that she was hired by the defendant to work as a full time state employee on his legislative staff in January of 2000. Ms. Bitenc stated that she had no policy experience prior to being hired by the defendant but had worked exclusively on political campaigns. Ms. Bitenc stated that when she was hired she believed that she would work on the defendant's legislative staff for a while to get to know people and then would transfer over and work on the defendant's campaign in 2000. She assumed that she would have to take a leave to do this because this was what she had seen done in other states. Ms. Bitenc stated that during the spring of 2000 while working in the defendant's state office, the defendant directed her to call Barb Candy who Ms. Bitenc knew to be a fundraiser. Eventually Ms. Bitenc began to work with Ms. Candy and the defendant on fundraising calls. Ms. Bitenc stated that these calls included calls made by the defendant to raise money for the Hansen campaign.

121. Ms. Bitenc stated that the defendant would make these calls during the regular business day from his law office and that her job was to assist him

and take notes regarding the commitments that he received. She stated that she did not take leave or vacation to do this fundraising activity with Mr. Burnett. She also traveled to Green Bay with Ms. Candy for the purposes of meeting with Dave Hansen to discuss fundraising, again without taking any leave or vacation. Ms. Bitenc stated that at one point she raised her concerns about the mixing of campaign and legislative work to Mr. Burnett after a reporter came to the Senate office to ask Mr. Burnett a question about the campaign. Ms. Bitenc thought it was strange that the press seemed to know that state employees worked on campaigns. Mr. Burnett told her that that was the way it was, both democrats and republicans did it and the press knew about it. She stated this conversation was memorable because when she had worked in Virginia, the campaign work was separated from the legislative work.

122. Your complaining witness states that he has spoken with State Senator Dave Hansen, and Senator Hansen acknowledged that he was recruited by the defendant to run for the State Senate in the 30th Senate District. The defendant told Senator Hansen that he would help by making phone calls and raising money for the Hansen campaign. Senator Hansen said that the defendant told him that Lance Walter would be in touch with him during the campaign. Senator Hansen stated that he did not have regular meetings with Mr. Walter but did speak to him by phone on a regular basis. Senator Hansen stated that Wendy Kloiber also worked with Lance Walter on the campaign. Senator Hansen stated that he believed that Lance Walter and Wendy Kloiber worked for Senator Chvala's office or the Democratic Party. He stated he was unaware that Lance Walter and Wendy Kloiber were State employees. Senator Hansen stated that both Walter and Kloiber were very helpful with the campaign, but he didn't see much of them until the last month or so before the election. Senator Hansen also indicated that Lance Walter made arrangements for Sue Meinholz, who was the defendant's State office manager to do the campaign finance reports. Mr. Walter testified that the defendant made the arrangements for Sue Meinholz to do the bookkeeping and campaign finance reports for the Hansen campaign.

123. Your complaining witness states that he spoke with former Senator Alice Clausing and Ms. Clausing acknowledged that Carrie Lynch had provided assistance to her 2000 campaign. Ms. Clausing acknowledged that she knew that Lynch worked for the Senate Democratic Caucus. Ms. Clausing stated that although she knew that Ms. Lynch was an employee of the SDC she assumed that Lynch was providing services on her own time or that she was taking vacation or compensatory time.

Probable Cause as to Counts 11: (UNLAWFUL POLITICAL CONTRIBUTIONS)

124. Your complaining witness states that he has reviewed testimony provided by Mr. Walter, and Mr. Walter testified that in late June or early July

of 2000 Mr. Walter went to the defendant's law office located at 44 East Mifflin Street in the City of Madison, County of Dane. Mr. Walter testified that when he traveled up to the 30th Senate District, it was common for the defendant to ask Mr. Walter to pick up checks to convey to the Hansen campaign. On this particular occasion, however, the defendant handed Mr. Walter an envelope containing over $1,500 in cash. The defendant handed the envelope to Mr. Walter and told Mr. Walter that it was money that was raised for Senator Hansen by a group who passed the hat for him. The defendant instructed Mr. Walter to make sure that this money got up to Green Bay and into the campaign account. Mr. Walter testified that he subsequently opened the envelope and it contained a series of bills, fives, ones, tens and twenties. He proceeded to count the money and determined that it exceeded $1,500.

125. Mr. Walter stated that he discussed this situation with Wendy Kloiber and that they were both very uncomfortable but felt that the campaign was strapped and they had been working incredibly hard on it. **Mr. Walter stated that he then took $1,000 of the cash and deposited into his own bank account and gave the remaining funds to Wendy Klobier for the purposes of having her deposit it into her bank account. Mr. Walter stated that he then transferred the $1,000 from his personal account to a joint account held by his wife and had his wife write a $1,000 check to the Dave Hansen campaign. Mr. Walter stated that he did this because he was trying not to tie the Dave Hansen campaign to the defendant in any way.**

126. Mr. Walter identified a deposit slip from the State Capitol Employees Credit Union dated July 3, 2000 reflecting a deposit of $1,000 cash. Mr. Walter indicated that this was the cash given to him by the defendant. After having transferred the money along with some other funds into a joint account he asked his wife to sign a check to the Hansen campaign. Mr. Walter stated that to the best of his knowledge the monies that exceeded $1,000 were deposited by Wendy Kloiber into her account and subsequently contributed to the Hansen campaign. Mr. Walter indicated that he did not raise his concerns with the defendant about receiving and handling of the cash. He stated that when he received the money in the envelope, he did not realize how much was there and when he did open it and count it, he did not feel comfortable questioning the defendant about the funds. Mr. Walter further stated that when he counted the funds, the bills were in denominations of 5$, $10, and $20 bills,

127. Your complaining witness states that he spoke with Wendy Kloiber, and Ms. Kloiber informed him that she was approached by Lance Walter who told her that the defendant had been at a union rally and collected contributions. Mr. Walter gave her $630 in cash and told her that he was unable to contribute the money to the Hansen campaign because he was

already at the $1,000 limit for the year. Ms. Kloiber stated that she then deposited the $630 given to her by Mr. Walter into her account and shortly thereafter wrote out a $750 check to the Dave Hansen campaign. Your complaining witness states that bank records from the UW Credit Union confirm that on June 29, 2000 Ms. Kloiber deposited $630 cash into her checking account.

128. Your complaining witness states that bank records from the State Capitol Employees Credit Union confirm the transfer made by Mr. Walter and the check signed by Sue Sabatke made payable to the Hansen campaign in July of 2000.

129. Your complaining witness states that Wisconsin Statutes Section 11.26(2)(b) limits the amount of money that can be contributed to candidates for state senate to $1,000 per election campaign. Chapter 11 also requires that contributions over $10 be recorded and that any contribution of over $50 may not be made in cash. Your complaining witness states that during his investigation he received information that the defendant was involved in hundreds of fundraising solicitations for numerous candidates, committees and independent expenditure groups. Therefore, your complaining witness believes that when the defendant gave more than $1600 in cash to Lance Walter he would have known that it was illegal for Mr. Walter to contribute the money in his own name.

Probable Cause as to Counts 12-20 (UNLAWFUL CAMPAIGN COORDINATION):

130. The defendant unlawfully coordinated Independent Citizens for Democracy's (hereinafter "Independent Citizens for Democracy (PAC)") political activities with Sen. Mark Meyer's 2000 campaign for Wisconsin State Senate. The defendant regularly and directly advised Senator Mark Meyer on his campaign committee's efforts. At the same time, Mr. Burnett controlled Independent Citizens for Democracy (PAC)'s activities to elect Sen. Mark Meyer. The defendant likewise served a substantial role with Independent Citizens for Democracy (PAC)" and with Sen. Mark Meyer's 2000 campaign, including extensive fundraising assistance for both groups.

131. This campaign coordination enabled the defendant to circumvent statutory limits on direct contributions to Sen. Meyer's campaign committee. Section 11.26(2)(b) of Wisconsin Statutes limits individual political action committee donations to $1,000 per Wisconsin State Senate candidate. The law does not limit the amount a political action committee may give to an independent expenditure group. The defendant used Independent Citizens for Democracy (PAC) to receive unlimited political action committee contributions, and then spent the funds on the Mark Meyer campaign.

132. The defendant's activities violated Wisconsin campaign finance laws in two ways. First, the defendant caused Independent Citizens for Democracy (PAC) to make in kind contributions to the Mark Meyer campaign committee which exceeded the statutory limits of $1,000.00 per Wisconsin State Senate candidate. Because Independent Citizens for Democracy (PAC) acted in concert, cooperation or consultation with candidate Mark Meyer, Independent Citizens for Democracy (PAC)'s pro-Meyer advertising constituted an in kind contribution to the Mark Meyer campaign committee. Second, the defendant caused Independent Citizens for Democracy (PAC) to file false campaign finance reports. The reports claimed Independent Citizens for Democracy (PAC)'s expenditures were independent, but in fact, the expenditures were coordinated with the Mark Meyer campaign.

Defendant's relationship with Sen. Mark Meyer's campaign

133. Complainant reviewed a summary which Milwaukee County District Attorney's Office Investigator Aaron Weiss prepared of his interview with **Senator Mark Meyer**. Sen. Meyer stated as follows. Sen. Meyer consulted with the defendant about Sen. Meyer's 2000 campaign on a near daily basis. Sen. Meyer described the defendant as a "micro-manager" in regards to Sen. Meyer's campaign. Sen. Meyer consulted with the defendant about themes and content of Sen. Meyer's campaign literature.

134. Sen. Meyer further stated Meghan Bitenc helped him with his campaign fundraising. With Ms. Bitenc' assistance, Sen. Meyer made fundraising telephone calls from the defendant's law firm office. Complainant reviewed a summary of Milwaukee County District Attorney's Office Investigator Heidi Bisswurm's interview with **Meghan Bitenc**, wherein Ms. Bitenc stated she served on the defendant's legislative staff from January to August 2000. Ms. Bitenc did political fundraising at the defendant's direction while on his legislative staff. She stopped fundraising when she left the defendant's staff.

135. Sen. Meyer further stated he had frequent discussions with the defendant's chief of staff, Mr. Burnett, on the message and themes of Sen. Meyer's 2000 campaign. Mr. Burnett advised Sen. Meyer on how and where to spend his campaign committee funds on television and radio campaign advertisements. Sen. Meyer described Mr. Burnett as having expertise in the area of broadcast media. Mr. Burnett advised Sen. Meyer concerning how to target broadcast media to particular voting groups. Mr. Burnett also advised Sen. Meyer concerning the optimal levels of gross ratings points in Sen. Meyer's campaign media markets.

136. Sen. Meyer further stated Jay Wadd was an advisor to his 2000 campaign. Mr. Wadd generally oversaw campaign activities. Mr. Wadd

assisted with the content, production, and media buys for Sen. Meyer's television and radio advertisements. The defendant was aware of who worked on Sen. Meyer's campaign, and had to know of Mr. Wadd's role.

137. Sen. Meyer was cooperative with complainant's investigation and displayed a forthright demeanor throughout the above interview. Sen. Meyer stated he did not know of the defendant control of Independent Citizen's for Democracy (PAC). Sen. Meyer also believed Mr. Wadd was assisting his campaign on vacation time or at other times outside of Mr. Wadd's employment with the Senate Democratic Caucus.

138. Complainant interviewed **Jay Wadd**. Complainant also reviewed a summary which Investigator Bisswurm prepared of her interviews with Mr. Wadd. Mr. Wadd stated as follows. Throughout 2000, he was a paid full-time staff member of the Senate Democratic Caucus. Andrew Gussert, the director of the Senate Democratic Caucus, assigned Mr. Wadd to assist with Sen. Mark Meyer's 2000 campaign for Wisciosin State Senate. Mr. Wadd effectively managed Sen. Meyer's campaign. Mr. Wadd produced the campaign budget, controlled the campaign finances, did strategic analysis, created a campaign web-site, and drafted campaign literature. Mr. Wadd did portions of these campaign tasks at the Senate Democratic Caucus offices during regular hours of his employment as a State of Wisconsin employee. Mr. Wadd stated that, typically, from June to November of an election year, the entire staff of Senate Democratic Caucus was so absorbed in campaign work that no legitimate policy work was ever discussed.

139. Mr. Wadd further stated he repeatedly met with the defendant to discuss Mr. Wadd's work on Sen. Meyer's campaign. The defendant was particularly interested in Sen. Meyer's campaign because it was a tight race.

140. Mr. Wadd further stated the defendant reviewed and approved all of Sen. Meyer's campaign literature and television advertisements before Sen. Meyer's campaign committee disseminated them. Mr. Wadd showed the defendant drafts of Sen. Meyer's campaign literature. Mr. Wadd specifically recalls viewing a tape of a proposed Sen. Meyer campaign television advertisement with the defendant. The defendant approved the advertisement. Mr. Wadd then told the defendant that Mr. Wadd wanted to air the advertisement early in the Meyer campaign. Mr. Wadd explained that Sen. Meyer's campaign committee lacked sufficient funds to do so. Mr. Wadd asked whether the defendant could raise additional funds to allow Sen. Meyer to do the early television spots. The defendant replied he would attempt to raise the funds.

Defendant's relationship with Independent Citizens for Democracy (PAC)

141. Complainant reviewed filings Independent Citizens for Democracy (PAC) made with the State of Wisconsin Elections Board, 134 E. Wilson Street, Madison, Wisconsin. Those submissions reflect as follows. On September 15, 1998, Robin Nix filed a Campaign Registration Statement (Form EB-1) recording Independent Citizens for Democracy (PAC) as an independent committee with Ms. Nix serving as treasurer. On March 24, 1999, Scott McCormick filed an amended Campaign Registration Statement reporting he had replaced Ms. Nix as treasurer.

142. On September 7, 2000, Mr. McCormick swore to, and filed, an Oath for Committees and Individuals Making Independent Disbursements (Form EB-6) on behalf of Independent Citizens for Democracy (PAC). The Form EB-6 states Independent Citizens for Democracy (PAC) supported candidate Mark Meyer. The Form EB-6 further contains Independent Citizens for Democracy (PAC)'s oath, as prescribed by Section 11.06(7) of Wisconsin Statutes, wherein Independent Citizens for Democracy (PAC) swears it does not act in concert, cooperation or consultation with candidate Mark Meyer or any agent or authorized committee of Mark Meyer. A notarial jurat certifies the oath was duly subscribed and sworn in Dane County, Wisconsin.

143. Complainant reviewed four Reports of Independent Disbursements (Form EB-7) which Independent Citizens for Democracy (PAC) submitted to the State of Wisconsin Elections Board. The reports are signed by Scott McCormick and show as follows.

144. By report filed September 14, 2000, Independent Citizens for Democracy (PAC) certified making an "independent expenditure" of $50,000 on September 11, 2000 to Media Strategies Research in support of Mark Meyer's candidacy for Wisconsin State Senate [Count 13].

145. By report filed October 27, 2000, Independent Citizens for Democracy (PAC) certified making an "independent expenditure" of $25,000 on October 24, 2000 to Media Strategies Research in support of Mark Meyer's candidacy for Wisconsin State Senate [Count 14].

146. By report filed November 2, 2000, Independent Citizens for Democracy (PAC) certified making an "independent expenditure" of $17,308 on October 28, 2000 to Dixon Media Group in support of Mark Meyer's candidacy for Wisconsin State Senate [Count 15].

147. By separate report filed November 2, 2000, Independent Citizens for Democracy (PAC) certified making an "independent expenditure" of $274.30 to Deanna Williams, and $13,450.99 to Litho Productions, on October 31, 2000, in support of Mark Meyer's candidacy for Wisconsin State Senate [Count 16].

Copies of the above reports are attached hereto and incorporated herein by reference.

148. Each of the above Reports of Independent Expenditures was filed pursuant to the Oath for Committees and Individuals Making Independent Disbursements (Form EB-6). By that oath, Independent Citizens for Democracy (PAC) swore it was not acting in concert, cooperation or consultation with candidate Mark Meyer or any agent or authorized committee of Mark Meyer. Moreover, the above reports, on their face, certify they are "independent disbursements."

149. The reports are false in that, as described in this complaint, Independent Citizens for Democracy (PAC), in fact, did act in concert, coordination, or consultation with Mark Meyer's campaign.

150. Section 11.02(2), Wisconsin Statutes, designates the Wisconsin State Elections Board as the filing officer for campaign finance reports filed by organizations, such as Independent Citizens for Democracy (PAC), which register as independent expenditure committees under section 11.06(7), Wisconsin Statutes.

151. Complaint reviewed copies of bank records which Heartland Credit Union, 555 W. Washington Street, Madison, Wisconsin maintains in the ordinary course of business for checking account number 558350 in the name of "Independent Citizens for Democracy." Those records confirm Independent Citizens for Democracy (PAC) made the above expenditures.

152. Complainant reviewed the following business records which likewise document the above expenditures:

Dixon Media Group invoices to Independent Citizens for Democracy (PAC) in the amount of $17,308 for producing pro-Meyer television advertisements;

a DeeSigns Williams invoice dated October 23, 2000 to Independent Citizens for Democracy (PAC) in the amount of $274.30 for a Mark Meyer brochure;

a Litho Productions invoice dated November 15, 2000 to Independent Citizens for Democracy in the amount of $13,450.99 for a "Mark Meyer Mailer (2nd Mailing)"; and

various business records from television stations WQOW, WLAX and WKBT in LaCrosse, Wisconsin showing Independent Citizens for Democracy (PAC) purchased, through their agent Media Strategies and Research, extensive pro-Meyer television advertisement during September to November

2000.

153. Complainant was present when **Scott McCormick** testified before a John Doe hearing in Dane County Case No. 01-JD-6. Mr. McCormick stated as follows. Both Tom Boeder and Mr. Burnett asked Mr. McCormick to assist with Independent Citizens for Democracy (PAC). Mr. Burnett indicated Independent Citizens for Democracy (PAC) would work to elect Democrats to the Wisconsin State Senate. Mr. Burnett and Mr. McCormick agreed that Mr. McCormick would serve as a figurehead treasurer on behalf of the organization. Mr. McCormick knows Mr. Burnett serves as chief of staff for the defendant's legislative office.

154. Mr. McCormick further testified he served as the nominal treasurer for Independent Citizens for Democracy (PAC) from approximately April 1999 through January 2001. He did not exercise any actual control over Independent Citizens for Democracy (PAC). He did not receive or deposit contributions. He did not issue disbursements. He exercised no control over the organization's checking account with Heartland Credit Union. He had no access to Post Office Box 3274, Madison, Wisconsin 53704 which served as the official mailing address for Independent Citizens for Democracy (PAC).

155. Mr. McCormick further testified that Susan Meinholz and Mr. Boeder routinely brought completed campaign finance reports for Independent Citizens for Democracy (PAC) to Mr. McCormick's home for his signature. On at least one occasion, Mr. McCormick met with Ms. Meinholz in the defendant's legislative office to sign campaign finance reports for Independent Citizens for Democracy (PAC). Mr. McCormick knows Ms. Meinholz serves on the defendant's legislative staff.

156. Complainant interviewed **Tom Boeder** and was present when Mr. Boeder testified before a John Doe hearing in Dane County Case No. 01-JD-6. Mr. Boeder stated as follows. Mr. Boeder actively participated in Independent Citizens for Democracy (PAC) beginning in 1998. Mr. Boeder maintained a home office and computer at his residence at 1314 E. Wilson Street, Madison, Wisconsin to operate Independent Citizens for Democracy (PAC) and other similar political organizations. He was an authorized signer on Independent Citizens for Democracy (PAC)'s checking account 558350 with Heartland Credit Union, Madison, WI. He maintained the checkbook.

157. Mr. Boeder further stated Scott McCormick served as the nominal treasurer for Independent Citizens for Democracy (PAC) during 2000 and early 2001, but Mr. McCormick exercised no control over the organization. Mr. Boeder became the official treasurer in July 2001.

158. Mr. Boeder further stated Mr. Burnett essentially ran Independent Citizens for Democracy (PAC). Mr. Burnett focused Independent Citizen's for Democracy efforts on expressly advocating the election of Mark Meyer, Alice Clausing, and Dave Hansen to the Wisconsin State Senate during the Fall 2000 campaign. Mr. Burnett directed Mr. Boeder's work on Independent Citizens for Democracy (PAC). Mr. Burnett controlled Independent Citizens for Democracy (PAC)'s fundraising, political research, political advertising production, and political advertising dissemination.

159. Regarding fundraising, Mr. Boeder stated, at Mr. Burnett's direction, he successfully solicited the Democratic Legislative Campaign Committee (DLCC), Washington, D.C., for funding for Independent Citizens for Democracy (PAC). Complainant reviewed campaign finance reports which Independent Citizens for Democracy filed with the State of Wisconsin Elections Board. Those reports show the DLCC gave $292,000 to Independent Citizens for Democracy (PAC) during the Fall of 2000. Mr. Boeder also provided his contemporaneous notes showing Mr. Burnett directed Mr. Boeder to solicit a plumbers union for a $10,000 to Independent Citizens for Democracy (PAC).

160. Mr. Boeder further stated Mr. Burnett arranged for Susan Meinholz to prepare the campaign finance reports for Independent Citizens for Democracy (PAC). Ms. Meinholz prepared the reports for Mr. McCormick's signature.

161. Regarding political research, Mr. Boeder stated Mr. Burnett gave Mr. Boeder political polling information, background research on candidates, candidate press packets, and position papers written by candidates. Mr. Boeder forwarded these materials to Dixon Media, Washington, DC. to be used in the production of political advertising for television and radio.

162. Regarding political advertising production, Mr. Boeder stated Mr. Burnett reviewed and edited all television and radio scripts produced by Dixon Media. Mr. Boeder provided draft copies of these scripts to Mr. Burnett. Mr. Burnett directed changes, which Mr. Boeder forwarded to Dixon Media. No scripts were submitted for production without Mr. Burnett's direct approval. Mr. Burnett also reviewed and edited the written political advertising which Independent Citizens for Democracy (PAC) disseminated.

163. Mr. Boeder gave complainant three e-mails addressed from Mr. Burnett to Mr. Boeder dated late October, 2000. The e-mails bring two television advertisements to Mr. Boeder's attention. One advertisement attacked Senate candidate Mark Meyer. The second advertisement favored Sen. Meyer's opponent, Dan Kapanke. Mr. Boeder stated Mr. Burnett directed him to forward this information to Dixon Media so they could prepare pro-Meyer advertisements in response.

164. Mr. Boeder gave complainant copies of preliminary drafts of mail brochures which Independent Citizens for Democracy (PAC) disseminated supporting Mark Meyer's candidacy. The drafts contain editing notes directing changes to text and lay out. Mr. Boeder explained Mr. Burnett directed these editing changes.

165. Mr. Boeder gave complainant numerous other e-mails addressed between Mr. Boeder and the DLCC during Fall 2000. The e-mails specifically relate to Independent Citizens for Democracy (PAC)'s campaign to elect Mark Meyer, and include discussions of advertisements being run by Mark Meyer's opponent, television and radio scripts for pro-Meyer advertisements, and transfers of funds for pro-Meyer advertising production and media buys.

166. Mr. Boeder further stated he once encountered the defendant at a fundraiser. On that occasion, the defendant thanked Mr. Boeder for Mr. Boeder's work on Independent Citizens for Democracy.

167. Complainant knows the defendant engaged in fundraising for Independent Citizens for Democracy (PAC). The below-summarized statements of lobbyists Michael Bright and William Broyderick describe such fundraising.

168. Complainant reviewed a summary which Investigator Bisswurm prepared of her interview with **Michael Bright**. Mr. Bright stated as follows. Mr. Bright is a registered lobbyist who owns and operates the firm of Bright Consulting Inc., Madison, WI. The defendant invited Mr. Bright to the defendant's law office during various legislative budget cycles. In these meetings, the defendant reviewed Mr. Bright's clients' political donation track record, and then asked for Mr. Bright's clients to make political contributions to Democratic interests. Sen. Chvala listed political candidates and political committees he wanted to receive monies. The defendant specifically stated that Mr. Bright's clients could keep their political contributions "under the radar" by directing monies "across the Potomac" to the DLCC.

169. Mr. Bright stated the defendant also identified Independent Citizens for Democracy (PAC) as a group to which Mr. Bright's clients should contribute. The defendant named Tom Boeder as the contact person for Independent Citizens for Democracy (PAC). Mr. Bright provided his contemporaneous notes recording the defendant's statements about Independent Citizens for Democracy (PAC).

170. Complainant was present when Milwaukee County District Attorney E. Michael McCann questioned **William Broydrick** at a John Doe hearing in

Dane County Case No. 01-JD-6. Mr. Broydrick stated as follows. He is a registered lobbyist and presently operates the largest lobbying firm in the State of Wisconsin. Mr. Broydrick has attended numerous political fund raising meetings with the defendant. The defendant asked for contributions to certain specific political committees. Mr. Broydrick described the defendant's chosen political committees as "laundromats," meaning in Mr. Broydrick's words, the "money goes through a washing machine and it comes out clean."

171. Mr. Broydrick further stated the defendant specifically requested Mr. Broydrick's clients donate to the DLCC. Mr. Broydrick noted the DLCC funneled $292,000 to Independent Citizens for Democracy (PAC) in 2000. Mr. Broydrick's clients contributed monies to the DLCC. Mr. Broydrick sometimes delivered these contribution checks to the defendant's office. For example, Ameritech made a $40,000 contribution to the DLCC during the 2001 legislative budget cycle. Mr. Broydrick believes he handed this check to the defendant so that the defendant would be immediately aware of Ameritech's contribution.

172. When questioned whether such DLCC donations were earmarked for return to Wisconsin, Mr. Broyderick replied as follows. As a matter of routine, the defendant wanted DLCC contribution checks to be physically routed through the defendant. The defendant would thereby "get credit for them."

173. Complainant reviewed a copy of check number 5000095126. The check is drafted in the amount of $40,000 from SBC/Ameritech to the DLCC, Washington, D.C. and is dated July 9, 2001.

174. Mr. Broydrick stated, over the past several years, he was unaware of any legislation passing over the defendant's objection. Mr. Broydrick noted, when Ameritech donated the above $40,000, the Senate version of the 2001 budget included a tax provision highly unfavorable to Ameritech. Mr. Broydrick discussed Ameritech's desire to remove the unfavorable tax provision with the defendant. After Ameritech made the above $40,000 contribution, the unfavorable tax provision was removed from the budget bill by the legislative conference committee.

175. Mr. Broydrick described Ameritech making another donation of $40,000 to the DLCC in early 2002.

176. Mr. Broydrick also stated the defendant specifically identified Independent Citizens for Democracy (PAC) as a group to which Mr. Broydrick's clients should contribute. Referring to Independent Citizens for Democracy (PAC), the defendant stated "these people do good things." In response to the defendant's solicitation, Mr. Broydrick had his clients give to Independent Citizens for Democracy (PAC). For example, at Mr. Broydrick's

advice, Plumber Local 75 gave $5,000 to Independent Citizens for Democracy (PAC).

177. Deposit records for Heartland Credit Union checking account 500289 confirm Plumbers Local 75 contributed $5,000 to Independent Citizens for Democracy (PAC) on September 29, 2000.

178. Mr. Broydrick further stated he received telephone calls from Mr. Boeder requesting Mr. Broydrick's clients give to Independent Citizens for Democracy (PAC). When asked whether he believed Mr. Boeder's group acted independently from the defendant, Mr. Broydrick stated, based upon his long experience in politics, "It's inconceivable that these are actually arm's length transactions."

179. Complainant interviewed **Andrew Gussert**. Mr. Gussert stated as follows. He served as the director of the Senate Democratic Caucus throughout 2000. He extensively discussed and planned, with the defendant, the 2000 Democratic campaigns for the Wisconsin State Senate. Those discussions included analyses of independent political groups' impact upon the election. For example, Mr. Gussert and the defendant extensively talked about the independent expenditures of Wisconsin Education Association Council (WEAC) on the 2000 election races for Wisconsin Senate.

180. In contrast, Mr.Gussert stated the defendant made it clear they did not want to discuss Independent Citizens for Democracy (PAC) with Mr. Gussert. Mr. Gussert knew Independent Citizens for Democracy (PAC) was an important political advertiser in the 2000 Senate election. Referring to Independent Citizens for Democracy (PAC), Mr. Gussert found it strange that, in his words, "there was an 800 pound gorilla in the room" but the defendant did not want to discuss it with Mr. Gussert. Mr. Gussert concluded, from this circumstance, the defendant had some secret control or contact with Independent Citizens for Democracy (PAC).

Defendant's conspiracy to violate campaign finance laws through Independent Citizens for Democracy-Issues (2001)

181. The defendant similarly used Mr. Boeder, as an unknowing co-conspirator, to operate Independent Citizens for Democracy-Issues, Inc. (hereinafter "ICD-Issues Inc. (2001)") in 2001-2002. The circumstances surrounding the formation and operation of ICD-Issues Inc. (2001) show the defendant intended to use the organization to make unlawful in kind contributions to Democratic candidates. Just as the defendant misused Independent Citiziens for Democracy (PAC) during the 2000 Wisconsin State Senate, he likewise intended and agreed to misuse ICD-Issues Inc. (2001) in the 2002 Wisconsin State Senate election. [Count 20]

182. Complainant reviewed the Articles of Incorporation which ICD-Issues Inc. (2001) filed with Wisconsin Department of Financial Institutions. The Articles of Incorporation show ICD-Issues Inc. (2001) was incorporated on April 24, 2001. Tom Boeder, Sarah Benedict, and Tom Winchell are listed as the board of directors.

183. A news article dated July 11, 2002 in The Capital Times of Madison, Wisconsin reported Ms. Benedict is a former member of the defendant's legislative staff.

184. Complainant questioned Mr. Boeder concerning his involvement with ICD-Issues Inc. (2001). Mr. Boeder stated as follows. Mr. Burnett recruited Mr. Boeder to establish ICD-Issues Inc. (2001). Mr. Burnett told Mr. Boeder the organization would serve as a receptacle for corporate donations. The money would then be used to disseminate issue advertisements favoring Democratic candidates for Wisconsin State Senate in 2002.

185. Mr. Boeder provided his handwritten notes he made during conversations with Mr. Burnett about the formation of ICD-Issues Inc. (2001). The notes include draft language for a statement of ICD-Issues Inc. (2001)'s political purpose. This language was ultimately incorporated into a one-page statement entitled "Fact Sheet". Mr. Boeder used this statement as his primary written advertisement when fundraising for ICD-Issues Inc. (2001). Mr. Burnett suggested much of the language comprising the Fact Sheet.

186. The ICD-Issues Inc. (2001) Fact Sheet states, in part, as follows:

"ICD-Issues, Inc...will focus exclusively on issues related to the State Senate and will not get involved in any other issues."

"ICD-Issues Inc. Inc. can accept soft money donations. Hard money, or PAC, contributions can be made to ICD PAC." (Emphasis added.)

The underscored excerpt shows ICD-Issues Inc. (2001) and Independent Citizens for Democracy (PAC) were operated in conjunction with each other.

187. Mr. Boeder further stated he conducted fundraising for ICD-Issues Inc. (2001) in the same fashion as fundraising for Independent Citizens for Democracy (PAC). Mr. Burnett provided lobbyist and industry representative names for Mr. Boeder to solicit. Mr. Burnett also told Mr. Boeder how much money to request from these sources. Mr. Boeder found the named sources to be readily forthcoming with large contributions of as much as $75,000.00 individually. Thee solictation leads Mr. Burnett provided were the only persons Mr. Boeder contacted for contributions.

188. Mr. Boeder provided his contemporaneous notes of his telephone conversations with Mr. Burnett. In those conversations, Mr. Burnett told Mr. Boeder whom to solicit for contributions to ICD-Issues Inc. (2001). The notes list lobbyist names and dollar amounts to solicit. Mr. Boeder's notes include the following lobbyist names in reference to the industries and/or organizations shown in parentheses: Patrick Essie (Distilled Spirits Council of the United States), Joseph Strohl (Dominion), Walter Kunicki (WEPCO), Mark Williamson (Madison Gas and Electric), Ron Antonneau (Wisconsin Public Service Corporation), Bill Broyderick (Ameritech), Eric Peterson (liquor wholesalers, road builders), Tony Driessen (MCI-Worldcom), Greg Everts (Wal-Mart), Lee Fanshaw (American Family Insurance), and many others.

189. Complaint reviewed copies of bank records which Heartland Credit Union, 555 W. Washington Street, Madison, Wisconsin maintains in the ordinary course of business for checking account number 569540 in the name of "Independent Citizens for Democracy-Issues Inc." The records show the following checks were deposited into the ICD-Issues Inc. (2001) account:

check 031064 dated June 1, 2001 from Madison Gas and Electric Company for $75,000;

check 0002661 dated June 5, 2001 from Wisconsin Energy Corporation for $50,000;

check 000101600 dated June 7, 2001 from PG & E Energy Group for $25,000;

check 030572 dated June 1, 2001 from Dominion Asset Services, LLC. for $50,000;

check 030573 dated July 1, 2001 from Dominion Assets Services, LLC for $75,000;

checks 021278, 023685, 023026 from Distilled Spirits Council of the United States totaling $75,000;

check 1858 dated June 12, 2001 from Rime Management Group, Inc. for $10,000;

check 51874 dated September 7, 2001 from Philip Morris Management Corp. for $20,000;

check 334701 dated June 19, 2001 from American Family Mutual Insurance Company for $20,000;

and many other high dollar checks from special interests.
In total, the Heartland Credit Union account records show ICD-Issues Inc. (2001) amassed $633,781.58 as of March 31, 2002.

190. Complainant reviewed a copy of the defendant's legislative office calendar. The calendar shows the defendant met with lobbyists at his law firm during May and June 2001. These meetings frequently correlate with donations ICD-Issues Inc. (2001) received.

191. For example, the defendant was scheduled to meet with Lee Fanshaw on June 8, 2001. Lee Fanshaw is an executive and registered lobbyist for American Family Mutual Insurance Company. On June 18, 2001, American Family Mutual Insurance Company gave $20,000 to ICD-Issues Inc. (2001).

192. As another example, the defendant was scheduled to meet with Tom Hanson on May 30, 2001. Tom Hanson is a registered lobbyist for Dairyland Greyhound Park, Inc. On June 12, 2001, Rime Management Group gave $10,000 to ICD-Issues Inc. (2001). Rime Management Inc. owns Dairyland Greyhound Park.

193. As another example, the defendant was scheduled to meet with Robert Bartlett on June 28, 20001. Mr. Bartlett is a registered lobbyist and president of the Petroleum Marketers Association of Wisconsin. On July 12, 2001, U.S. Oil Co., Inc., Riiser Energy, and Quality State Oil Co., Inc. all gave $5,000 each to ICD-Issues Inc. (2001). Each of these corporations is a member of the Petroleum Marketers Association of Wisconsin.

194. As another example, the defendant was scheduled to meet jointly with Joe Strohl and John Matthews on May 16, 2001. Mr. Strohl and Mr. Matthews are registered lobbyists for Dominion Assets Services LLC. On June 1, 2001, Dominion Asset Services LLC gave $50,000 to ICD-Issues Inc. (2001). Complainant knows Dominion Asset Services, LLC is the owner of the private prison in Stanley, Wisconsin.

195. At the time the above contributors met with the defendant and gave to ICD-Issues Inc. (2001), they each had special interest legislation pending as part of the 2001-2003 Wisconsin State Budget. American Family Insurance had an interest in a budget amendment to build a bridge in Burke, Wisconsin. Dairyland Greyhound Park was to benefit from a budget amendment allowing dog track owners to retain unclaimed winnings. The Petroleum Marketers Association of Wisconsin strongly opposed a budget amendment repealing the gasoline minimum mark-up law. Dominion Assets Services LLC owned the Stanley Prison, and sought a budget amendment funding the State of Wisconsin's purchase of the prison.

196. Mr. Boeder's ICD-Issues Inc. (2001) notes show Mr. Burnett directed Mr. Boeder to solicit the same lobbyists that met with the defendant. The notes read as follows:

"Lee Fanshaw, American Family Ins., appropriate, not traditionally new territory";

"Tom Hanson- 2 letters - fax - cable, dog track, 6/12, Wed will have check, Dairyland -> 10K tomorrow to pick up"

"Robert Bartlett fax (608) 256-7666"; and

"John Matthews, Dominion, 258-4787, 150K, left message"

The above comparison of the defendant's calendar, Mr. Boeder's notes of the fundraising leads Mr. Burnett suggested, and the contribution checks to ICD-Issues Inc. (2001), show a working relationship among those parties.

197. Complainant was present when **Patrick Essie** testified at a John Doe hearing in Dane County case 01JD-06. Mr. Essie stated as follows. He is a lobbyist for Distilled Spirits Council of the United States (DISCUS). He had a fundraising meeting with the defendant in spring of 2001 wherein the defendant discussed what monies Mr. Essie's clients could contribute to Senate Democratic candidates interests. The defendant advised there was an organization which could receive corporate coffer monies from Mr. Essie's clients. The defendant stated Mr. Burnett could provide more information about this organization. Shortly thereafter, Mr. Burnett called Mr. Essie. Mr. Burnett referred Mr. Essie to Tom Boeder and ICD-Issues Inc. (2001). Mr. Essie spoke with Mr. Boeder, and made commitments that DISCUS would make a series of contributions to ICD-Issues Inc. (2001). At Mr. Essie's advice, DISCUS did thereafter contribute a total of $85,000 to ICD-Issue (2001). Mr. Essie assumed the defendant would be informed of these contributions.

198. Complainant interviewed **Walter Kunicki**. Complainant also reviewed a transcript of Mr. Kunicki's testimony at a John Doe hearing in Dane County case 01JD-06. Mr. Kunicki stated as follows. Mr. Kunicki is an executive and registered lobbyist with Wisconsin Energy Corporation. In April or May of 2001, he had a fundraising meeting with the defendant. The defendant told Mr. Kunicki he wanted Wisconsin Energy Corporation to contribute to ICD-Issues Inc. (2001). The defendant stated the contribution should be in the amount of $100,000. Mr. Kunicki replied Wisconsin Energy Corporation might be able to contribute $50,000 immediately and $50,000 the next year. The defendant stated Tom Boeder would contact Mr. Kunicki concerning these contributions.

199. Mr. Kunicki further stated Mr. Boeder thereafter telephoned him. Mr. Boeder requested a contribution of $100,000 from Wisconsin Energy Corporation. Mr. Kunicki agreed to $50,000 immediately with the prospect of an additional $50,000 the next year.

200. Mr. Kunicki further stated he received a follow up telephone call from the defendant. The defendant reiterated the amount he expected Wisconsin Energy Corporation to contribute to ICD-Issues Inc. (2001) was $100,000.

201. Mr. Kunicki provided a copy of check number 00022611 dated June 5, 2001 in the amount of $50,000 from Wisconsin Energy Corporation to "Independent Citizens for Democracy, Attn: Tom Boerner" (sic).

202. Mr. Kunicki further stated that, at the time the defendant made the above solicitations, legislation known as "Power the Future" was pending before the Wisconsin legislature. This legislation was very important to Wisconsin Energy Corporation.

203. Complainant interviewed **Greg Everts**. Mr. Everts stated as follows. He is an attorney with the law firm of Quarles & Brady, Madison, WI. He is not a registered lobbyist, but did some limited lobbying on behalf of his client Wal-Mart in 2001. On April 26, 2001, Mr. Everts met with the defendant to discus Wal-Mart's interest in repealing the gasoline minimum mark-
204. up law. The defendant suggested there might be an opportunity in the budget process to repeal the law.

205. Mr. Everts further stated that, on May 10, 2001, Tom Boeder called Mr. Everts. Mr. Boeder asked Mr. Everts whether Wal-Mart would contribute to ICD-Issues Inc. (2001). Complainant notes that Greg Everts is not publicly registered as a lobbyist for Wal-Mart. Accordingly, Mr. Everts' representation of Wal-Mart would not have been a matter of general public knowledge at the time Mr. Boeder called Mr. Evert's about Wal-Mart.

206. Mr. Boeder advised complainant that Mr. Burnett directed Mr. Boeder to solicit Mr. Everts for a contribution from Wal-Mart. Mr. Boeder's ICD-Issues Inc. (2001) notes confirm Mr. Burnett identified Mr. Everts as a solicitation lead.

207. Complainant reviewed the transcript of the testimony of **Anthony Driessen** before a John Doe hearing in Dane County Case No. 01-JD-6. Complainant also reviewed the summary which DCI Special Agent Robin Broeske prepared of her interview with Mr. Driessen. Mr. Driessen stated as follows. He is an attorney with Quarles & Brady, Madison, Wisconsin and a registered lobbyist. He met with the defendant on April 26, 2001 to discuss fundraising. The defendant verbally listed those candidates to whom he wanted Mr. Driessen's clients to contribute. The defendant stated

his highest priorities were incumbent candidates Sen. Kim Plache, Sen. Jim Baumgart, and Sen. Judy Robson. Mr. Driessen provided a memorandum he drafted, the day after his meeting with the defendant, summarizing the discussions.

208. Mr. Driessen further stated, during the meeting of April 26, 2001, the defendant mentioned independent expenditures groups and issue advertisement groups as being among "the universe of political contributions" available to Mr. Driessen's clients. The defendant identified Thomas Boeder as responsible for certain of these groups.

209. Mr. Boeder's ICD-Issues Inc. (2001) notes indicate Mr. Burnett identified Mr. Driessen as a solicitation lead.

Defendant's control over other "independent" political groups

210. The defendant had considerable contact with, and control of, other "independent" political groups connected with Tom Boeder. These groups were operated in a similar manner to Independent Citizens for Democracy (PAC) and ICD-Issues Inc. (2001), and show the defendant acted with the same continuing motive, intent, preparation, and plan with respect to Independent Citizens for Democracy (PAC) and ICD-Issues Inc. (2001).

211. Complainant questioned **Tom Boeder** concerning his involvement with independent political groups other than Independent Citizens for Democracy (PAC). Mr. Boeder stated as follows. He had a role in the creation or operation of the following organizations: Future Wisconsin; Independent Citizens for Democracy - Issues, Inc. [incorporated on November 4, 1999 (hereinafter "ICD-Issues Inc. (1999)")]; Citizens for Working Families; and On Wisconsin - Issues Inc.

212. Mr. Boeder further stated that, in 1998, Mr. Burnett recruited Mr. Boeder to establish and operate an independent expenditure group named **"Future Wisconsin."** Mr. Boeder was essentially a figurehead. Mr. Burnett actually controlled the group. Future Wisconsin supported and advocated for the election of Democratic candidate Brian Manthey over Republican candidate Mary Lazich for Wisconsin State Senate. Mr. Burnett told Mr. Boeder who to solicit for contributions to Future Wisconsin. Mr. Burnett also controlled the content and dissemination of all political advertising Future Wisconsin funded in the Manthey-Lazich race. When allegations of campaign collusion were raised, Mr. Burnett told Mr. Boeder how to respond to investigative reporters.

213. Mr. Boeder provided fundraising records for Future Wisconsin. Those records included a cover letter dated March 11, 1998 whereby Tim Elverman, Government Relations Director (Midwest Region), Bank One,

forwarded a $1,000 donation to Future Wisconsin. The letter indicates "cc: Attorney Chuck Chvala." Complainant was present when Mr. Elverman testified before a John Doe hearing in Dane County Case No. 01-JD-06. Mr. Elverman could provide no explanation as to why he notified the defendant of the above payment to Future Wisconsin.

214. Complaint reviewed copies of bank records which M & I Bank, Madison, Wisconsin maintains in the ordinary course of business for checking account number 8973668 in the name of "Future Wisconsin." Those records show the DLCC donated $102,500 to Future Wisconsin.

215. Mr. Boeder further stated Mr. Burnett recruited him to establish an organization called **"Citizens for Working Families."** Mr. Burnett believed a Wisconsin State Senate seat would be vacated in 1998 calling for a special election. Citizens for Working Families was planned to advocate for the Democratic candidate for this expected opening. The vacancy did not occur, and Citizens for Working Families was disbanded.

216. Mr. Boeder further stated Mr. Burnett recruited him to establish an issues advocacy group called **ICD-Issues Inc. (1999)** in 1999. Mr. Burnett controlled ICD-Issues Inc. (1999) with Mr. Boeder serving as the figurehead. Mr. Burnett told Mr. Boeder who to solicit for contributions to ICD-Issues Inc. (1999). Mr. Burnett obtained contributions totaling $121,359.30 from the sources Mr. Burnett identified. These sources were primarily lobbyists and the corporate business interests they represented.

217. Complainant reviewed copies of bank records which Heartland Credit Union, 555 W. Washington Street, Madison, Wisconsin maintains in the ordinary course of business for checking account number 562910IN in the name of "Independent Citizens for Democracy-Issues Inc." Those records show the following contributions to ICD-Issues Inc. (1999):

$50,000 from Central Wisconsin Development Corporation (a subsidiary of Madison, Gas and Electric) on September 13, 1999;

$5,000 from Alliant Services Company on July 30, 1999;

$10,000 from U.S. Generating Company on July 1, 1999; and

$7,500 from Wisconsin Public Service Corporation on July 15, 1999.

218. Complainant was present when **William McCoshen** testified at a John Doe hearing in Dane County case 01JD-06. Mr. McCoshen stated as follows. He was the president of, and a registered lobbyist for, Energize Wisconsin. Energize Wisconsin was a consortium of utility industry interests which included Alliant Energy among others. During the summer

of 2000, legislation popularly known as "Reliability 2000" was under consideration as part of the biennial State of Wisconsin budget. Passage of Reliability 2000 was of great importance to the utility industry.

219. Legislative records show Reliability 2000 passed the legislature as an amendment (AA-ASA1-AB133) to the budget bill on October 6, 1999.

220. Complainant was present when **Mark Williamson** testified at a John Doe hearing in Dane County case 01JD-06. Mr. Williamson stated as follows. In 1998, he was an executive and registered lobbyist for Madison Gas and Electric. He frequently spoke with the defendant regarding Madison Gas and Electric contributing to Wisconsin Senate Democratic interests. The defendant advised that Madison Gas & Electric could route money to the **Kansas Democratic Party**, and that such contributions would be "helpful" to the defendant. In response to the defendant's comments, Mr. Williamson forwarded the below three checks to the Kansas Democratic Party. Mr. Williamson knows corporate coffer contributions to political candidates and political committees are forbidden by law within the State of Wisconsin.

221. Complainant reviewed copies of the following checks issued by Madison Gas and Electric subsidiaries to the Kansas Democratic Party:

check 2561 dated October 20, 1998 from MAGAEL Inc. to the Kansas Democratic Party for $5,000;

check 1650 dated October 20, 1998 from Great Lakes Energy Corporation to the Kansas Democratic Party for $15,000; and

check 1091 dated October 20, 1998 from Central Wisconsin Development Corporation to the Kansas Democratic Party for $5,000.

222. Mr. Boeder found, among his Independent Citizens for Democracy (PAC) records, copies of these same three checks from Madison Gas and Electric subsidiaries. The check copies were attached to a handwritten note reading "Steve Martino, Kansas Dem. Party, 700 S.W. Jackson St., 3rd Fl, Topeka, KS 66603" and bearing fax and voice telephone numbers. When Investigator Bisswurm asked Mr. Boeder about these checks, he stated he was aware of a scheme for routing campaign money through Kansas, but he was unsure precisely how the scheme worked. Mr. Boeder and Mr. Burnett discussed Mr. Boeder contacting the Kansas Democratic Party for money. Mr. Boeder believes he faxed a fundraising request to the Kansas Democratic Party. He did receive a check from the Kansas Democratic Party. He believes the contribution went to Independent Citizens for Democracy (PAC).

223. Complainant reviewed a campaign finance report dated April 7,1998 which Mr. Boeder filed on behalf of Future Wisconsin with the State of Wisconsin Elections Board. The report shows Dennis Langley of Leawood, Kansas gave $4,000 to Future Wisconsin on April 1, 1998. Dennis Langley was chairman of the Kansas Democratic Party when he made this contribution.

224. The above examples of contributions to, and from, the Kansas Democratic Party, suggests an ongoing scheme of reciprocal transfers of campaign money.

225. Mr. Boeder further stated that, at Mr. Burnett's direction, Mr. Boeder transferred the entire cash balance of $121,359.30 in ICD-Issues Inc. (1999) account with Heartland Credit Union to **Tom Winchell**. Mr. Winchell thereupon took over control of ICD-Issues Inc. (1999) and changed the organization's name to **"On Wisconsin Issues Inc."**

226. Complainant reviewed a filing dated December 21, 1999 with the Wisconsin Department of Financial Institutions showing ICD-Issues Inc. (1999) changed its name to "On Wisconsin Issues Inc." and changed its registered agent from Mr. Boeder to Mr. Winchell.

227. Complainant was present when Tom Winchell testified at a John Doe hearing in Dane County case 01JD-06. Mr. Winchell stated as follows. Andrew Gussert and Mr. Burnett asked him to operate an issue advocacy group called "On Wisconsin Issues Inc." Mr. Burnett indicated the organization would be used to support the candidacy of Democrats for Wisconsin State Senate. Mr. Winchell agreed to run the organization.

228. Mr. Winchell identified a copy of certified check number 4448 dated December 31, 1999 drawn on Heartland Credit Union in the amount of $121,359.30 as the negotiable instrument whereby Mr. Boeder transferred the funds of ICD-Issues Inc. (1999) to him.

229. Mr. Winchell further stated either Mr. Burnett or Mr. Boeder gave him a fundraising goal of $380,000 for On Wisconsin Issues-Inc. That figure was the expected cost to broadcast issue advertisements in two media markets significant to the 2000 Senate election.

230. Mr. Winchell further stated Mr. Burnett provided Mr. Winchell with names of lobbyists he should contact to solicit contributions. When Mr. Winchell contacted these lobbyists, he found they readily arranged for large contributions to On Wisconsin Issues, Inc. Mr. Winchell rarely provided more information than a one page form solicitation letter to secure these large contributions. The solicitation letter vaguely stated On Wisconsin Issues, Inc.'s purpose was to "provide the people of Wisconsin with the information they need to make informed decisions on public policy." During

the course of the fundraising efforts, Mr. Winchell informed Mr. Burnett which organizations contributed and how much they contributed.

231. Mr. Winchell recalled that lobbyist Eric Peterson's clients from the beer or alcohol distributors industry made a $40,000 contribution to On Wisconsin Issues Inc. Mr. Peterson asked Mr. Winchell to make it known Mr. Peterson's clients had made the contribution. Mr. Winchell communicated this information to Mr. Burnett.

232. Mr. Winchell further stated he received numerous contributions to On Wisconsin Issues Inc. which he had not solicited. After Columbia Correctional Facilities or some similarly named organization made an unsolicited contribution of $5,000, Mr. Winchell sought an explanation from Mr. Gussert. Mr. Gussert stated words to the effect "that's the Stanley Prison issue."

233. These two conversations - the Eric Peterson conversation and Andrew Gussert conversation - made Mr. Winchell uncomfortable. He believed "a line had been crossed, and that in order to maintain separation and to maintain legality" he divested himself from expending On Wisconsin Issues Inc. funds. He turned over control of the expenditures to the independent control of political consultant Kent Fitch.

Interview of Douglas Burnett

234. Milwaukee County Assistant District Attorneys David Feiss and Kurt Benkley have advised complainant as follows. In their capacity as Special Prosecutors for Dane County, and acting on behalf of the State of Wisconsin, they have reached an agreement with Douglas Burnett to cooperate with the investigation and prosecution of the matters set forth in this criminal complaint. Under this agreement, Mr. Burnett must honestly reveal any and all information he possesses relevant to the present investigation and prosecution. He has further agreed to testify truthfully to such matters in any prosecution brought by the State of Wisconsin. In exchange for his cooperation, the State of Wisconsin has agreed to limit the charges against Mr. Burnett to two misdemeanors for unlawful coordinated campaigning with the understanding that Mr. Burnett shall plead guilty to those offenses.

235. Complainant believes Mr. Burnett's statements, as described below, are reliable, truthful, and accurate, because they are extensively corroborated by other witnesses' statements and documentary evidence.

236. Complainant reviewed the report which Investigator Aaron Weiss prepared of his interview with Douglas Burnett on October 16, 2002. Mr. Burnett stated as follows. He has been the chief of staff for defendant's

legislative office for approximately nine years. After reviewing a preliminary draft of this criminal complaint, Mr. Burnett acknowledged the allegations set forth regarding Counts 12-16 and 20 above are substantially accurate and true. Mr. Burnett stated that, during 2000, defendant did coordinate the campaign of Sen. Mark Meyer with the pro-Meyer campaign of Independent Citizens for Democracy (PAC). Mr. Burnett further stated, that during 2001 to present, defendant and Mr. Burnett conspired to operate ICD-Issues Inc (2001) for the purpose of unlawfully violating campaign finance laws.

237. In addition to the matters set forth above, Mr. Burnett stated, during 2000, that he and defendant coordinated the campaign of Sen. Alice Clausing with the pro-Clausing campaign of Independent Citizens for Democracy (PAC), and, that he and defendant likewise coordinated the campaign of Sen. Dave Hansen with the pro-Hansen campaign of Independent Citizens for Democracy (PAC).

238. Mr. Burnett stated that he and defendant designed a scheme to hide defendant's control of Independent Citizens for Democracy (PAC). Under this scheme, defendant directed Mr. Burnett, who in turn directed Thomas Boeder, who in turn, operated Independent Citizens for Democracy (PAC). Mr. Burnett and defendant agreed that defendant would have no direct contact with Mr. Boeder, so that Mr. Boeder would never know of, and could not be a witness to, defendant's control of Independent Citizens for Democracy (PAC). Mr. Burnett further stated he and defendant knew, and together discussed, that it was unlawful for defendant to direct the campaigns of both a Senate candidate and an "independent" group expending money to reelect the same Senate candidate.

239. Mr. Burnett stated as follows regarding coordination with **Sen. Mark Meyer's Fall 2000 election campaign**. Defendant exercised control over Sen. Meyer's political advertising expenditures. Jay Wadd, from the SDC, effectively ran Sen. Meyer's campaign. Mr. Wadd drafted Sen. Meyer's campaign budget, and submitted it to defendant. Mr. Wadd regularly advised defendant as to how much campaign money Sen. Meyer had. Mr. Wadd told defendant that Mr. Wadd wanted to air pro-Meyer television advertising early in the 2000 campaign, but that Sen. Meyer lacked adequate campaign funds to run such an early advertisement campaign. Defendant told Mr. Burnett about this shortfall in Sen. Meyer's campaign funds. Defendant further told Mr. Burnett to direct Mr. Boeder to do an early pro-Meyer television advertising campaign using Independent Citizens for Democracy (PAC) funds. Mr. Burnett reviewed Independent Citizens for Democracy (PAC) campaign finance reports with Investigator Weiss, and pointed out three expenditures totaling $145,000 made to Media Strategies and Research in September and early October 2000. Mr. Burnett stated those expenditures constituted the pro-Meyer television advertising which defendant directed.

240. Mr. Burnett further stated that defendant reviewed, edited, and approved pro-Meyer television advertising scripts and tapes before they were aired by Sen. Meyer's campaign. Defendant likewise reviewed, edited, and approved pro-Meyer television advertising scripts and dub tapes before they were aired by Independent Citizens for Democracy (PAC). As a general rule, television advertising was only done by Sen. Meyer's campaign and by Independent Citizens for Democracy (PAC) after being approved by defendant.

241. Mr. Burnett stated as follows regarding coordination with **Sen. Dave Hansen's Fall 2000 election campaign**. Lance Walter, of the SDC, effectively ran Sen. Hansen's campaign. Mr. Walter drafted Sen. Hansen's campaign budget, and submitted it to defendant. Mr. Walter regularly advised defendant as to how much campaign money Sen. Hansen had. Mr. Burnett stated that defendant approved and directed expenditure of Sen. Hansen's campaign monies on television advertising. Defendant likewise approved and directed expenditure of Independent Citizens for Democracy (PAC) monies on pro- Hansen television advertising.

242. Mr. Burnett remembered two specific pro-Hansen television advertisements which defendant directed Independent Citizens for Democracy (PAC) to purchase and air. First, early in the Fall 2000 campaign, defendant directed Mr. Burnett to have Independent Citizens for Democracy (PAC) develop, pay for, and air a television advertisement entitled "Dave Hansen - A Wisconsin Original." Defendant reviewed the script for the advertisement, edited it, and directed Mr. Burnett to return it to Mr. Boeder for production. When the advertisement was produced on a dub tape, Mr. Burnett viewed the tape with defendant at his law office. Defendant approved the tape and directed Mr. Burnett to have Independent Citizens for Democracy (PAC) pay for television airing of the advertisement.

243. Mr. Burnett described a second incident of defendant authorizing and directing pro-Hansen television advertisement by Independent Citizens for Democracy (PAC). As to this incident, Mr. Burnett stated as follows. Mr. Burnett and defendant discussed that Sen. Hansen's opponent, then incumbent Gary Drzwiecki, had aired a television advertisement attacking Sen. Hansen during the Fall 2000 campaign. Defendant told Mr. Burnett that Sen. Meyer's campaign could not do a response advertisement for either financial or strategic reasons. Defendant directed Mr. Burnett, instead, to have Independent Citizens for Democracy (PAC) do a television advertisement response. Mr. Burnett did as defendant directed. Mr. Burnett presented both the script and television dub tape to defendant for his review. Defendant approved the advertisement, and at defendant's direction, Independent Citizens for Democracy (PAC) paid for the advertisement to be televised in Green Bay, Wisconsin.

244. Complainant reviewed a Report of Independent Disbursements, dated October 30, 2000, which Scott McCormick filed with the Wisconsin State Elections Board on behalf of Independent Citizens for Democracy (PAC). The reports lists a pro-Hansen $4,908.75 expenditure on a media buy from WFRV-TV, an anti-Drzwiecki $3,591.25 expenditure on a media buy from WGBA-TV, and an anti-Drzwiecki $9,137.50 expenditure on a media buy from WBAY-TV, all occurring on October 30, 2000. The report is stamped as received by the Wisconsin State Elections Board on November 2, 2000. Complainant concludes this report documents the expenditures described in the immediately preceding paragraph of this complaint. A copy of said report is attached hereto and incorporated by reference. [Counts17 and 18]

245. The above described report is false in that it asserts on its face, that pro-Hansen disbursement listed therein was "independent." The disbursements were, in fact, made in concert, coordination and consultation with Dave Hansen's election campaign.

246. Mr. Burnett further stated defendant controlled what television advertisements Sen. Hansen's campaign purchased and aired during the Fall 2000 campaign. For example, Mr. Burnett described a meeting between defendant, Lance Walter, and Mr. Burnett at Jenna's Bar in Madison, Wisconsin during the Fall 2000 campaign. At that meeting, Mr. Walter discussed a pro-Hansen "Tall Tales" cartoon theme television advertisement which he was producing using Sen. Hansen's campaign funds. This Tall Tales television advertisement was not ready by the expected deadline. Mr. Burnett stated defendant consequently directed Mr. Walter to have Sen. Hansen's campaign produce and air a traditionally formatted pro-Hansen advertisement to fill the gap. Mr. Walter did as defendant directed and caused the Dave Hansen campaign to thereafter air a Lambeau Field theme advertisement

247. Mr. Burnett further stated that, on one occasion during the Fall 2000 campaign, he met with defendant and Chris Micklos at Visuality, which is a Madison, Wisconsin advertising production company. At this meeting, defendant and Mr. Burnett viewed a pro-Hansen television advertisement which the Dave Hansen campaign was purchasing. Defendant directed changes to be made to this advertisement and the production staff made the changes.

248. Mr. Burnett stated as follows regarding coordination with **Sen. Alice Clausing's Fall 2000 election campaign.** Carrie Lynch, of the SDC, effectively ran Sen. Clausing's campaign. Ms. Lynch drafted Sen. Clausing's campaign budget, and submitted it to defendant. Ms. Lynch regularly advised defendant as to how much campaign money Sen. Clausing had. Mr. Burnett stated that defendant approved and directed expenditure of Sen. Clausing's campaign monies on campaign advertising.

Defendant likewise approved and directed expenditure of Independent Citizens for Democracy (PAC) monies on pro-Clausing campaign advertising. [Count 19].

249. Mr. Burnett specifically remembered defendant Chvala arranged for AFSCME WI People Political Action Committee (hereinafter "AFSCME PAC") to make a large in-kind contribution to Independent Citizens for Democracy (PAC) during the Fall 2000 campaign. Defendant told Mr. Burnett that AFSCME PAC agreed to pay for a pro-Clausing political mailing. Defendant directed Mr. Burnett to draft a pro-Clauisng piece for issuance through Independent Citizens for Democracy (PAC). Mr Burnett did so. AFSCME PAC then paid for the printing and mailing of this piece. Mr. Burnett pointed out a contribution of $26,174.00 dated October 18, 2000 on Independent Citizens for Democracy (PAC)'s pre-election 2000 campaign finance report. Mr. Burnett stated this entry documented the above described pro-Clauisng mailing.

250. As to ICD-Issues Inc. (2001), Mr. Burnett stated as follows. Defendant directed Mr. Burnett to set up ICD-Issues Inc. (2001) as a receptacle to receive corporate contributions in 2001. The two agreed that Mr. Boeder would serve as the figurehead. Mr. Burnett and defendant set up the group as a funding source for "issue advertisements" promoting Democratic candidates for the State Senate during the Fall 2002 election. At the time the group was formed, the SDC was still in existence. Defendant and Mr. Burnett planned to spend ICD-Issues Inc. (2001) monies in coordination with Democratic candidates, and to use the SDC employees as agents within the Democratic candidate campaigns to assist in coordinating the Senate campaigns with ICD-Issues Inc. (2001). Defendant and Mr. Burnett knew such coordinated campaigning would be unlawful. Consequently, defendant once again employed Mr. Burnett as an intermediary to direct Mr. Boeder. This scheme hid defendant's control of ICD-Issues Inc. (2001).

251. Mr. Burnett further stated defendant orchestrated the fundraising for ICD-Issues Inc. (2001). Mr. Burnett specifically remembered the following incident. Mr. Burnett and defendant met at Luigi's Resturant in Madison, Wisconsin for lunch during early 2001. The meeting coincided with the early stages of the biennial State budget process. Defendant reviewed a list of lobbyists with Mr. Burnett. Defendant noted which lobbyists had clients with special interest legislation implicated in the biennial budget. Defendant told Mr. Burnett to have Mr. Boeder solicit money from these same special interest groups. Defendant stated specific dollar amounts Mr. Boeder should request for ICD-Issues Inc. (2001). Mr. Burnett further stated that, during this same time frame, defendant was meeting with lobbyists to solicit campaign contributions.

252. Mr. Burnett further stated that, at defendant's direction, Mr. Burnett routinely reported to defendant who gave money to ICD-Issues Inc. (2001) and how much they gave.

253. Mr. Burnett further stated the present criminal investigation, and the related disbanding of the SDC and other caucuses, prevented defendant and Mr. Burnett from ultimately using ICD-Issues Inc. (2001) in coordination with the 2002 Senate election campaigns.

254. Mr. Burnett further stated he and defendant have coordinated the expenditures of "independent" groups with Wisconsin State Senate candidate campaigns as far back as 1998. Defendant, Mr. Burnett, and Mr. Boeder unlawfully coordinated the campaign efforts of Future Wisconsin with the Senate campaign of Brian Manthey against Sen. Mary Lazich. When a complaint was filed with the Wisconsin State Elections Board alleging Tom Boeder and Future Wisconsin were engaging in unlawful campaign coordination, Mr. Burnett and defendant discussed the situation. Defendant directed Mr. Burnett to make sure Mr. Boeder was "well scripted" when authorities and investigative reporters questioned him. Mr. Burnett provided Mr. Boeder with responses for Mr. Boeder to give verbatim to such inquiries.

255. Mr. Burnett further stated he and defendant intentionally kept their control of the above described "independent" groups secret from the Senate candidates, such as Senators Meyer, Hansen, and Clausing. They also kept the coordination secret from SDC staff running the senators campaigns. Mr. Burnett stated he and defendant did not wish anyone but themselves to know of their coordinated campaigning. They knew the activity was unlawful, and wished to have no witnesses who knew of the coordination. Mr. Burnett stated that defendant is a lawyer, and when he was engaged in unlawful campaign coordination, he was acutely aware of how to limit the witnesses and proof of his wrongdoing.

256. Regarding misuse of SDC employees, Mr. Burnett stated as follows. Defendant routinely directed SDC employees to perform campaign work during both the 1998 and 2000 election Wisconsin State Senate campaigns. Mr. Burnett further stated that, given all the surrounding circumstances, defendant must have known SDC employees were doing this work in the course of their State of Wisconsin employment.

257. Regarding defendant's power to control legislation, Mr. Burnett stated as follows. As Senate Majority Leader, defendant had great power to kill legislation defendant wanted to kill.

258. Regarding the extortion incident involving the Wisconsin Wholesale Beer Distributors, Mr. Burnett stated as follows. Defendant specifically directed Mr. Burnett to remove from the biennial State budget bill, the provisions of

interest to the Wisconsin Wholesale Beer Distributors. Mr. Burnett reviewed a copy of his own drafting request to the Wisconsin Legislative Reference Bureau (LRB) to accomplish defendant's directive. That request contains Mr. Burnett's handwritten notes, which he made during his meeting with defendant. The notes specifically identify, for removal, the provisions of interest to the Wholesale Beer Distributors Association.

259. Mr. Burnett has agreed to submit to further interviews concerning lobbyist activities with defendant, and any other misconduct related to the matters described in the present criminal complaint.

260. Your complaining witness states that in making this complaint he has relied on statements made to him by adult citizen witnesses and victims who are presumed to be reliable. William O'Connor, Wendy Kloiber, Julie Laundrie, Meghan Bitenc, Jay Wadd and Thomas Boeder all were granted limited immunity agreements. Your complaining witness believes these witnesses to be reliable because the information they provided has been corroborated by other witnesses and documents, and because their agreements provided that if they were not truthful any statements made could be used against them. Carrie Lynch received a similar limited immunity grant. Andy Gussert received a grant of limited crimminal immunity which is void if he is untruthful and the State has informed Mr. Gussert of its intention to issue forfeiture charges against him. Further Mr. Gussert's information has been corroborated by other witnessses and documents

261. Complainant has attached, and incorporates by reference herein, copies of the orders, dated June 6, 2001, December 18, 2001, and July 26, 2002, of Dane County Circuit Court Judge Diane Nicks, appointing Milwaukee County District Attorney E. Michael McCann and his Assistant District Attorneys David Feiss and Kurt Benkley, as Special Prosecutors to investigate and prosecute the matters alleged in this criminal complaint. All facts presented in this complaint, in its entirety, shall serve as the probable cause basis for each and every criminal count alleged herein. Complainant states that the above does not exhaust his knowledge with regard to the acts charged in this complaint.

****End of Complaint****

Subscribed and sworn to before me and approved for filing on this _____ day of _____, 2002

_____ _____

DEPUTY / ASSISTANT DISTRICT ATTORNEY Complaining Witness

David A. Feiss\Kurt Benkley\jo

-- FELONY COMPLAINT --

J:\COMPLAINTS2002\CHVALA,CHARLES,DAF.DOC

DEFENDANT-APPELLANT-PETITIONER'S ANALYSIS OF THE STATUTES RELIED ON BY THE STATE AS BASIS FOR PROSECUTION UNDER § 946.12(3), STATS.

The State relies on the following statutes as bases for the duty violated by Senator Chvala: §§ 11.33(2); 11.36(3); 11.37; 12.07(3); 12.07(4); 12.08; 19.41(1); 19.45(1); 19.45(2); 19.45(5); and 19.46(1)(b). The statutory sections relied on by the State do not form the basis for felony misconduct.

The state begins with § 11.33(2) and § 11.37, Stats. These statutes regulate the use of public funds for printed materials and the use of state vehicles for campaign purposes. The State argued that the combination of these statutes put Senator Chvala on notice that it was a felony to use SDC staff to work on campaigns.

As an initial matter, a general statute cannot be used for the basis for misconduct in public office charges. State v. Schmidt, 115 Wis. 2d 657, 340 N.W.2d 752 (Ct. App. 1983) is instructive on this issue. Ms. Schmidt was charged with misconduct in office under Wis. Stats. § 946.12(2) because she engaged in sexual intercourse with a prisoner while on duty. Wis. Stats. § 946.12(2) is slightly different than Wis. Stats. § 946.12(3) in that it requires her to take action in her capacity as a public employee that she knows she is forbidden by law to do. In

1980, it was a crime to engage in sexual intercourse if you were not married. The court of appeals ruled that engaging in sexual intercourse while unmarried is a forbidden act not merely for prison guards, but for everyone. Schmidt, 115 Wis. 2d 659, 660. The court also held:

> We think this dual requirement of the statute evinces a legislative intention to confine the application of the statute to acts committed within the scope of public employment. The purpose of the law appears to be the prevention of the misuse of the power entrusted to public officers, rather than the imposition of an additional penalty for conduct which is forbidden to all persons generally when the conduct is committed by a public officer or employee. Schmidt, 115 Wis. 2d 659, 660.

Schmidt makes it clear that there needs to be a nexus between the duty and the public officer's position. In this case, as in Schmidt, the alleged duty does not arise out of Senator Chvala's position as a senator. Thus, many of the statutory bases relied on by the State are inapplicable.

Section 11.37, Stats. provides that "no person" may use state vehicles. This statute is not specific to public employees or officials. Thus, it cannot be the basis for charges under § 946.12(3).

Sections 11.33 and 11.37 prohibit specific conduct. There is no claim that Senator Chvala violated either provision cited by the State. Rather, the claim is that

because these activities are forbidden by statute, Senator Chvala was put on notice that any campaign activity on state time was a felony. The State goes too far. The legislature criminalized the use of state vehicles and certain mass mailings. The legislature did not criminalize the conduct alleged in this case, working on campaigns on state time. The State concedes as much in its brief to the court of appeals. (Plaintiff-Respondent's Br. p. 16). It is axiomatic that the legislature can criminalize certain behavior while leaving closely related behavior legal. The sexual assault of a minor statutes are a perfect example. Sexual contact on one day can be a crime, while the exact same behavior a day later is not a crime. The only difference between the activities is that the would be victim has a birthday. Sections 11.33 and 11.37 do not give clear notice to Senator Chvala.

The state next looks to § 11.36(3) as the source of the duty. This section applies to all persons, and under State v. Schmidt, 115 Wis. 2d 657, 340 N.W.2d 752 (Ct. App. 1983), it cannot be the basis for the charges in this case.

Assuming that § 11.36(3) provides for some special duty, no violation of this section is alleged by the complaint. Presumably, the persons entering the caucus

headquarters for the purpose of making a contribution are the SDC employees. There is no allegation that SDC employees donated money to candidates in the caucus offices. Therefore, the contribution must be the time SDC employees spent on campaigns in the caucus offices. Such a contribution is an "in kind" contribution as defined by Election Board Rule 1.20(1)(e), as "a disbursement by a contributor to procure a thing of value or service for the benefit of a registrant who authorized the disbursement". The candidate must authorize "in kind" contributions. The complaint makes no allegations to support any authorization. In fact Mark Meyer thought that the caucus members were using vacation to help with his campaign. (R.1 p. 45; A.App.125 [Appellant's Appendix, hereinafter "A.App."])

The next problem with using § 11.36(3) as the basis for the duty under § 946.12(3) is that the administrative code requires the contributor to make a disbursement to procure a thing of value for the candidate. In this case the contributor is presumably Senator Chvala. There is no claim that he paid any SDC members for campaign work. Therefore he could not have violated this section, and it cannot be the basis for felony misconduct.

The next statutes used by the State are § 12.07(3) and (4). Section 12.07(3) forbids an employer from distributing printed materials to employees containing threats that the business will go under if a certain person is not elected. Senator Chvala is not accused of doing any such thing. This fact does not deter the State from attempting to bootstrap a felony out of this statute. There is no connection between scaring employees with dire warnings in an attempt to sway the vote and using Caucus employees on campaigns.

Section 12.07(4) is a statute of general application and sets forth no duty specific to Senator Chvala as a senator. Thus, under Schmidt, this section cannot be the basis for the charged felony. Even if this section were applicable, Senator Chvala is specifically excluded. The statute reads:

> This subsection does not apply to employment by a candidate, political party or other registrant under § 11.05 in connection with a campaign or political party activities.

Senator Chvala is a registrant under § 11.05 and the State alleges the activities involved are campaign or political party activities. This statute is not applicable to this situation and cannot be the basis for a felony prosecution.

The next section the State references is § 12.08. This section suffers the same fatal flaw as the other general statutes. It does not set out a duty specific to public officials. In addition, the statute addresses the situation where a person is required to work on a campaign in exchange for governmental benefits. The complaint alleges that SDC employees were required to work on campaigns as a condition of their employment. There is no government benefit program discussed in the complaint. The preceding section of the statute covered the employment realm. The State wants to enlarge the meaning of government benefit to include jobs. That interpretation is not reasonable in light of the statutory context.

Section 19.41, Stats., is a declaration of policy that sets forth the need for a code of ethics for public officials. By its terms it sets forth no duties. The statute reads:

> **1)** It is declared that high moral and ethical standards among state public officials and state employees are essential to the conduct of free government; that the legislature believes that a code of ethics for the guidance of state public officials and state employees will help them avoid conflicts between their personal interests and their public responsibilities, will improve standards of public service and will promote and strengthen the faith and confidence of the people of this state in their state public officials and state employees.

The duties of subchapter III of Chapter 19 are set forth in §§ 19.42 through 19.59.

The State next turns to § 19.45, Stats., to set forth a duty. This section concerns conflicts of interest for state public officials. The State begins by asserting that Senator Chvala had no responsibility to the public to work for the election of certain candidates to the senate. (Plaintiff-Respondent's Br. p. 19). The State cites no authority for this position, and they are wrong. Senator Chvala and every other citizen of this state have a responsibility to elect candidates in whomthey believe to represent them in the senate.

The State then claims that Senator Chvala violated § 19.45(2) and § 19.46(1)(b). These sections prohibit the use of public office to obtain a thing of value for the public official, his family, or an organization with which the official is associated. The complaint does not allege that Senator Chvala used any caucus resources on his own campaign or for the benefit of his family. The state contends that the Senate Democratic Campaign Commmittee ("SDCC") is an organization that Senator Chvala is "associated with" under the statute. The term is defined in § 19.42 as follows:

> **(2)** "Associated", when used with reference to an organization, includes any organization in which an individual or a member of his or her immediate family is a director, officer or trustee, or owns or controls, directly or indirectly, and severally or in the aggregate, at least 10% of the outstanding equity or of which an individual or a member of his or her immediate family is an authorized representative or agent.

The state offers no proof or claim that Senator Chvala met the statutory definition. Rather, the state claimed that its allegation in paragraph 74 of its complaint was sufficient to allege that Senator Chvala was an authorized agent of the SDCC. (Plaintiff-Respondent's Br. p. 19). The allegation that Senator Chvala raised money for the SDCC is not sufficient to show that he was an agent or representative of that group.

The State offers no nexus between the fact that Senator Chvala raised funds for the SDCC and the charges asserted in Counts 7-10. Assuming that Senator Chvala was an agent of the SDCC, there is no claim that raising funds for the SDCC was wrong. There is no allegation that the SDCC used any caucus members to assist with fundraising. The State's claim is that caucus members did the work of the SDCC insofar as caucus employees worked on campaigns. This argument is without merit. Senator Chvala is free to raise money for the SDCC. The SDCC is free to campaign on behalf of Democratic candidates, and the SDC employees are

free to campaign on behalf of whomever they choose on their own time. The mere fact that the SDCC and the SDC employees are campaigning for the same person does not implicate Senator Chvala in any wrongdoing.

The State next claims that Senator Chvala violated § 19.45(5) by using caucus members to work on campaigns. This section of the statute forbids public officials from using their office to obtain an unlawful advantage for another. The State has already conceded that there is no statute that specifically forbids campaigning on state time. (Plaintiff-Respondent's Br. p. 16.). This section cannot create a duty because the underlying activity, campaigning on state time, is not unlawful.

The statutes cited by the State do not give notice to Senator Chvala, because the conduct alleged does not fit within the area proscribed by them, and they do not set out duties specific to a state senator.

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STATE OF WISCONSIN
IN SUPREME COURT

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OF WISCONSIN

No. 03-0442-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHARLES CHVALA,

Defendant-Appellant-Petitioner.

ON PETITION FOR REVIEW FROM A DECISION OF THE WISCONSIN COURT OF APPEALS, DISTRICT IV, AFFIRMING A PRETRIAL ORDER DENYING CHVALA'S MOTION TO DISMISS THE CRIMINAL COMPLAINT, ENTERED IN THE CIRCUIT COURT FOR DANE COUNTY, THE HONORABLE DANIEL R. MOESER, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT

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STATE OF WISCONSIN

IN SUPREME COURT

No. 03-0442-CR

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Plaintiff-Respondent,

v.

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Defendant-Appellant-Petitioner.

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BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Publication is warranted. The state does not oppose Chvala's request for oral argument.

INTRODUCTION

Chvala is charged under Wis. Stat. § 946.12(3) for misusing his official position to divert public resources to

private election campaigns. Chvala challenges these charges on the grounds that Wis. Stat. § 946.12(3) is unconstitutionally vague as applied to him and that this prosecution violates the Speech or Debate Clause and the separation of powers doctrine.[1]

Chvala's claims should be rejected and the court of appeals' decision should be affirmed.

ARGUMENT

I. CHVALA LACKS STANDING TO CHALLENGE WIS. STAT. § 946.12(3) ON GROUNDS OF VAGUENESS.

Chvala argues that § 946.12(3) is unconstitutionally vague as applied to him. He is without standing to do so. In *State v. Tronca*, 84 Wis.2d 68, 267 N.W.2d 216 (1978), this court held that defendants who were actually aware of the criminality of their actions, as Chvala was here, did not have standing to challenge the official misconduct statute on grounds of vagueness. In reaching its conclusion, the court looked at defendants' attempts to cover up their unlawful behavior and evidence that they knew what they were doing was illegal, finding the evidence demonstrated that "[e]ach of the defendants was well aware that he was approaching the area proscribed by the statute." *Tronca,* 84 Wis.2d at 87.

Tronca is squarely on point. The criminal complaint provides clear factual allegations that Chvala knew that the conduct with which he is charged is unlawful. The complaint alleges that Chvala told Andy Gussert, a former director of the Senate Democratic

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[1]The state addresses Chvala's arguments in a different order than he has presented them, addressing first his vagueness claim and then addressing his speech or debate clause and separation of powers claims thereafter. This was the order in which these claims were presented and addressed in the Court of Appeals. The state believes this order is most appropriate.

Caucus (SDC), to "make sure that SDC employees took vacation or compensatory time if they were seen by outside people working on campaigns" (1:34). The complaint further states: "The defendant was concerned about *getting caught* and did not appear to be concerned about the fact that it was wrong to have State employees working on campaigns while on State time" (*id.*) (emphasis added).

In light of Chvala's demonstrated knowledge that it was illegal for him to require state employees to operate political campaigns on state time with state resources, under *Tronca*, Chvala lacks standing to challenge the statute on grounds of vagueness.

II. CHVALA HAS FAILED TO DEMONSTRATE THAT THE OFFICIAL MISCONDUCT STATUTE, AS APPLIED TO HIS CONDUCT, IS VAGUE BEYOND A REASONABLE DOUBT.

Chvala asserts that § 946.12(3) is unconstitutionally vague as applied to him because a reasonable person could not be expected to know that the term "duties" as provided in that statute would encompass a public official's duty to refrain from hiring and directing employees to operate private political campaigns using state resources and funds.

The circuit court and the court of appeals rightly concluded that Chvala's vagueness challenge must be rejected. Chvala had ample notice that his activities were inconsistent with his official duties.

A. Legal standards governing vagueness claims.

A party seeking to invalidate a statute on grounds of vagueness must prove that it is unconstitutionally vague

beyond a reasonable doubt. *State v. Pittman*, 174 Wis.2d 255, 276, 496 N.W.2d 74 (1993). Courts "indulge every presumption to sustain the constitutionality of a statute." *State v. Wickstrom*, 118 Wis.2d 339, 351, 348 N.W.2d 183 (Ct. App. 1984).

Facing that heavy burden of proof, anyone challenging a statute on vagueness grounds must first show that "'because of some ambiguity or uncertainty in the gross outlines of the conduct prohibited by the statute, persons of ordinary intelligence do not have fair notice of the prohibition.'" *Pittman*, 174 Wis.2d at 276 (citation omitted). A statute provides fair notice if there is "sufficient warning to one wishing to obey the law that his conduct comes near the proscribed area." *Tronca*, 84 Wis.2d at 86. "'The fact that a statute fails to itemize with particularity every possible kind of conduct which would violate such statute does not make it unconstitutionally vague.'" *Ryan v. State,* 79 Wis.2d 83, 91, 255 N.W.2d 910 (1977) (citations omitted).

The second requirement to invalidate a statute is to prove that those who enforce the laws must create their own standards rather than apply standards set forth in the statutes. *Pittman*, 174 Wis.2d at 276-77. Courts must bear in mind that enforcement of any statute requires judgment, and this fact does not make a statute vague. *Kalt v. Milw. Bd. of Fire Com'rs*, 145 Wis.2d 504, 512, 427 N.W.2d 408 (Ct. App. 1988). A statute is not vague "'simply because "there may exist particular instances of conduct the legal or illegal nature of which may not be ascertainable with ease."'" *Pittman*, 174 Wis.2d at 277. All that is required is a "'fair degree of definiteness.'" *State v. Courtney*, 74 Wis.2d 705, 710, 247 N.W.2d 714 (1976) (citation omitted). "'[O]ne who deliberately goes perilously close to an area of proscribed conduct'" assumes the risk "'that he may cross the line.'" *Courtney*, 74 Wis.2d at 711 (citation omitted).

A person whose conduct is clearly prohibited by the terms of a statute does not have standing to base a

vagueness challenge on hypothetical fact situations, since his case represents a permitted application. *Milwaukee v. K.F.*, 145 Wis.2d 24, 34, 426 N.W.2d 329 (1988); *Pittman*, 174 Wis.2d at 278. This is true even where a defendant's first amendment rights are implicated. *K.F.*, 145 Wis.2d at 34. Thus, the only question is whether, on *the facts of this case*, "'one bent on'" obeying § 946.12(3) would be unable to discern that the conduct described in the criminal complaint was near the "region of proscribed conduct." *Courtney*, 74 Wis.2d at 711.

B. Wisconsin Stat. § 946.12(3) is not unconstitutionally vague merely because it requires interpretation.

Section 946.12(3) requires proof that as a public officer Chvala exercised a discretionary power in a manner inconsistent with his duties with the intent to gain a dishonest advantage for himself or another. Wis. JI-Criminal 1732 (1990).

Section 946.12 reads as follows:

> **946.12 Misconduct in public office.** Any public officer or public employee who does any of the following is guilty of a Class I felony:
>
> **(1)** Intentionally fails or refuses to perform a known mandatory, nondiscretionary, ministerial duty of the officer's or employee's office or employment within the time or in the manner required by law; or
>
> **(2)** In the officer's or employee's capacity as such officer or employee, does an act which the officer or employee knows is in excess of the officer's or employee's lawful authority or which the officer or employee knows the officer or employee is forbidden by law to do in the officer's or employee's official capacity; or
>
> **(3)** Whether by act of commission or omission, in the officer's or employee's capacity as such officer or employee exercises a discretionary

> power in a manner inconsistent with the duties of the officer's or employee's office or employment or the rights of others and with intent to obtain a dishonest advantage for the officer or employee or another; or
>
> **(4)** In the officer's or employee's capacity as such officer or employee, makes an entry in an account or record book or return, certificate, report or statement which in a material respect the officer or employee intentionally falsifies; or
>
> **(5)** Under color of the officer's or employee's office or employment, intentionally solicits or accepts for the performance of any service or duty anything of value which the officer or employee knows is greater or less than is fixed by law.

As is evident, each of the subsections of § 946.12 contemplates a different manner in which misconduct in public office may be committed. Contrary to Chvala's assertions otherwise, the duty contemplated in § 946.12(3) does not have to be one established by a specific statute.[2] Even assuming such an element is required to be proven in other subsections of § 946.12 such as (1), (2) and (5) which all make reference to the "law," it does not apply to (3) because that subsection contains no such language. If such an element exists for those other subsections, interpreting (3) to require proof of the same would in effect make it identical to (2), thus making (3) redundant. Instead, it is clear that in creating (3), the legislature intended to reach conduct different from the other subsections, conduct that might not in itself be a specific violation of any statute, but that nonetheless constitutes misconduct in public office.

The fact that a violation of § 946.12(3) can be based upon an act not specifically identified in a statute

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[2]While § 946.12(3) does not require proof that a public officer violated a duty imposed by statute, as discussed in section II.C.2 below, one of the sources of Chvala's duty in this case were the statutory prohibitions on using state resources for private campaigns.

does not make that subsection unconstitutionally vague. This court made that clear in *Tronca,* 84 Wis.2d 68. In that case, three defendants, one of them a Milwaukee alderman, were convicted as parties to the crime of misconduct in public office under § 946.12(3) for soliciting and accepting bribes in exchange for the alderman's support of a liquor license application. *Id.* Defendants in that case challenged their conviction on the grounds that the discretionary power exercised by the alderman, his approval of the liquor license, was an informal aldermanic privilege, not a formal discretionary power conferred by statute. *Tronca,* 84 Wis.2d at 76. This court rejected that argument, finding that the powers of a public official are not limited to expressly conferred powers but apply to *de facto* powers which arise by custom and usage and which are exercised under the color of office, and which, by virtue of the office, tend to have a corrupt influence on public affairs. *Tronca,* 84 Wis.2d at 80.

If a discretionary power under § 946.12(3) does not have to be specifically defined by statute, then neither does a duty for purposes of that statute.

Tronca is also notable for the court's discussion of whether the acts committed were "inconsistent" with the alderman's duties. In finding that they were, this court looked at several Milwaukee City Ordinances that defined the duties of common council members. *Tronca,* 84 Wis.2d at 82. One such ordinance prohibited a common council member from voting on any matter in which he may be directly or indirectly interested. *Id.* While the alderman in *Tronca* did not technically violate that ordinance because he did not have any ability to vote on the licensing application at issue, he did agree to informally support the application. The court found this violated the intent of the ordinance and therefore was inconsistent with his duties. *Id.*

Like § 946.12(3), other Wisconsin statutes leave room for interpretation without being rendered vague. For

example, Wisconsin's disorderly conduct statute prohibits persons from engaging, in a public or private place, in "violent, abusive, indecent, profane, boisterous, unreasonably loud *or otherwise disorderly conduct* under circumstances in which the conduct tends to cause or provoke a disturbance." Wis. Stat. § 947.01. The statute does not further define "otherwise disorderly conduct," nor does any other statute define that phrase. Nonetheless, the supreme court has held, for example, that this statutory language was not unconstitutionally vague as applied to a defendant's conduct in sending anonymous mailings with disturbing contents to three victims. *State v. Schwebke*, 2002 WI 55, 253 Wis.2d 1, 644 N.W.2d 666.

Wisconsin lacks a statute explicitly prohibiting "mailing of disturbing contents" to others, just as it lacks a statute expressly stating "the use of state resources for private campaigns is prohibited." The legislature is entitled to enact broadly worded statutes to address what it deems to be wrongful activity, whether the activity is a broad range of disorderly conduct that disturbs others or a broad range of official misconduct that diverts public resources for private advantage. In enacting § 946.12(3) to prohibit the corrupt exercise of discretionary power "'whether by act of commission or omission,'" the legislature clearly prescribed a broad scope of conduct which could be misconduct in public office. *Tronca*, 84 Wis.2d at 81.

The interpretation required for § 946.12(3) is simply no different from that required for many other statutes. *See, e.g., State v. McCoy*, 143 Wis.2d 274, 286-88, 421 N.W.2d 107 (1988) (though phrase "'imminent physical harm'" in Wis. Stat. § 946.715 is not defined, and the phrase did not appear in any other place in Wisconsin statutes, common usage and understanding of words provides reasonable notice); *State v. Armstead*, 220 Wis.2d 626, 640, 583 N.W.2d 444 (Ct. App. 1998) (terms "adequate treatment," "depreciate the seriousness of the offense," and "necessary to deter the child or other children," contained in Wis. Stat. § 970.032(2)(a)-(c) are

"fairly definite" and not unconstitutionally vague). Wisconsin's official misconduct statute is designed to operate in a flexible manner, in the same way that many other criminal statutes operate.

Chvala invites the court to search for ambiguity, which is not the purpose of statutory interpretation. *State v. Hamilton*, 2003 WI 50, ¶38, 261 Wis.2d 458, 661 N.W.2d 832. As shown above, many statutes require significant interpretation of a statutory word or phrase; this does not make the statutes vague. Decisions by this court and the court of appeals interpreting the official misconduct statute, as well as the pattern jury instructions for this statute, allow for such interpretation of the term "duties."

In *State v. Schwarze*, 120 Wis.2d 453, 355 N.W.2d 842 (Ct. App. 1984), the circuit court, in interpreting a public official's duties, instructed the jury that the defendant, an accounts receivable clerk for the Watertown School District, had a duty under § 946.12(3) to disclose shortages of money to her employer. The court of appeals held that the existence of a duty is a question of law. *Schwarze*, 120 Wis.2d at 455. Therefore, it was proper for the circuit court to instruct the jury that such a duty existed. *Schwarze*, 120 Wis.2d at 456. Chvala here fails to provide any basis to distinguish *Schwarze* from this case.

Additionally, the pattern jury instruction for § 946.12(3), Wis. JI-Criminal 1732, specifically instructs the court to fill in the blank with respect to the defendant's duty:

> The third element requires that the defendant exercised a discretionary power in a manner inconsistent with (the duties of his office) (the duties of his employment) (the rights of others). As a (position), it was defendant's duty to _____.

Furthermore, in the instant case, the state is able to point to several sources of Chvala's duty to refrain from

using state resources to conduct political campaigns, any one of which would be sufficient to sustain charges of public misconduct: (1) the long-established duty in Wisconsin law of conflict-free loyalty to the public, which is a state senator's employer; (2) chapters 11, 12 and 19 and other relevant provisions of the Wisconsin Statutes; and (3) the Senate's rules prohibiting such activity. Chvala violated this duty as discussed below.

C. Chvala had adequate notice that he had a duty, as contemplated by § 946.12(3), to refrain from using state employees and state resources to conduct campaign activity.

The duty that Chvala is charged with violating was the duty to refrain from using state employees and state resources to conduct campaign activity. The complaint alleges that as a state senator who was elected both Majority and Minority Leader, Chvala basically ran the State Democratic Caucus ("SDC") (1:7). The SDC was a state-funded entity that operated using state employees, state-leased offices and state owned or leased equipment (*id.*). Chvala is alleged to have used the state-funded SDC employees and resources for the private election campaigns of candidates he selected.

Specifically, with respect to Count Seven, Chvala is charged with misconduct for hiring Wendy Kloiber as a state employee to run the re-election campaign of State Senator Alice Clausing (1:20). According to Kloiber, that was the number one job for which she was hired. Chvala gave her a 10% raise based upon her performance on political campaigns, not on any other type of work (1:35).

Likewise, in Count Eight, Chvala is charged with misconduct for offering full-time state employment to Heather Colburn for the sole purpose of "putting money in the bank" for various campaigns (1:23).

Counts Nine and Ten allege that Chvala turned the SDC into a "campaign machine" in the months leading up to the 1998 and 2000 elections (1:33). From September through November 1998, SDC employees worked almost exclusively on campaigns and did very little policy work (1:25). From July through November 2000, other legislators knew not to request things from the SDC because the organization switched over to a "campaign machine" at that time. Chvala used SDC employees and resources for running specific targeted campaigns, fundraising, approving campaign literature, "doing doors and making fund-raising calls," recruiting volunteers for election day, creating campaign advertisements and budgets, and "develop[ing] campaign plans and fundraising strategy" (1:26-35).

In arguing that a reasonable person could not be expected to know that a public official has a duty to refrain from using state time and resources to operate private election campaigns, Chvala asserts that the vagueness of the official misconduct statute is somehow exposed by the fact that the state and courts continually point to additional sources for defining a public official's duties to include the duty to refrain from conducting campaigns using state resources. That the sources are ubiquitous only demonstrates the weakness of Chvala's vagueness challenge, not its strength. Further, as stated by the court of appeals, "Chvala cites no authority for the proposition that we are confined to a specific statute or to one specific source to ascertain his duty as a legislator." (Slip op. at 8, ¶ 13).

Chvala also contends that the sources of this duty identified by the court of appeals are inapplicable. This court is not confined to the sources of a public official's duties cited by the court of appeals or identified in the criminal complaint in determining whether the statute provides sufficient notice to survive a vagueness challenge. Therefore, in addition to addressing the sources of Chvala's duties identified by the court of appeals and addressed in Chvala's brief, the state

discusses other sources of the duty to refrain from hiring and directing employees to conduct partisan campaigns using state funds and resources.

1. Chvala had a clear fiduciary duty to the public to refrain from using taxpayer dollars to run private political campaigns.

One source of Chvala's duty to refrain from using state employees and resources for private campaigns stems from the fiduciary nature of Chvala's position as a public official. This fiduciary duty has long been recognized in Wisconsin: A public employee may not use public property for private gain. *Milwaukee v. Drew*, 220 Wis. 511, 518, 265 N.W. 683 (1936). A legislator violates her fiduciary duty as a public official by, for example, representing a private party before a government agency. *State v. Catlin*, 2 Wis.2d 240, 249-50, 85 N.W.2d 857 (1957) (acting in dual roles of legislator and attorney for client compromises requirement that legislator act only in what he conceives to be the public interest; even full disclosure would not overcome conflict). "A public office is created by law, not for the benefit of the officer but for the public." *State ex rel. Duesing v. Lechner*, 187 Wis. 405, 409, 204 N.W. 478 (1925).

This long-standing duty has been recognized as a duty for purposes of § 946.12(3). In *Schwarze*, the court of appeals held that a school district employee had a duty to report shortages of public money, under the theory of master (the public) and servant (the public employee). 120 Wis.2d at 456. The defendant in *Schwarze* did not steal these public funds herself. Instead, she became aware that they had been stolen, and failed to exercise the discretionary authority of her official position to disclose the shortages to her superior. In failing to make full disclosure of material facts bearing on her official responsibility, the public employee placed her personal

interest in protecting the thief above her official duties to the public, in violation of § 946.12(3).

Relative to *Schwarze*, this case presents an even more obvious duty in that it is axiomatic that public officials cannot covertly funnel taxpayer dollars into private ventures such as election campaigns.

Courts from other jurisdictions have also upheld misconduct charges based on an official's breach of his fiduciary duty to the public. For example, in *People v. Scharlau*, 565 N.E.2d 1319, 1323 (Ill. 1990), elected city commissioners were charged under an official misconduct statute which provided that a public officer commits misconduct when that official performs an act "in excess of his lawful authority" to "obtain a personal advantage for himself." The commissioners had negotiated a settlement in a voting rights action which established a transition period during which the commissioners would remain employed by the city for three years at a salary they themselves determined. *Scharlau*, 565 N.E.2d at 1321.

The Illinois Supreme Court held that, in securing for themselves the three-year terms of employment, the commissioners exceeded the scope of their authority and could be properly charged for official misconduct:

> Defendants had a duty to act in the best interests of the city. They also had a duty to refrain from using their positions as city commissioners for personal benefit. We agree that the defendants' settling the lawsuit was within their lawful authority. We find, however, that defendants' arranging for their own employment for a fixed term and salary was outside that authority. Public officials are expected to adhere to the highest standards of ethical conduct.

Scharlau, 565 N.E.2d at 1326. Here, Chvala is alleged to have used his official position for the personal benefit of individuals he determined were worthy of election.

As stated in *State v. Maiorana*, 573 A.2d 475, 480 (N.J. Super. 1990), a criminal case involving alleged misconduct in office under a New Jersey statute:

> When constructing statutes which prescribe the duties and obligations of public officials, it is a practical impossibility to spell out with specificity every duty of the office, and therefore courts take judicial notice of the duties which are inherent in the very nature of the office.

See also United States v. Lopez-Lukis, 102 F.3d 1164, 1169 (11th Cir. 1997) (public officials inherently owe a fiduciary duty to the public to make governmental decisions in the public's best interest); *State v. Weleck*, 91 A.2d 751, 756 (N.J. 1952) ("Duties may be imposed by law on the holder of an office in several ways: (1) they may be prescribed by some special or private law ...; (2) they may be imposed by a general act of the Legislature ...; or (3) they may arise out of the very nature of the office itself[.]") (citations omitted); *State v. Deegan*, 315 A.2d 686, 695 (N.J. Super. 1974) (citation omitted) ("'These obligations are not mere theoretical concepts or idealistic abstractions of no practical force and effect; they are obligations imposed by the common law on public officers and assumed by them as a matter of law upon their entering public office.'"); *State v. Parker*, 592 A.2d 228, 235 (N.J. 1991) (official misconduct statute does not require that the underlying act be criminal in nature).

Thus, Chvala was bound by a well-established fiduciary duty to the public to use public funds only on behalf of the public and not on behalf of private political campaigns.

2. The duty to refrain from using state resources for private campaigns has been codified by the Legislature.

Even though Chvala's duty to refrain from using state resources for private purposes was not required to be

set out by statute, that duty is clearly established in the statutes and the Senate's own Policy Manual and Guidelines.

a. Statutory provisions prohibit the conduct Chvala engaged in.

The Legislature has enacted numerous statutory provisions that prohibit the use of state resources for private campaigns.[3] While no one statute contains an express statement using the words "conducting political campaigns on state time using state resources is prohibited," the statutes taken together in effect produce that result. These statutes regarding campaign financing, prohibited election practices, and the duties of public officials demonstrate unequivocally that legislators act inconsistently with their official duties when they run private political campaigns using state resources or hire others to do so.

A campaign for office in Wisconsin is a private, regulated venture, not a function of legislative authority. A collective reading of chapters 11, 12 and 19 exhibits a legislative intent to keep political campaigns well-regulated and distinct from the work public officials are required to perform. These statutes are premised on a policy that in a democracy, citizens elect public officials to act for the common good; public officials may not treat the public's resources as their own in operating private campaigns.

Restrictions on the financing of election campaigns have long existed in Wisconsin. For example, in *State ex rel. Orvis v. Evans,* 229 Wis. 304, 282 N.W.14 (1938), this court examined campaign finance laws to determine whether a disbursement of mirrors and match containers for political purposes would render an election for municipal court judge null and void.

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[3]For the court's convenience, the state has included the text of these statutes in its appendix (R-Ap.).

The current campaign financing restrictions are contained in chapter 11, enacted in 1973. Ch. 334, Laws of 1973. As expressly stated therein, one of the purposes of chapter 11 is to "enable candidates to have an equal opportunity to present their programs to the voters" and to ensure that the true source and extent of support for a candidate is fully disclosed. Wis. Stat. § 11.001(1) (R-Ap. 101). The legislature has also made a policy determination that in order "to ensure fair and impartial elections," officeholders are "preclud[ed] ... from utilizing the perquisites of office at public expense in order to gain an advantage over nonincumbent candidates who have no perquisites available to them." Wis. Stat. § 11.001(2) (R-Ap. 101). In this case, Chvala was circumventing the entire purpose of chapter 11 by using the perquisites of his office to covertly provide state resources to certain state senate candidates he selected, services that were unavailable to the opponents of those candidates.

Chvala argues this provision does not apply because some of the candidates listed in the complaint were not incumbents (Chvala's brief at 36). Chvala ignores the allegations in Counts Seven and Ten that he used the perquisites of his office in order to direct SDC employees to run the campaign of incumbent Alice Clausing in 2000 (1:20-21, 31-41). Chvala concedes that a senator cannot use state resources to do a campaign mailing against his opponent (Chvala's brief at 36). Notwithstanding that concession, Chvala implies that financing private campaigns with public resources is perfectly acceptable: "The fundamental flaw in this prosecution rests on the premise, reiterated by the lower courts, that it is wrong to use public funds to finance private campaigns" (*id.* at 28). This proposition cannot in any way be reconciled with the existence of chapter 11 and its clear policy statement, or with any of the other various sources discussed here.

Chvala's conduct conflicts directly with several specific prohibitions found in chapter 11. Wisconsin Stat. § 11.36(1) precludes any person from soliciting services for political purposes from any state employee who is engaged in his or her official duties (R-Ap. 102). Chvala solicited SDC employees to perform services for political purposes while engaged in their official duties when he directed them to engage in campaign activity using state computers, supplies and office space during hours when the SDC offices were open to the public.

Chvala's conduct also fits within the literal terms of § 12.07(4), which provides that no person may attempt to influence an election by causing any person to provide any service or other thing of value to or for the benefit of a candidate, by means of denial or threat of denial of employment, work, or promotion, or compensation or other benefit of employment (R-Ap. 103-04). The complaint alleges that Chvala made some employment at the SDC contingent upon performance of campaign activity. For example, Wendy Kloiber was hired for that very purpose and her raise was based upon her campaign activities (1:35). Heather Colburn was offered employment for the sole purpose of fundraising (1:22-23). SDC employees Andy Gussert and Julie Laundrie understood that they would be fired if they were not successful in campaigning for particular candidates (1:29, 33).

Chvala argues, however, that he is a registrant under Wis. Stat. § 11.05 (A-Ap. 154) and therefore the charged conduct falls within the exception to § 12.07(4) which states: "This subsection does not apply to employment by a ... registrant under s. 11.05 in connection with a campaign or political party activities." Wis. Stat. § 12.07(4) (R-Ap. 103-04).

Chvala's interpretation nullifies the statute. Violation assumes that the employment which is conditioned on the employee's involvement in campaign activities is not a position intended for campaign

activities. Chvala seeks to use the very conduct which constitutes a violation of the statute—conditioning an employment position not intended for campaign activity on the employee's willingness to conduct campaign activity—as the exception to the violation.

To allow public officials to hire employees into publicly financed positions unintended for conducting campaigns and to then require those employees to operate political campaigns, as was alleged here, would be utterly inconsistent with the duties expressed in § 12.07(4) (R-Ap. 103-04).

Section 11.36(3) expressly requires that those in control of a state occupied office prohibit others from entering that office for purposes of making or receiving campaign contributions (R-Ap. 102). Here, Chvala had SDC employees using state offices to conduct campaign fundraising (*i.e.*, solicit contributions) and other private campaign activities (1:13).

Chvala claims § 11.36(3) is inapplicable to his conduct because he did not pay SDC staffers for their campaign work (A-Ap. at 153; R-Ap. 102). On the contrary, in hiring SDC staff to perform campaign activities and awarding raises or continuing employment based on success in that area, Chvala was compensating those employees specifically for their services to election campaigns.

Chvala also asserts that § 11.36(3) does not apply because the individual candidates did not authorize the use of SDC employees and therefore there was no "'in kind'contribution" (A-Ap. 152-53; R-Ap. 102). The candidates were obviously aware that these employees were working on their campaigns (1:30, 41, 45). The definition of "in-kind contribution" in Wis. Admin. Code § ElBd 1.20(1)(e) (2001) does not require that candidates knew the SDC employees were performing their campaign work on state time (R-Ap. 112). To say that these were not "in-kind contributions" because they were not

specifically authorized by the candidate would defeat the purpose of the statute. Further, Chvala's contribution of SDC staff and resources was made not only to individual candidates but also to the Senate Democratic Campaign Committee, a private campaign committee. He used a state employee, Joanna Richard, in her position as director of the SDC, as the director of the Senate Democratic Campaign Committee (1:24). Thus her services were in-kind contributions by Chvala to that private campaign organization.

These provisions codify Wisconsin's long-standing prohibition against private use of taxpayer funds, particularly in the context of campaign operations. They make clear that use of official power in this manner betrays the public trust under Wisconsin law because it is a misuse of public authority for private benefit, which undermines the authority of government and distorts our democratic system.

Chvala asserts that a "general statute" (*i.e.*, one that can be violated by any person) cannot establish a duty for a misconduct in public office charge (A-Ap. 150). In support of this argument, he relies on the court of appeals' decision in *State v. Schmit,* 115 Wis.2d 657, 340 N.W.2d 752 (Ct. App. 1983). *Schmit* involved a prison guard who was charged with misconduct in public office under § 946.12(2) for engaging in sexual intercourse with an inmate. Chvala's argument under *Schmit* fails for several reasons.

First, *Schmit* is distinguishable in that it involved a challenge to the sufficiency of the complaint, not a constitutional challenge.

Second, in *Schmit* the court focused on whether the complaint sufficiently alleged the defendant committed an act which was "forbidden by law to do in [her] official capacity," as required by subsection (2) of the misconduct statute, a subsection not at issue in this case. The court in that case noted that subsection (2) "evinces a legislative

intention to confine the application of the statute to acts committed within the scope of public employment." *Schmit*, 115 Wis.2d at 660. The court found that subsection (2) requires a nexus between the forbidden act and the defendant's public office. Thus, the thrust of the case was a determination of whether the defendant acted in her official capacity or engaged in a "'personal frolic.'" *Schmit,* 115 Wis.2d at 665.

The court determined that Schmit did not use her official position to commit the acts of fornication which formed the basis of the misconduct charge, and therefore could not be charged with misconduct under § 946.12(2). The court specifically noted that Schmit did not "utilize the power of her office in any manner when she had intercourse with the prisoner" and did not commit those acts in anything other than a "'purely private capacity.'" *Schmit,* 115 Wis.2d at 662. The court found significant the fact that Schmit did not "threaten[] sanctions or offer[] benefits within her power as a public officer to bestow or withhold" in order to gain the prisoner's consent to the acts alleged. *Id.* Had Schmit done so, the fornication statute could be the basis for a violation of 946.12(2). *Schmit,* 115 Wis.2d at 665. Thus, *Schmit* does not bar a prosecution under the misconduct statute based upon violation of a "general statute." Rather, in such a case there must also be a relationship between the acts committed and the individual's position as a public official.

In this case, there was a direct nexus between Chvala's alleged conduct and his official position. Chvala used his official position to solicit state employees to do campaign work on state time by offering benefits (*e.g.*, employment and/or raises in the case of Kloiber and Colburn), by threatening sanctions (termination of employment in the case of Laundrie and Gussert) (1:20-23, 29, 35), and by generally directing employees over whom he had control to perform these activities. Chvala did not do so acting in his private capacity because he would have had no ability to direct staff to perform such

work. Since Chvala misused the power of his public office to commit the acts alleged in the criminal complaint, even under *Schmit,* the misconduct charges in this case are permissible.

Numerous other provisions demonstrate the legislature's determination that state resources cannot be used for campaign activity. Even assuming that these provisions do not technically apply, as Chvala argues (A-Ap. at 150-58), they nevertheless provide further notice to Chvala that using SDC staff and resources for private campaigns was inconsistent with his duties. For example, Wis. Stat. § 11.37 restricts use of state vehicles for campaign purposes (R-Ap. 102). It would be an absurdity to have such a prohibition on the use of state vehicles if all other state resources were fair game for use by a public official in pursuing private campaign operations.

Wisconsin Stat. § 19.45(1) reaffirms the clear common law of all public officials' duties to act on behalf of the public rather than for personal gain:

> **(1)** The legislature hereby reaffirms that a state public official holds his or her position as a public trust, and any effort to realize substantial personal gain through official conduct is a violation of that trust. This subchapter does not prevent any state public official from accepting other employment or following any pursuit which in no way interferes with the full and faithful discharge of his or her duties to this state.

(R-Ap. 107-08).

Chvala violated the public trust by using his position as a state senator for personal gain rather than for the public good. Chvala had no responsibility to the public to assure the election of candidates he himself determined were worthy of election. In fact, in using state resources and funds on these chosen elections, his personal interest in these candidates' elections conflicted with his responsibilities to the public.

Chvala asserts that he and "every other citizen of this state have a responsibility to elect candidates in whom they believe to represent them in the senate." (A-Ap. 156). Even assuming that private citizens have such a responsibility and that it extends beyond the act of voting, facilitating the election of a particular candidate is *not* the job of public officials and chapter 11 makes clear that state resources are not to be used to subsidize election campaigns.

Furthermore, Wis. Stat. § 19.45(5) provides: "No state public official may use or attempt to use the public position held by the public official to influence or gain unlawful benefits, advantages or privileges personally or for others." (R-Ap. 108). Chvala did just that—he used his public position to influence or gain unlawful benefits, advantages or privileges for others, namely, certain candidates he determined should win elections.

Section 19.45(2) states: "No state public official may use his or her public position or office to obtain financial gain or anything of substantial value for the private benefit of himself or herself ..., or for an organization with which he or she is associated." (R-Ap. 108). Similarly, Wis. Stat. § 19.46(1)(b) states that "no state public official may ... (b) [u]se his or her office or position in a way that produces or assists in the production of a substantial benefit, direct or indirect, for ... an organization with which the official is associated." (R-Ap. 109).

"Associated," as defined in Wis. Stat. § 19.42(2), may refer to any organization for "which an individual ... is an authorized representative or agent." (R-Ap. 105-06). Chvala directed fundraising for the Senate Democratic Campaign Committee (1:7; 27). He also appointed the director of that organization (1:24). In hiring and directing publicly funded caucus employees to conduct the private campaign work of the Senate Democratic Campaign Committee, a private, partisan organization, Chvala used his public position and office to gain

substantial value and benefit to that organization with which he was associated.

Chvala's vagueness challenge rests on the assumption that in interpreting what their duties as public officials are under § 946.12(3), and deciding whether their actions might be inconsistent with such duties, those bent on obedience could not be expected to consider chapters of the Wisconsin Statutes such as "General Duties of Public Officials" (chapter 19) and the Code of Ethics contained in that chapter; "Campaign Financing" (chapter 11); or "Prohibited Election Practices" (chapter 12). This argument should fail. Reasonable public officials wishing to steer clear of violating § 946.12(3) would believe that at a minimum their duties are encompassed in the requirements of the "General Duties of Public Officials" and the Code of Ethics. Reasonable persons wondering whether conducting campaign activities on state taxpayer dollars would be "inconsistent with the duties of his office or employment" under § 946.12(3) would reasonably look to "Campaign Financing" (chapter 11) and "Prohibited Election Practices" (chapter 12) for guidance. Chvala's arguments, though couched in terms of vagueness, amount to nothing more than an assertion that "I didn't know it was against the law," or at least against this particular law, a claim that is unavailing in a court of law, and in any case is belied by the allegations in the complaint.

These statutory provisions, taken individually and collectively, provided adequate notice to Chvala that he had a duty to refrain from using state employees and resources for private election campaigns.

b. The Senate Policy Manual and Guidelines prohibit the conduct alleged in the complaint.

The Senate Policy Manual, referenced in the criminal complaint, reiterates the various statutory prohibitions described above:

> No political activity is permitted during working hours. No State facility, office, office equipment, supplies, etc. may be used for political purposes at any time. During non-office time employees may exercise their citizenship rights by political activity in community involvement.

(1:8; 14:430). In addition, the complaint describes a document entitled, "Wisconsin State Senate Guidelines for Incumbents" ("Guidelines"), which the Senate Clerk distributed in May of each election year (1:8; R-Ap. 113-31).[4] The introduction to the Guidelines states, "One simple rule to remember: State *offices and their supplies are not to be used for any campaign activity*." (R-Ap. at 114) (emphasis added). In Part I, the Guidelines examine the use of state equipment and supplies, noting that "[i]n November 1977, the Senate established a written policy that state equipment and supplies are strictly for conducting official state business and are not to be used at all for political campaign activities" (1:8; R-Ap. at 114).

In Part II, the Guidelines speak to state employee activity while on state time, stating specifically:

> * **Activity on Political Campaigns** -- Senate policy and state law, s. 11.36, states, that "no

[4]Though referenced in the complaint (1:7-8), these Guidelines are not included separately in the record. However, this document is a state government publication of which this court may take judicial notice. *See* Wis. Stat. § 902.01(2)(a). *See also Perkins v. State,* 61 Wis.2d 341, 346, 212 N.W.2d 141 (1973) (this court has taken judicial notice of state records that are available at the seat of government in Madison that are easily accessible). The state includes the Guidelines in its appendix (R-Ap. 113-31).

> staff member may engage in activities for private business, or political purposes while on state time."
>
> In order to participate in campaign activities, the staff member must be on a "non-paid leave of absence" or use accumulated compensatory time or use vacation time. Accumulated sick leave cannot be used to work on campaign activities.

(R-Ap. at 116).

The Guidelines reference, and include in their Appendices, several Ethics Board and Election Board opinions which further repeat the prohibition on the use of state resources for campaign activities. For example, Ethics Board opinion 138 states:

> "The State Of Wisconsin Ethics Board advises you that you should not engage in campaign activities (a) with the use of the state's supplies, services or facilities not generally available to all citizens, (b) during hours for which you are compensated by the State of Wisconsin, or (c) at your office in the Capitol regardless whether the activity takes place during regular office hours. Moreover, you should attempt to refer campaign related inquiries received at your office to the legislator or legislator's campaign co+mmittee [sic]."

Guidelines (quoting Ethics Bd. 138) (R-Ap. at 124).

Likewise, an Elections Board opinion states:

> "Section 11.36, Stats., prohibits any officer or employee of this state from receiving from any other officer or employee of this state, while on state time or engaged in his official duties, any contribution or service which is primarily for a political purpose and not incidental to the officer's or employees' official duties."

Guidelines (quoting Op. El. Bd. 76-2 (1976)) (R-Ap. at 124).

Thus, the Senate Policy Manual and the Senate Guidelines, which summarize and incorporate various

other sources, are unequivocal: using state offices, state supplies, or state employees on state time for campaign activities is prohibited.

Chvala complains that a senate rule cannot be the basis for a charge under § 946.12(3). If a court may look to common law to establish a duty on the part of an employee to report money shortages to her employer as in *Schwarze*, a court may certainly look to explicit senate rules in determining a senator's duties. Likewise, in *Tronca,* this court found that the "discretionary power" contemplated in § 946.12(3) could include not only those powers conferred by statute or written policy, but also those *de facto* powers arising out of custom and usage. *Tronca,* 84 Wis.2d at 77-80. If a discretionary power can be identified based upon something other than an official statute, then so might a duty.

Chvala argues that the court of appeals' decision in *State v. Dekker*, 112 Wis.2d 304, 332 N.W.2d 816 (Ct. App. 1983), provided him with notice that senate rules cannot be relied upon to prove misconduct in public office (Chvala's brief at 35). Chvala did not raise this argument below and therefore it should be disregarded. *Neely v. State,* 97 Wis.2d 38, 55, 292 N.W.2d 859 (1980).

Moreover, *Dekker* did not provide Chvala with any such notice. *Dekker* did not involve a constitutional challenge to the misconduct statute. *Dekker* also did not involve § 946.12(3). Rather, the court of appeals in that case upheld dismissal of a criminal complaint charging police officers with failing to provide first aid in violation of Wis. Stat. § 946.12(1), a subsection not at issue here. Subsection (1) of § 946.12 makes it a crime to fail to perform a mandatory duty "within the time or in the manner required by law." The court found that a departmental rule to provide first aid was discretionary, rather than mandatory and therefore could not be the subject of a misconduct charge under Wis. Stat. § 946.12(1). In contrast, in this case § 946.12(3) is

charged, which does not require that the duty be mandatory or established "by law."

In light of the clear prohibitions discussed above, Chvala's claim that he had inadequate notice that senators have a duty to refrain from conducting campaign activities on state time using state resources is implausible.

D. Chvala failed to establish that those who enforce and apply § 946.12(3) are not able to do so without creating or applying their own standards.

For the same reasons set forth above, Chvala has also failed to establish the second prong of the test for vagueness, that those who enforce and apply § 946.12(3) would not be able to do so in this case without creating or applying their own subjective standards. *Pittman*, 174 Wis.2d at 276-77. In light of the clear authority prohibiting Chvala's conduct, there is no need to apply subjective standards here.

Chvala provides no reasonable alternative to the state's interpretation of § 946.12(3). Apparently, his view is that legislators and legislative staffers are simply not subject to § 946.12(3), since, under that statute, he does not consider himself bound by any fiduciary duty, the Campaign Finance Laws, the Code of Ethics for state officials or related provisions.

Chvala's interpretation would also nullify other statutes that apply to public officials, such as § 946.10(1), which prohibits bestowing any property or personal advantage on a state official to intentionally induce a state official "to do or omit to do any act in violation of the officer's ... lawful duty ...." "Lawful duty" is not defined in § 946.10. Under Chvala's approach, courts lack a standard to determine when a legislator might have a lawful duty to do or refrain from doing anything.

For all of the reasons stated above, Chvala has failed to establish that § 946.12(3) is vague as applied to his conduct.

III. CHVALA'S ACTIVITIES ARE NOT PROTECTED BY THE SPEECH OR DEBATE CLAUSE.

Chvala asserts that art. IV, § 16 of the Wisconsin Constitution, commonly referred to as the Speech or Debate Clause, protects him from prosecution in this case. That clause reads as follows: "**Privilege in debate.** SECTION 16. No member of the legislature shall be liable in any civil action, or criminal prosecution whatever, for words spoken in debate."

In *State v. Beno*, 116 Wis.2d 122, 143-44, 341 N.W.2d 668 (1984), this court held that the Speech or Debate Clause extends beyond just words spoken on the floor of the Assembly or Senate in debate to matters that are "an integral part of the processes by which members of the legislature participate with respect to the consideration of proposed legislation or with respect to other matters which are within the regular course of the legislative process."

Beno involved the question of whether a legislative aide, who received information during a legislative investigation, was subject to subpoena in a civil trial. The aide sought to quash the subpoena, claiming, among other things, legislative immunity under art. IV, § 16. *Beno*, 116 Wis.2d at 128. The court held that, because the aide obtained the information at issue through a legislative investigation that was "within the regular course of the legislative process," the aide was entitled to immunity under art. IV, § 16. *Beno*, 116 Wis.2d at 145.

However, in *Beno* this court stressed that the protection of the Speech or Debate Clause is limited: while the privilege must be broad enough to protect the integrity of the legislative process, it should not be so

broad as to endow a legislator with absolute personal immunity or to protect him from any obligation to testify in a judicial proceeding. *Beno,* 116 Wis.2d at 142-43. The court recognized that judicial action may be needed to serve broad public interests in maintaining proper checks and balances or vindicating the public interest. *Beno,* 116 Wis.2d at 143. The court also noted that it was not dealing with a case in which a legislator had committed a criminal or unconstitutional act, suggesting that such acts would not be protected by the Speech or Debate Clause. *Beno*, 116 Wis.2d at 143 n.6.

The *Beno* court also emphasized that Wisconsin courts "are not bound by the construction given the speech and debate clause (article, I, section 6) of the United States Constitution by the United States Supreme Court." 116 Wis.2d at 134. The court noted that the framers of the Wisconsin Constitution sought guidance not merely in the federal Constitution "but also in the common law, the experiences, the tradition, and the values of the people of the territory of Wisconsin." *Beno,* 116 Wis.2d at 135. Because of the differences between the federal and state constitutions, a construction of the federal Speech or Debate Clause provides no "'clear implication as to the meaning of the state clause.'" *Beno,* 116 Wis.2d at 136 (citation omitted).

Chvala ignores the unique history and language of Wisconsin's Speech or Debate Clause and the Wisconsin Supreme Court's admonishment that our courts are not bound by federal precedent. Instead, he relies heavily on federal authority for his assertion that his prosecution is barred. Even under federal authority, however, his claim is meritless, particularly when that authority is viewed through the lens of *Beno*.

A. Chvala's activities are not protected because they were not integral to the legislative process.

Even though the Wisconsin and United States Supreme Courts have both determined that their respective Speech or Debate Clauses reach beyond mere debate on the floor to other matters within the course of the legislative process, both courts have gone to great lengths to emphasize that not all conduct by a legislator is protected by the respective Speech and Debate Clause at issue.

In *Beno*, this court stated:

> Not all of the legislator's activities fall within the protection of section 16. The privilege granted a legislator by section 16 is not unlimited. The constitution literally protects the member from liability for "words spoken in debate." The clause thus focuses upon matters occurring in legislative deliberations. Neither section 16 nor the separation of powers doctrine bars the court from ever exercising jurisdiction over a legislator. The principle accorded legislators by section 16 exists only to the extent necessary for the adequate functioning of the state legislative body.

116 Wis.2d at 142.

Similarly, in *Gravel v. United States,* 408 U.S. 606, 625 (1972), the United States Supreme Court noted that not all acts performed by senators in their official capacity were necessarily legislative in nature, and that legislative acts are not all encompassing. *Gravel,* 408 U.S. at 625. The Court further explained that "the courts have extended the privilege to matters beyond pure speech and debate in either House, but only when necessary to prevent indirect impairment of such deliberations." *Id. See also Doe v. McMillan,* 412 U.S. 306, 314 (1973) ("The [Speech or Debate] Clause has not been extended beyond the legislative sphere, and legislative acts are not all-encompassing.").

Chvala's activities, as alleged in the criminal complaint, are not within the legislative sphere and are not integral to the legislative process. In fact, they are the subject of criminal charges specifically because they were inconsistent with his legislative duties. The function of Wisconsin's legislative branch is "determining policies and programs and review of program performance for programs previously authorized." Wis. Stat. § 15.001(1). While broad, this description does not include direct operation of political campaigns within the sphere of legislative functions. A political campaign is not a state policy or program. As such, Chvala's conduct in hiring and directing state employees to conduct campaign work on state time and with state resources is not protected by the Speech or Debate Clause.

Chvala fails to articulate how his activities in hiring and directing state employees to operate partisan campaigns on state time using state resources relate to either the consideration of proposed legislation or other matters which are within the due course of the legislative process. He summarily states, without support or explanation, that the allegations against him are intertwined with his duties as a legislator and senate majority leader (Chvala's brief at 25).

By Chvala's logic, if a senator assigns a legislative employee to murder a member of the legislature or embezzle state funds, this would also be within the "regular course of the legislative process" because it would involve that senator's assignment of job duties to his or her employee. The mere fact that Chvala supervised state employees whose positions were supposed to be legislative in nature, does not transform his activities in ordering them to perform campaign election work into conduct that is related or integral to the legislative process. His direction of state employees in operating private campaigns is not an act performed as part of or even incidental to the role of a legislator.

Throughout his brief Chvala asserts there is great overlap between that which is legislative and that which is political. Even if true in some circumstances, that is not the case presented here. As already discussed, the activities conducted by the SDC employees which form the basis for the charges were not legislative in nature but were instead exclusively campaign related.

Chvala mischaracterizes the nature of the charges against him as being "based on his personnel decisions." (Chvala's brief at 24). Chvala is not being prosecuted because the state disagrees with the personnel choices he made with respect to carrying out his legislative duties. Rather, he is charged specifically with using state resources, including employees, for activities unrelated to the due functioning of the legislature. Because those activities were not integral to the legislative process, under *Beno* Chvala is not entitled to the protection of art. IV, § 16 of the Wisconsin Constitution in this case. *See also United States v. Rostenkowski,* 59 F.3d 1291, 1303-04 (D.C. Cir. 1995) (prosecution for use of legislative staff for personal services not prohibited by the Speech or Debate Clause); *Walker v. Jones,* 733 F.2d 923, 931 (D.C. Cir. 1984) (termination of Congressional food services manager not protected by Speech or Debate Clause); *Bastien v. Office of Campbell,* 209 F.Supp.2d 1095 (D. Colo. 2002) (speech or debate protections will not apply to a legislative functionary carrying out a non-legislative task).

In arguing that he is entitled to immunity under the Speech or Debate Clause, Chvala relies heavily on several cases involving personnel decisions. His reliance on those cases is misplaced.

Chvala relies most heavily upon *Browning v. Clerk, United States House of Representatives,* a decision by the D.C. Circuit Court of Appeals. 789 F.2d 923 (D.C. Cir. 1986). *Browning* is not controlling. First, it is not binding precedent because this court is bound on the subject of federal law only by the pronouncements of the United

States Supreme Court. *State v. Webster,* 114 Wis.2d 418, 426 n.4, 338 N.W.2d 474 (1983) (citations omitted). Thus, even if this court interpreted Wisconsin's constitutional provisions identically to the United States Constitution, this lower federal court decision would not be binding precedent. Moreover, the *Browning* approach has never been adopted by the United States Supreme Court, and, in fact, is inconsistent with that court's reasoning in *Forrester v. White*, 484 U.S. 219 (1988). As noted in *Gross v. Winter*, 876 F.2d 165, 170-71 (D.C. Cir. 1989):

> There is unquestionably tension between precedent of this court, which has "identified the ultimate issue to be the *duties of the employee*" in the context of immunity for congressional personnel decisions, *Browning*, 789 F.2d at 928 (emphasis in original), and *Forrester*, which accords no weight to the duties of the employee, "even though they may be essential to the very functioning of the" state institution at issue, 108 S.Ct. at 544."...
>
> ....
>
> The Supreme Court's strict "functional" immunity analysis in *Forrester*, however, contrasts with the employee-centric approach this court took in *Browning*.

See also Bates v. Hess, 1994 WL 854963, at *14 (D. Pa. 1994) ("Five pages or so were devoted to *Browning*, a curious choice of case law inasmuch as after the Supreme Court's *Forrester* decision, *Browning* was virtually rejected by the court that issued it. *See Gross v. Winter*, ... 876 F.2d 165 (D.C.Cir.1989)").

Furthermore, even if *Browning* is persuasive authority, it is distinguishable. In that case, the court determined that Congressional staff were immune from suit by an official Congressional reporter alleging race discrimination. The court held that the standard for determining Speech or Debate Clause immunity for personnel decisions was whether the employee's duties were directly related to the functioning of the legislative

process. *Browning*, 789 F.2d at 929. The court determined that if the employee's duties are an integral part of the legislative process, such that they are directly assisting legislators in the discharge of their functions, personnel decisions affecting them are correspondingly legislative and shielded from judicial scrutiny. *Id.*

The court found that the reporter's duties in transcribing floor and committee proceedings were directly related to the legislative process, noting that some of the questions a court would be required to pose in considering the plaintiff's claim would implicate the areas protected by the clause, such as the nature and underlying purpose of the hearings to which the reporter was assigned, and whether the reporter's performance frustrated those purposes. *Browning,* 789 F.2d at 930. The court found that this sort of intrusion into the legislative sphere is exactly what the clause was designed to prevent. *Id.*

The *Browning* case is distinguishable on its face because the duties performed by the reporter in that case, which would be the subject of inquiry if that suit was allowed to proceed, were legitimate duties related directly to the functioning of the legislative process. *Browning*, 789 F.2d at 929-30.

Noticeably absent from the *Browning* case and *Niedermeier v. Office of Baucus*, 153 F. Supp. 2d 23 (D. D.C. 2001), a case cited by Chvala, was any suggestion or allegation that the employees' duties were anything but legitimate duties directly related to the operation of the House.

The Wisconsin cases Chvala cites are distinguishable for the same reason. For example, in *Barland v. Eau Claire County,* 216 Wis.2d 560, 565, 575 N.W.2d 691 (1998), this court held that a removal of a judicial assistant by way of a collective bargaining agreement violated the doctrine of separation of powers because that action impermissibly interferes with the

court's ability to carry out its constitutional duties. *Barland*, 216 Wis.2d at 581-82. Neither *Barland* nor any of the other Wisconsin cases cited by Chvala involved allegations that judicial employees or resources were being misused.[5] Rather the courts found separation of powers violations specifically because of interference with employees or facilities essential to the proper functioning of the courts. *See, e.g., In re the Appointment and Removal of the Janitor of the Supreme Court,* 35 Wis. 410 (1874).

In contrast, in this case, it was Chvala's use of employees for activities unrelated to the due functioning of the legislature that led to criminal charges. To characterize Chvala's supervision of SDC employees in conducting campaign work as "legislative" would be to "stretch the meaning of the word beyond sensible proportion." *Walker,* 733 F.2d at 931.

B. Chvala's acts, even if legislative in nature, are not protected by the clause because it would not serve the purpose of the clause.

Even assuming that this case will require inquiry into legislative acts, Chvala is still not entitled to the protection of the Speech or Debate Clause.

Both the Wisconsin Supreme Court and the United States Supreme Court have been careful to make clear that their rulings were limited to the cases before them. In so doing, they left open the possibility of prosecution in a case such as this one which involves criminal charges for misconduct.

As already noted above, the court in *Beno* cautioned that judicial action might be needed to serve broad public interests such as maintaining the proper

[5]These cases also did not involve challenges under the Speech or Debate Clause.

checks and balances or vindicating the public interest. *Beno,* 116 Wis.2d at 143.

As is evident by the fact Chvala's alleged misconduct spanned at least four years, any internal legislative checks on Chvala's misuse of his position were unsuccessful. Absent intervention by the executive and judicial branches in this case, Chvala's alleged criminal conduct in the misuse of state employees and state resources would be continuing today unabated.

The courts have never interpreted legislative immunity provisions to be so expansive as to preclude all checks on the legislative branch. Indeed, one of the purposes of the provision is to ensure the integrity of the legislative process. *Beno*, 116 Wis.2d at 141, 142-43. Interpreting the Speech or Debate Clause to provide Chvala with protection for misuse of his position would thwart that purpose and would preclude vindication of the public's interest in holding corrupt legislators responsible for their actions.

As the United States Supreme Court has recognized the Speech or Debate Clause was not intended to make members of Congress "super-citizens, immune from criminal responsibility." *United States v. Brewster,* 408 U.S. 501, 516 (1972).

C. Chvala's acts are not protected by the Speech or Debate Clause because he is charged under a specific statute applicable to members of the legislature.

In *Beno*, the court emphasized that it was not addressing a situation in which the legislator has committed a criminal or unconstitutional act in the course of legislative duties, or a case in which the disclosure of words or acts within the scope of legitimate legislative functions is sought in a criminal case. 116 Wis.2d at

143 n.6. This court reiterated this principle in *In re John Doe Proceeding*, 2004 WI 65, ¶ 21, 272 Wis.2d 208, 680 N.W.2d 792. This language suggests that a prosecution such as this one may proceed.

Decisions by the United States Supreme Court are in accord. In *United States v. Johnson,* 383 U.S. 169 (1966), the Court held that prosecution under a general criminal statute, such as conspiring to defraud the United States, is prohibited if dependent on inquiries into legislative acts or the motivations for such acts. *Johnson*, 383 U.S. at 185. However, the Court specifically left open the question of the application of the clause in a prosecution which, though possibly involving inquiry into legislative acts, is founded upon a narrowly drawn statute passed by Congress in exercise of its legislative power to regulate the conduct of its members. *Id.* It is significant that the *Johnson* Court did not question the power of the government to try the defendant on charges of violating a conflict-of-interest statute that specifically applied to members of Congress. *Brewster,* 408 U.S. at 510. The Court again raised this question of prosecution for legislative acts under a narrowly drawn statute, but declined to answer it in *Brewster,* 408 U.S. at 529 n.18.

In this case, Chvala is charged under § 946.12(3), which by its nature is concerned with the activities and duties of a public officer. In making this statute applicable to all public officers, the legislature was exercising its legislative power to regulate the conduct of its members, *Johnson,* 383 U.S. at 185, giving limited authority to the executive and judicial branches to inquire into legislative activity and the underlying motivation for purposes of rooting out corruption.

IV. CHVALA FAILS TO SHOW BEYOND A REASONABLE DOUBT THAT THE CHARGES IN THIS CASE VIOLATE THE SEPARATION OF POWERS DOCTRINE.

Chvala asserts that prosecution in this case violates the separation of powers doctrine because it requires an impermissible inquiry into an ambiguous senate rule and presents a nonjusticiable issue. Chvala must establish a constitutional violation beyond a reasonable doubt. *State v. Holmes*, 106 Wis.2d 31, 38, 315 N.W.2d 703 (1982). He fails to meet his burden and his separation of powers claim must fail.

A. The courts may adjudicate the criminal charges against Chvala in this case, even if senate rules must be applied to define his duties as senator.

Chvala asserts generally that "it is the duty of the senate to interpret its own rules," a duty within the legislature's "core zone of authority" (Chvala's brief at 8, 10).

Fundamentally, Chvala's argument is merely an assertion that as a member of the Senate, he is beyond the reach of the criminal law. No one is beyond the reach of the criminal law, not even Chvala.

Chvala relies on art. IV, § 8 of the Wisconsin Constitution, which provides that "Each house may determine the rules of its own proceedings, punish for contempt and disorderly behavior, and with the concurrence of two-thirds of all the members elected, expel a member[.]"

Prosecuting Chvala for criminal offenses under § 946.12(3) does not violate art. IV, § 8. Neither the executive nor the judicial branch is interfering with the

Senate's ability to "determine the rules of its own proceedings" or is impeding the due functioning of the legislature. Nor does the state attempt to prosecute for contempt or disorderly behavior or seek to expel anyone from the legislature. The state is merely looking at an existing legislative rule as one source for determining what duties Chvala had and whether he acted inconsistently with those duties, for purposes of enforcing a criminal statute. That statute was obviously designed to hold public officials accountable for the misuse of their position. The executive branch has the obligation to enforce such statutes. Wis. Const. art. V, § 4.

This court rejected a similar separation of powers argument in *In re John Doe Proceeding,* 272 Wis.2d 208. In that case petitioners challenged a John Doe subpoena issued to the Legislative Technology Services Bureau on the grounds that the subpoena intruded into the legislature's "core zone" of authority and that § 13.96 was a "rule of proceeding" under art. IV, § 8, that only the legislature could interpret. *In re John Doe Proceeding,* 272 Wis.2d at ¶ 24. In rejecting these arguments, this court noted that the subpoena was not attempting to change the way in which the legislature functions but rather was attempting to gather information in a criminal investigation. *In re John Doe Proceeding,* 272 Wis.2d at ¶ 26. The court further noted that if all of the documents maintained by the LTSB were out of bounds to a criminal investigation, "the legislature would have effectively immunized its members and employees from criminal prosecution and in so doing usurped the role of the executive branch in assuring the faithful execution of the laws and the prosecution of crime." *Id.*

While recognizing that courts generally are unwilling to decide whether the legislature adhered to its own rules governing how it operates, this court found that § 13.96, which makes the electronic records of the legislature confidential, was not a rule of proceeding for purposes of art. IV, § 8, because it had "nothing to do with the process the legislature uses to propose or pass

legislation or how it determines the qualifications of its members." *In re John Doe Proceeding*, 272 Wis.2d at ¶ 30. So too is the rule at issue here not a "rule of proceeding." A rule that reiterates statutory prohibitions on the use of state resources for private campaigns has nothing to do with the process the legislature uses to propose or pass legislation or how it determines the qualifications of its members. Instead it prohibits the use of state resources for activities that are *not* related to those functions.

In *In re John Doe Proceeding,* this court found compelling the fact that the subpoena sought information in the course of a criminal investigation, a function assigned to the executive branch. 272 Wis.2d at ¶¶ 26, 31. In the present case, the executive branch is carrying out its function of prosecuting criminal activity.

The cases Chvala cites do not support his position that only the legislature can examine its rules. Chvala implies that in *Integration of Bar Case,* 244 Wis. 8, 11 N.W. 604 (1943), this court found it had no power to review internal legislative rules (Chvala's brief at 8-9). On the contrary, the court interpreted and relied upon two specific legislative rules in reaching its conclusion that the bill at issue had been properly enacted. *Integration of Bar Case,* 244 Wis. at 28, 29-35. Likewise, in *State ex rel. Elfers v. Olson,* 26 Wis.2d 422, 426-29, 132 N.W.2d 526 (1965), this court relied upon a legislative rule in determining whether a legislative action fell within art. IV, § 8.

Rostenkowski, 59 F.3d 1291, also relied upon by Chvala, actually cuts against Chvala's position.

In *Rostenkowski,* Illinois Congressman Daniel Rostenkowski was charged with misappropriation of public funds. Rostenkowski argued that the prosecution violated the Rulemaking Clause and the separation of powers doctrine because it was based on interpretation of

the legislative rules. 59 F.3d at 1306. The Rulemaking Clause, like art. IV, § 8 of the Wisconsin Constitution, empowers Congress to "determine the rules of its proceedings, punish for contempt and disorderly behavior, and with the concurrence of two-thirds of all the members elected, expel a member." U.S. Const. art. I, § 8.

The court there held "it is perfectly clear that the Rulemaking Clause is not an absolute bar to judicial interpretation of the House Rules." *Rostenkowski,* 59 F.3d at 1305 (citing *Yellin v. United States,* 374 U.S. 109, 114 (1963)).

Thus, under *Rostenkowski*, judges are not prohibited by the Rulemaking Clause or by the doctrine of the separation of powers from interpreting legislative rules; indeed, the prosecution may rely on legislative rules in its efforts to prove statutory violations. 59 F.3d at 1305.

Like Rostenkowski, Chvala rests his arguments on "the mistaken premise that the [state] seeks to impose criminal liability upon him for violating [legislative] Rules themselves." *Id.* The state is prosecuting Chvala for a violation of the criminal law, namely, § 946.12(3), a felony. The senate rule is one source for determining Chvala's duties for purposes of enforcing § 946.12(3).

The *Rostenkowski* court pointed out that there are numerous criminal statutes that, if violated by a legislator, would require reliance on legislative rules for prosecution. For example, in a prosecution of a legislator for fraud or embezzlement of public funds, the government would have to show that the defendant diverted funds for an unauthorized purpose. *Rostenkowski*, 59 F.3d at 1305. *See also* Wis. Stat. § 943.20(1)(b) (theft by bailee).

Similarly, a prosecution for official misconduct under § 946.12(3) requires inquiry into a public official's discretionary powers, duties, and intent. It applies to all public officers without exception, including members of

the legislature itself. *See* Wis. Stat. § 939.22(30) (public officer is any person appointed or elected according to law to discharge a public duty for the state or one of its subordinate governmental units).

The *Rostenkowski* court properly recognized that accepting an argument like Chvala's "would effectively insulate every Member of Congress from liability under certain criminal laws." *Id.* The court concluded that "[n]either the Rulemaking Clause nor the doctrine of the separation of powers requires that result." *Id.* This court reached a similar conclusion in *In re John Doe Proceeding*, 272 Wis.2d at ¶ 26.

A finding that a prosecution under § 946.12(3) in this case violates separation of powers would render that section unenforceable. It would similarly invalidate all of the provisions regulating legislators' activities contained in chapters 11, 12 and 19, discussed above.

B. The official misconduct charges in this case are justiciable because they do not interfere with any unique function of the legislature and because they rest on unambiguous legal standards.

Chvala claims the Senate Policy Manual is ambiguous (Chvala's brief at 10-19). This argument is intertwined with Chvala's assertions in Section III of his brief that this case presents a nonjusticiable "political question" (Chvala's brief at 27-30). Therefore, the state addresses them together, rather than in the order presented by Chvala.

In *Baker v. Carr*, 369 U.S. 186, 217 (1962), the United States Supreme Court identified six alternative factors to be considered in determining whether an issue is a "political question" and therefore nonjusticiable. At least one of the factors must be "[p]rominent on the

surface" if an issue is to be determined nonjusticiable. *Id.* Further, such a determination must be made or based upon the particular facts and posture of an individual case. *Id. See also Rostenkowski,* 59 F.3d at 1310. Therefore, any hypothetical situations raised by Chvala should be disregarded as they are not relevant to the question of justiciability in this case.

Chvala addresses only the first two factors set forth in *Baker v. Carr*: a textually demonstrable constitutional commitment to a coordinate political department and a lack of judicially discoverable and manage standards for resolving the issue. In ignoring the other factors, Chvala rightfully concedes that they are not relevant here. The first and second present no obstacle either.

In arguing for the applicability of the first factor, constitutional commitment of the issue to another branch, Chvala merely reasserts his arguments related to art. IV, § 8, discussed above. As stated, this constitutional provision addresses legislative procedural rules, punishment for "contempt" and "disorderly" behavior, and expelling members. It is inapplicable to the criminal charges at issue here.

With respect to the second *Baker* factor, Chvala argues that there are no judicially manageable standards to prosecute him under § 946.12(3) because rules prohibiting engaging in political campaign activity are sufficiently ambiguous so as to be non-justiciable.

As support, Chvala points to the *Rostenkowski* court's finding that "a sufficiently ambiguous house Rule is non-justiciable." However, Chvala ignores the necessary corollary to that principle, which the *Rostenkowski* court clearly articulated:

> If a particular House Rule is sufficiently clear that we can be confident of our interpretation, however, then that risk is acceptably low and preferable to the alternative risk that an ordinary crime will escape the

> reach of the law merely because the malefactor holds legislative office.

Rostenkowski, 59 Wis.2d at 1306. Thus, a court may interpret an internal legislative rule if there is a reasonably "discernible legal standard." *Id.* (citing *United States ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1385 (D.C. Cir. 1981)).

The standards for resolving the criminal charges in this case are discernible and unambiguous. As already discussed above, the use of state resources and employees for campaign activities is expressly prohibited by the statutes and the Senate's Policy Manual and Guidelines. Notwithstanding these explicit prohibitions, Chvala attempts to obfuscate this case by attacking particular phrases in the Senate Policy Manual as being ambiguous. The Senate Policy Manual cannot be viewed in isolation and Chvala's myopic approach should be rejected.

Chvala first argues the phrases "political activity" and "political purposes" contained in the Senate Policy Manual are ambiguous and thus only the legislature may define them.

The legislature has already done so. The phrase "political activity" is used interchangeably with "political purposes" and "campaign activity" in the policy manual and guidelines. "Political purposes" is a term of art that has been equated with campaign activity by the legislature and the courts since long before the senate adopted its written policy in 1977.

For example, the phrase "political purposes" was already in use in chapter 11 at the time the senate adopted its written policy. Significantly, that chapter is entitled "Campaign Financing." The campaign finance restrictions therein apply primarily to acts done "for political purposes," which are specifically defined as acts done "for the purpose of influencing the election or

nomination for election of any individual to state or local office." Wis. Stat. § 11.01(16).[6]

Chvala complains the phrase "for political purposes" cannot be interpreted using reference to § 11.01(16) because that definition "is so broad that it impacts virtually everything a legislator does." (Chvala's brief at 11). In attacking the definition of "political purposes" in § 11.01(16) as including everything a legislator does, Chvala is now arguing that all of chapter 11 is unenforceable when applied to sitting legislators. Such an interpretation is absurd.

It is inherent in a senator's job to advance a political viewpoint and agenda, and senate caucus staff may obviously assist the senator in doing so. It cannot be seriously argued that a Senate policy manual or the campaign finance laws could be reasonably construed to prohibit senators or senate caucus staff from advancing a political platform. The policy can only be reasonably construed to prohibit activities done for the exclusive purpose of furthering a campaign, the sole form of conduct alleged here.

Lest there be any doubt about the type of political activity the senate policy prohibits, the Guidelines make it clear: state equipment, supplies, and employees are strictly for conducting official state business and are not to be used at all for political *campaign* activities (1:8; R-Ap. at 114, 116, 124).

Chvala also points to the Senate Policy Manual's use of the term "working hours" as ambiguous. This argument should be disregarded as Chvala did not raise it in the lower courts.

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[6]Predecessor statutes to chapter 11 also defined the phrase "for political purposes" in a similar manner. *See, e.g., State ex rel. LaFollette v. Kohler,* 200 Wis. 518, 564, 228 N.W. 895 (1930) (interpreting then existing § 12.01).

Regardless, the state notes first that Chvala's argument regarding "working hours" is irrelevant to state employees conducting campaign activities in their offices since the senate rule specifically states that the use of state facilities, offices, office equipment and supplies may not be used for political purposes *at any time.* (1:8; 14:430) (emphasis added). Therefore, SDC employees' use of state offices, phones, computers, etc. for campaign purposes was a violation of the rule in itself, irrespective of whether they were using leave time.

With respect to the use of state employees outside of state offices, such activity is only permissible under the Senate Policy Manual during "non-office time." (1:8; 14:430). The Guidelines elaborate on this to say that in order to participate in campaign activities, employees must be on a "non-paid leave of absence" or use accumulated compensatory time or vacation time (R. App. at).

Chvala asserts that "it is unclear what portion of any day is state time rather than personal time" for senate employees because they do not have set hours (Chvala's brief at 16-17).

While it is true that there are no specific "work hours" set forth in the statutes for state employees, that fact alone does not make the phrase ambiguous or undiscernible. At a minimum, full-time state employees are required to work forty hours per week, divided into five workdays of eight hours each. Wis. Stat. § 230.35(5)(a) and (b) (R-Ap. 111). Additional hours may be required when the needs of the employing unit cannot be fulfilled by adhering to the standard workweek. Wis. Stat. § 230.35(5)(a) (R-Ap. 111). "State time" or "working hours" for purposes of a state employee would then obviously include the forty hours per week an employee is required to work in exchange for his or her state pay check.

If, as alleged in this case, a state employee was engaged full-time in campaign work as part of the forty hours they were obligated to work for the state, then a clear violation exists. For example, Wendy Kloiber was working full-time on the Hansen campaign during the weeks leading up to the November 2000 election (1:35). Other caucus workers were working 90% of their time on campaigns (1:28).

As evidence of the ambiguity of "working hours," Chvala points to an allegation in the complaint that Senator Meyer believed SDC employee Jay Wadd was assisting the Meyer campaign while on vacation time or at other times outside of Wadd's SDC employment (Chvala's brief at 17). Chvala fails to explain how Senator Meyer's misperception makes the term "working hours" ambiguous. If anything, Senator Meyer's expectation in that instance is evidence that others commonly recognized the difference between state time and private time and understood that state employees could not be working on campaigns on the state's dime.

Regardless, Chvala fails to show that the rules which prohibit using state resources are ambiguous as applied in this case. They clearly prohibit the conduct alleged in the complaint.

Further, applying these unambiguous rules to the charges against Chvala requires no impermissible inquiry into the "internal workings" of the legislature (Chvala's brief at 19). In proving misconduct for the hiring of Wendy Kloiber, as alleged in Count Seven, the state need only inquire into the campaign activities that Kloiber was involved in and Chvala's role in those activities. The state will not be required to delve into legislative acts by Chvala or Kloiber, assuming she performed any such acts.

For purposes of Count Eight, the state need only prove that Chvala offered employment to Heather Colburn for the sole purpose of "putting money in the bank" for various campaigns (1:23). Raising campaign funds is not

the function of state employees and is not part of the legislative process. Indeed, employment contingent upon the performance of campaign activity is specifically prohibited under Wis. Stat. § 12.07(4) (R-Ap. 103-04). Inquiry outside the fund-raising nature of the position Chvala offered to Colburn is not necessary in order to prove Chvala engaged in the misconduct alleged in this count.

In proving Counts Nine and Ten, the state will seek to prove that during the periods charged in the complaint, Chvala used the SDC and its staff not to assist legislators in the discharge of their legislative functions but to assist individuals in their capacities as private citizens running for office. Inquiry need not be made into any legislative activity the SDC might have engaged in during that period of time because it was the non-legislative, purely political work that employees of the SDC performed that are the subject of those charges.

This case is analogous to one of the charges deemed permissible in *Rostenkowski.* While finding certain activities were nonjusticiable because they might involve a mix of official and personal activities, the court found that a charge involving a congressional employee who did "'little or no official work'" and "'performed regular bookkeeping duties'" for Rostenkowski's private insurance business was justiciable. *Rostenkowski,* 59 F.3d at 1310. The court determined that no reasonable interpretation of "official work" could include the performance of bookkeeping work for a private company owned by a Congressman. *Id.*

This case is justiciable for the same reason. A state employee doing work for a private election campaign is no different than a federal employee doing work for a private insurance business. The conduct alleged in the complaint in this case cannot be reasonably characterized as anything other than "political campaign activity," and was clearly prohibited by senate rules.

In arguing that this case presents a nonjusticiable question, Chvala attempts to show that prosecution of this case will result in dire consequences, arguing that every elected official who runs for re-election is guilty of misconduct because "she is using state resources, (*i.e.*, her time) on a private campaign." (Chvala's brief at 28). Chvala's argument assumes that once an individual becomes a public officer or public employee, that individual no longer has the ability to act in his or her private capacity. Nothing could be further from the truth, as is evident by the court's finding that the prison guard in *Schmit* engaged in a "personal frolic" even while on duty in her public position. *Schmit*, 115 Wis.2d at 664. Further, just because Chvala can create hypotheticals that could arguably be considered ambiguous under the rules does not mean this case is nonjusticiable. As already noted, the question of justiciability must be determined based upon the particular facts of this case. *Carr,* 369 U.S. at 217; *Rostenkowski*, 59 F.3d at 1305.

As the court of appeals correctly found in this case, most of Chvala's alleged misconduct unquestionably constituted campaign activity. With respect to such conduct, the court aptly stated:

> The trial court will not need to speculate as to whether this conduct could include legitimate legislative activity. On the contrary, these allegations show political campaign activity of the most basic type: the preparation and dissemination of campaign literature, political fundraising efforts on behalf of a number of candidates for the Wisconsin Senate, campaign data management on state computers, daily monitoring of campaign progress by Chvala, development and implementation of campaign strategy and debriefing of the 2000 election cycle on state time in state offices. The result is public financing of private campaigns without the public's permission. There is no reasonable argument that his activity serves any legitimate legislative duty or purpose. No statute, rule or policy sanctions this behavior.

(Slip op. at 35-36, ¶ 77).

Chvala points to the court of appeals conclusion that two specific activities discussed in the complaint—performing "opposition research" and monitoring a targeted Senator's press clippings, his or her votes, and committees chaired by the Senator—were not free from doubt as to whether they were purely campaign activity and that they therefore did not allege justiciable violations. (Slip op. at 27-28, 30, ¶¶ 56-58, 64). The state respectfully disagrees with the court's conclusion about those particular activities and believes all of the conduct alleged in Counts Seven through Ten was purely campaign activity. However, even if this court were to agree that certain activities alleged in the complaint are nonjusticiable, such a finding would not make the entire case nonjusticiable, as is clear from *Rostenkowski*. The court there parsed out that which was justiciable from that which was not. *Rostenkowski,* 59 F.3d at 1310-12.

Chvala goes to great lengths to convince this court that this case should be controlled by *People v. Ohrenstein*, 549 N.Y.S.2d 962 (1989), a case from New York which is not binding upon Wisconsin courts. Even if this court were inclined to adopt the approach taken in that case, *Ohrenstein* is unavailing to Chvala. In *Ohrenstein*, the court determined that "there were no legislative standards, rules or guidelines in existence detailing the 'proper duties' of legislative employees." 549 N.Y.S.2d at 975. As set forth above, this is not the case here.

Cannon, 642 F.2d 1373, may be distinguished on similar grounds. The *Cannon* court held there was "a complete absence" of judicially discoverable and manageable standards for resolving the question whether Senators may use paid staff members in their campaign activities. *Cannon*, 642 F.2d at 1379. The court stated: "Not even the Senate itself has been able to reach a consensus on the propriety of using staff members in

reelection campaigns." *Cannon*, 642 F.2d at 1380. Furthermore, no other statute, administrative law or judicial decision guided the court in determination of the issue generated by the charges. *Cannon,* 642 F.2d at 1379.

In contrast, the Wisconsin Legislature has clearly established that state employees and state resources cannot be used to conduct campaign activities. Given this clear policy statement by the legislature, Chvala's claims that the Senate Policy Manual is ambiguous and that this case presents a nonjusticiable issue are without merit.

In view of the foregoing, Chvala has failed to demonstrate a textually demonstrable constitutional commitment of this issue to the legislature or a lack of judicially discoverable and manageable standards for resolving the issue. *Carr*, 369 U.S. at 217. Consequently, this case is justiciable and Chvala's separation of powers claim fails.

CONCLUSION

> Left unsaid thus far are certain propositions so deeply embedded in our jurisprudence that they rarely find expression. Perhaps those values which go to the very heart of our democratic system of government need restating. The first is that no man is beyond the reach of the law. And the second is that those privileged to make the laws are obliged to obey them and live within their prescriptions.

State v. Gregorio, 451 A.2d 980, 988 (N.J. Super. Law Div. 1982). Chvala was properly charged under well-established law, and his prosecution should go forward. Therefore, the state respectfully requests that this court

affirm the court of appeals' decision and the circuit court's order denying Chvala's motion to dismiss.

Dated this 13th day of September, 2004.

Respectfully submitted,

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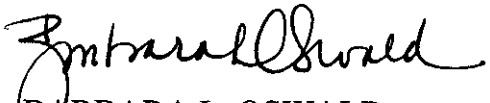

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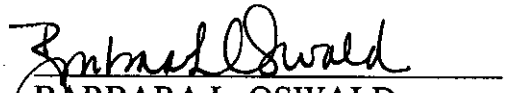
CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 14,822 words.



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CHAPTER 11

CAMPAIGN FINANCING

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Cross-reference: See definitions in s. 5.02.
Cross Reference: See also chs. ElBd 1 and 6, Wis. adm. code.

11.001 Declaration of policy. (1) The legislature finds and declares that our democratic system of government can be maintained only if the electorate is informed. It further finds that excessive spending on campaigns for public office jeopardizes the integrity of elections. It is desirable to encourage the broadest possible participation in financing campaigns by all citizens of the state, and to enable candidates to have an equal opportunity to present their programs to the voters. One of the most important sources of information to the voters is available through the campaign finance reporting system. Campaign reports provide information which aids the public in fully understanding the public positions taken by a candidate or political organization. When the true source of support or extent of support is not fully disclosed, or when a candidate becomes overly dependent upon large private contributors, the democratic process is subjected to a potential corrupting influence. The legislature therefore finds that the state has a compelling interest in designing a system for fully disclosing contributions and disbursements made on behalf of every candidate for public office, and in placing reasonable limitations on such activities. Such a system must make readily available to the voters complete information as to who is supporting or opposing which candidate or cause and to what extent, whether directly or indirectly. This chapter is intended to serve the public purpose of stimulating vigorous campaigns on a fair and equal basis and to provide for a better informed electorate.

(2) This chapter is also intended to ensure fair and impartial elections by precluding officeholders from utilizing the perquisites of office at public expense in order to gain an advantage over nonincumbent candidates who have no perquisites available to them.

(2m) The legislature finds a compelling justification for minimal disclosure of all communications that are to be made near the time of an election and that include a reference to or depiction of a clearly identified candidate at that election in order to permit increased funding for candidates who are affected by those communications. This minimal disclosure burden is outweighed by the need to establish an effective funding mechanism for affected candidates to effectively respond to communications that may impact an election.

NOTE: Sub. (2m) is created eff. 7-1-03 by 2001 Wis. Act 109.

(3) This chapter is declared to be enacted pursuant to the power of the state to protect the integrity of the elective process and to assure the maintenance of free government.

History: 1973 c. 334; 1979 c. 328; 1985 a. 303; 2001 a. 109.
Campaign finance in Wisconsin after *Buckley*. 1976 WLR 816.

11.002 Construction. This chapter shall be construed to impose the least possible restraint on persons or organizations whose activities do not directly affect the elective process, consistent with the right of the public to have a full, complete and readily understandable accounting of those activities intended to influence elections.

History: 1979 c. 328 ss. 9, 11.

11.01 Definitions. As used in this chapter:

(1) "Candidate" means every person for whom it is contemplated or desired that votes be cast at any election held within this state, other than an election for national office, whether or not the person is elected or nominated, and who either tacitly or expressly consents to be so considered. A person does not cease to be a candidate for purposes of compliance with this chapter or ch. 12 after the date of an election and no person is released from any requirement or liability otherwise imposed under this chapter or ch. 12 by virtue of the passing of the date of an election.

(2) "Charitable organization" means any organization described in section 170 (c) (2) of the internal revenue code, and also includes the United States, any state, territory or possession, the District of Columbia and any political subdivision thereof, when a gift is made exclusively for public purposes; but does not include any private organization conducting activities for political purposes.

(3) "Clearly identified", when used with reference to a communication in support of or in opposition to a candidate, means:

(a) The candidate's name appears;

(b) A photograph or drawing of the candidate appears; or

ing such advertising may pay any rate or charge in excess of the regularly charged rate.

History: 1973 c. 334.

11.33 Use of government materials by candidates. (1) (a) No person elected to state or local office who becomes a candidate for national, state or local office may use public funds for the cost of materials or distribution for 50 or more pieces of substantially identical material distributed after:

1. In the case of a candidate who is nominated by nomination papers, the first day authorized by law for circulation of nomination papers as a candidate.

2. In the case of a candidate who is nominated at a primary election by write-in votes, the day the board of canvassers issues its determination that the person is nominated.

3. In the case of a candidate who is nominated at a caucus, the date of the caucus.

4. In the case of any other candidate who is nominated solely by filing a declaration of candidacy, the first day of the month preceding the month which includes the last day for filing the declaration.

(b) This subsection applies until after the date of the election or after the date of the primary election if the person appears as a candidate on a primary election ballot and is not nominated at the primary election.

(2) This section does not apply to use of public funds for the costs of the following, when not done for a political purpose:

(a) Answers to communications of constituents.

(c) Actions taken by a state or local government administrative officer pursuant to a specific law, ordinance or resolution which authorizes or directs the actions to be taken.

(d) Communications not exceeding 500 pieces by members of the legislature relating solely to the subject matter of a special session or extraordinary session, made during the period between the date that the session is called or scheduled and 14 days after adjournment of the session.

(3) Except as provided in sub. (2), it is not a defense to a violation of sub. (1) that a person was not acting with a political purpose. This subsection applies irrespective of the distributor's intentions as to political office, the content of the materials, the manner of distribution, the pattern and frequency of distribution and the value of the distributed materials.

History: 1973 c. 334; 1975 c. 369; 1979 c. 328; 1983 a. 27; 1985 a. 303, 332; 1987 a. 370.

This section applies to persons elected to state office who are seeking reelection or election to a different office and to the use of public funds for political purposes. 69 Atty. Gen. 259.

11.34 Solicitation of contributions from candidates restricted. (1) No person may demand, solicit, take, invite or receive from a candidate any gift of anything of value for a religious, charitable or fraternal cause or for any organization other than a political committee or group. No candidate may make, intimate or promise such a gift.

(2) This section does not apply to payment of a regular subscription or contribution by a person to an organization of which the person is a member or to which the person may have been a regular contributor prior to the person's candidacy or to ordinary contributions at a regular church service.

History: 1973 c. 334; 1985 a. 303; 1991 a. 316; 1993 a. 213.

11.36 Political solicitation involving public officials and employees restricted. (1) No person may solicit or receive from any state officer or employee or from any officer or employee of the University of Wisconsin Hospitals and Clinics Authority any contribution or service for any political purpose while the officer or employee is engaged in his or her official duties, except that an elected state official may solicit and receive services not constituting a contribution from a state officer or employee or an officer or employee of the University of Wisconsin Hospitals and Clinics Authority with respect to a referendum only. Agreement to perform services authorized under this subsection may not be a condition of employment for any such officer or employee.

(2) No person may solicit or receive from any officer or employee of a political subdivision of this state any contribution or service for any political purpose during established hours of employment or while the officer or employee is engaged in his or her official duties.

(3) Every person who has charge or control in a building, office or room occupied for any purpose by this state, by any political subdivision thereof or by the University of Wisconsin Hospitals and Clinics Authority shall prohibit the entry of any person into that building, office or room for the purpose of making or receiving a contribution.

(4) No person may enter or remain in any building, office or room occupied for any purpose by the state, by any political subdivision thereof or by the University of Wisconsin Hospitals and Clinics Authority or send or direct a letter or other notice thereto for the purpose of requesting or collecting a contribution.

(5) In this section, "political purpose" includes an act done for the purpose of influencing the election or nomination for election of a person to national office, and "contribution" includes an act done for that purpose.

(6) This section does not apply to response by a legal custodian or subordinate of the custodian to a request to locate, reproduce or inspect a record under s. 19.35, if the request is processed in the same manner as the custodian or subordinate responds to other requests to locate, reproduce or inspect a record under s. 19.35.

History: 1973 c. 334; 1979 c. 328, 355; 1985 a. 303; 1987 a. 370; 1995 a. 27.

11.37 Travel by public officers. (1) No person may use any vehicle or aircraft owned by the state or by any local governmental unit for any trip which is exclusively for the purposes of campaigning in support of or in opposition to any candidate for national, state or local office, unless use of the vehicle or aircraft is required for purposes of security protection provided by the state or local governmental unit.

(2) No person may use any vehicle or aircraft owned by the state or by any local governmental unit for purposes which include campaigning in support of or in opposition to any candidate for national, state or local office, unless the person pays to the state or local governmental unit a fee which is comparable to the commercial market rate for the use of a similar vehicle or aircraft and for any services provided by the state or local governmental unit to operate the vehicle or aircraft. If a trip is made in part for a public purpose and in part for the purpose of campaigning, the person shall pay for the portion of the trip attributable to campaigning, but in no case less than 50% of the cost of the trip. The portion of the trip attributable to campaigning shall be determined by dividing the number of appearances made for campaign purposes by the total number of appearances. Fees payable to the state shall be prescribed by the secretary of administration and shall be deposited in the account under s. 20.855 (6) (h). Fees payable to a local governmental unit shall be prescribed by the governing body of the governmental unit.

History: 1973 c. 334; 1979 c. 221, 328, 355; 1983 a. 27 s. 2202 (57); 1985 a. 303.

11.38 Contributions and disbursements by corporations and cooperatives. (1) (a) 1. No foreign or domestic corporation, or association organized under ch. 185, may make any contribution or disbursement, directly or indirectly, either independently or through any political party, committee, group, candidate or individual for any purpose other than to promote or defeat a referendum.

2. Notwithstanding subd. 1., any such corporation or association may establish and administer a separate segregated fund and solicit contributions from individuals to the fund to be utilized by such corporation or association, for the purpose of supporting or opposing any candidate for state or local office but the corporation

CHAPTER 12

PROHIBITED ELECTION PRACTICES

12.01 Definitions.
12.02 Construction.
12.03 Election day campaigning restricted.
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Cross-reference: See definitions in s. 5.02.

12.01 Definitions. The definitions given under s. 11.01 apply to this chapter, except that a "candidate" includes candidates for national office.

History: 1973 c. 334; 1975 c. 93; 1977 c. 427; 1979 c. 89; 1983 a. 484.

12.02 Construction. In this chapter, criminal intent shall be construed in accordance with s. 939.23.

History: 1977 c. 427.

12.03 Election day campaigning restricted. (1) No election official may engage in electioneering on election day.

(2) No person may engage in electioneering during polling hours on any public property on election day within 100 feet of an entrance to a building containing a polling place. This subsection does not apply to the placement of any material on the bumper of a motor vehicle that is located on such property on election day.

(3) A municipal clerk, election inspector or law enforcement officer may remove posters or other advertising which is placed in violation of this section.

(4) In this section, "electioneering" means any activity which is intended to influence voting at an election.

History: 1973 c. 334; 1977 c. 427; 1979 c. 89; 1983 a. 484; 1993 a. 173.

Violators may not be deprived of the right to vote, although penalties may follow. Constitutional issues are discussed. 61 Atty. Gen. 441.

12.04 Communication of political messages. (1) In this section:

(a) "Election campaign period" means:

1. In the case of an election for office, the period beginning on the first day for circulation of nomination papers by candidates, or the first day on which candidates would circulate nomination papers were papers to be required, and ending on the day of the election.

2. In the case of a referendum, the period beginning on the day on which the question to be voted upon is submitted to the electorate and ending on the day on which the referendum is held.

(b) "Political message" means a message intended for a political purpose or a message which pertains to an issue of public policy of possible concern to the electorate, but does not include a message intended solely for a commercial purpose.

(c) "Residential property" means property occupied or suitable to be occupied for residential purposes and property abutting that property for which the owner or renter is responsible for the maintenance or care. If property is utilized for both residential and nonresidential purposes, "residential property" means only the portion of the property occupied or suitable to be occupied for residential purposes.

(2) Except as provided in s. 12.03 or as restricted under sub. (4), any individual may place a sign containing a political message upon residential property owned or occupied by that individual during an election campaign period.

(3) Except as provided in sub. (4), no county or municipality may regulate the size, shape, placement or content of any sign containing a political message placed upon residential property during an election campaign period.

(4) (a) A county or municipality may regulate the size, shape or placement of any sign if such regulation is necessary to ensure traffic or pedestrian safety. A county or municipality may regulate the size, shape or placement of any sign having an electrical, mechanical or audio auxiliary.

(b) In addition to regulation under par. (a), a 1st, 2nd or 3rd class city, or a town, may regulate the size, shape or placement of a sign exceeding 11 square feet in area. This paragraph does not apply to a sign which is affixed to a permanent structure and does not extend beyond the perimeter of the structure, if the sign does not obstruct a window, door, fire escape, ventilation shaft or other area which is required by an applicable building code to remain unobstructed.

(5) (a) The renter of residential property may exercise the same right as the owner to place a sign upon the property under sub. (2) in any area of the property occupied exclusively by the renter. The terms of a lease or other agreement under which residential property is occupied shall control in determining whether property is occupied exclusively by a renter.

(b) The owner of residential property may exercise the right granted under sub. (2) in any portion of the property not occupied exclusively by a renter.

(6) This section does not apply to signs prohibited from being erected under s. 84.30.

History: 1985 a. 198; 1993 a. 246.

12.05 False representations affecting elections. No person may knowingly make or publish, or cause to be made or published, a false representation pertaining to a candidate or referendum which is intended or tends to affect voting at an election.

History: 1973 c. 334; 1993 a. 175.

A violation of this section does not constitute defamation per se. Tatur v. Solsrud, 174 Wis. 2d 735, 498 N.W.2d 232 (1993).

12.07 Election restrictions on employers. (1) No person may refuse an employee the privilege of time off for voting under s. 6.76 or subject an employee to a penalty therefor.

(2) No employer may refuse to allow an employee to serve as an election official or make any threats or offer any inducements of any kind to the employee for the purpose of preventing the employee from so serving.

(3) No employer or agent of an employer may distribute to any employee printed matter containing any threat, notice or information that if a particular ticket of a political party or organization or candidate is elected or any referendum question is adopted or rejected, work in the employer's place or establishment will cease, in whole or in part, or the place or establishment will be closed, or the salaries or wages of the employees will be reduced, or other threats intended to influence the political opinions or actions of the employees.

(4) No person may, directly or indirectly, cause any person to make a contribution or provide any service or other thing of value to or for the benefit of a candidate, political party or registrant un-

der s. 11.05, with the purpose of influencing the election or nomination of a candidate to national, state or local office or the passage or defeat of a referendum by means of the denial or the threat of denial of any employment, position, work or promotion, or any compensation or other benefit of such employment, position or work, or by means of discharge, demotion or disciplinary action or the threat to impose a discharge, demotion or disciplinary action. This subsection does not apply to employment by a candidate, political party or other registrant under s. 11.05 in connection with a campaign or political party activities.

History: 1973 c. 334; 1983 a. 484; 1991 a. 316.

12.08 Denial of government benefits. No person may, directly or indirectly, cause any person to make a contribution or provide any service or other thing of value to or for the benefit of a candidate, political party or registrant under s. 11.05, with the purpose of influencing the election or nomination of a candidate to national, state or local office or the passage or defeat of a referendum by means of the denial or threat of denial of any payment or other benefit of a program established or funded in whole or in part by this state or any local governmental unit of this state, or a program which has applied for funding by this state or any local governmental unit of this state.

History: 1983 a. 484; 1985 a. 304.

12.09 Election threats. No person may personally or through an agent make use of or threaten to make use of force, violence or restraint in order to induce or compel any person to vote or refrain from voting at an election; or, by abduction, duress or any fraudulent device or contrivance, impede or prevent the free exercise of the franchise at an election; or by any act compel, induce or prevail upon an elector either to vote or refrain from voting at any election for or against a particular candidate or referendum.

History: 1973 c. 334; 1991 a. 316.

12.11 Election bribery. (1) In this section, "anything of value" includes any amount of money, or any object which has utility independent of any political message it contains and the value of which exceeds $1. The prohibitions of this section apply to the distribution of material printed at public expense and available for free distribution if such materials are accompanied by a political message.

(1m) Any person who does any of the following violates this chapter:

(a) Offers, gives, lends or promises to give or lend, or endeavors to procure, anything of value, or any office or employment or any privilege or immunity to, or for, any elector, or to or for any other person, in order to induce any elector to:

1. Go to or refrain from going to the polls.

2. Vote or refrain from voting.

3. Vote or refrain from voting for or against a particular person.

4. Vote or refrain from voting for or against a particular referendum; or on account of any elector having done any of the above.

(b) Receives, agrees or contracts to receive or accept any money, gift, loan, valuable consideration, office or employment personally or for any other person, in consideration that the person or any elector will, so act or has so acted.

(c) Advances, pays or causes to be paid any money to or for the use of any person with the intent that such money or any part thereof will be used to bribe electors at any election.

(2) This section applies to any convention or meeting held for the purpose of nominating any candidate for any election, and to the signing of any nomination paper.

(3) (a) This section does not prohibit a candidate from publicly stating his or her preference for or support of any other candidate for any office to be voted for at the same election. A candidate for an office in which the person elected is charged with the duty of participating in the election or nomination of any person as a candidate for office is not prohibited from publicly stating or pledging his or her preference for or support of any person for such office or nomination.

(b) This section does not apply to money paid or agreed to be paid for or on account of authorized legal expenses which were legitimately incurred at or concerning any election.

(c) This section does not apply where an employer agrees that all or part of election day be given to its employees as a paid holiday, provided that such policy is made uniformly applicable to all similarly situated employees.

(d) This section does not prohibit any person from using his or her own vehicle to transport electors to or from the polls without charge.

(e) This section does not apply to any promise by a candidate to reduce public expenditures or taxes.

History: 1973 c. 334; 1975 c. 93; 1983 a. 484; 1991 a. 316; 1993 a. 213.

There are constitutional limits on the state's power to prohibit candidates from making promises in the course of an election campaign. Some promises are universally acknowledged as legitimate, indeed indispensable to decisionmaking in a democracy. Brown v. Hartlage, 456 U.S. 45 (1982).

12.13 Election fraud. (1) ELECTORS. Whoever intentionally does any of the following violates this chapter:

(a) Votes at any election or meeting if that person does not have the necessary elector qualifications and residence requirements.

(b) Falsely procures registration or makes false statements to the municipal clerk, board of election commissioners or any other election official whether or not under oath.

(c) Registers as an elector in more than one place for the same election.

(d) Impersonates a registered elector or poses as another person for the purpose of voting at an election.

(e) Votes more than once in the same election.

(f) Shows his or her marked ballot to any person or places a mark upon the ballot so it is identifiable as his or her ballot.

(g) Procures an official ballot and neglects or refuses to cast or return it. This paragraph does not apply to persons who have applied for and received absentee ballots.

(h) Procures, assists or advises someone to do any of the acts prohibited by this subsection.

(2) ELECTION OFFICIALS. (a) The willful neglect or refusal by an election official to perform any of the duties prescribed under chs. 5 to 12 is a violation of this chapter.

(b) No election official may:

1. Observe how an elector has marked a ballot unless the official is requested to assist the elector; intentionally permit anyone not authorized to assist in the marking of a ballot to observe how a person is voting or has voted; or disclose to anyone how an elector voted other than as is necessary in the course of judicial proceedings.

2. Illegally issue, write, change or alter a ballot on election day.

3. Permit registration or receipt of a vote from a person who the official knows is not a legally qualified elector or who has refused after being challenged to make the oath or to properly answer the necessary questions pertaining to the requisite requirements and residence; or put into the ballot box a ballot other than the official's own or other one lawfully received.

4. Intentionally assist or cause to be made a false statement, canvass, certificate or return of the votes cast at any election.

5. Willfully alter or destroy a poll or registration list.

6. Intentionally permit or cause a voting machine, voting device or automatic tabulating equipment to fail to correctly register or record a vote cast thereon or inserted therein, or tamper with or disarrange the machine, device or equipment or any part or appliance thereof; cause or consent to the machine, device or automatic tabulating equipment being used for voting at an election with knowledge that it is out of order or is not perfectly set and adjusted so that it will correctly register or record all votes cast thereon or inserted therein; with the purpose of defrauding or deceiving any

challenge. After receiving the notice, the authority shall do one of the following:

(a) Concur with the challenge and correct the information.

(b) Deny the challenge, notify the individual or person authorized by the individual of the denial and allow the individual or person authorized by the individual to file a concise statement setting forth the reasons for the individual's disagreement with the disputed portion of the record. A state authority that denies a challenge shall also notify the individual or person authorized by the individual of the reasons for the denial.

(2) This section does not apply to any of the following records:

(a) Any record transferred to an archival depository under s. 16.61 (13).

(b) Any record pertaining to an individual if a specific state statute or federal law governs challenges to the accuracy of the record.

History: 1991 a. 269 ss. 27d, 27e, 35am, 37am, 39am.

19.37 Enforcement and penalties. (1) MANDAMUS. If an authority withholds a record or a part of a record or delays granting access to a record or part of a record after a written request for disclosure is made, the requester may pursue either, or both, of the alternatives under pars. (a) and (b).

(a) The requester may bring an action for mandamus asking a court to order release of the record. The court may permit the parties or their attorneys to have access to the requested record under restrictions or protective orders as the court deems appropriate.

(b) The requester may, in writing, request the district attorney of the county where the record is found, or request the attorney general, to bring an action for mandamus asking a court to order release of the record to the requester. The district attorney or attorney general may bring such an action.

(1m) TIME FOR COMMENCING ACTION. No action for mandamus under sub. (1) to challenge the denial of a request for access to a record or part of a record may be commenced by any committed or incarcerated person later than 90 days after the date that the request is denied by the authority having custody of the record or part of the record.

(1n) NOTICE OF CLAIM. Sections 893.80 and 893.82 do not apply to actions commenced under this section.

(2) COSTS, FEES AND DAMAGES. (a) Except as provided in this paragraph, the court shall award reasonable attorney fees, damages of not less than $100, and other actual costs to the requester if the requester prevails in whole or in substantial part in any action filed under sub. (1) relating to access to a record or part of a record under s. 19.35 (1) (a). If the requester is a committed or incarcerated person, the requester is not entitled to any minimum amount of damages, but the court may award damages. Costs and fees shall be paid by the authority affected or the unit of government of which it is a part, or by the unit of government by which the legal custodian under s. 19.33 is employed and may not become a personal liability of any public official.

(b) In any action filed under sub. (1) relating to access to a record or part of a record under s. 19.35 (1) (am), if the court finds that the authority acted in a willful or intentional manner, the court shall award the individual actual damages sustained by the individual as a consequence of the failure.

(3) PUNITIVE DAMAGES. If a court finds that an authority or legal custodian under s. 19.33 has arbitrarily and capriciously denied or delayed response to a request or charged excessive fees, the court may award punitive damages to the requester.

(4) PENALTY. Any authority which or legal custodian under s. 19.33 who arbitrarily and capriciously denies or delays response to a request or charges excessive fees may be required to forfeit not more than $1,000. Forfeitures under this section shall be enforced by action on behalf of the state by the attorney general or by the district attorney of any county where a violation occurs. In actions brought by the attorney general, the court shall award any forfeiture recovered together with reasonable costs to the state; and in actions brought by the district attorney, the court shall award any forfeiture recovered together with reasonable costs to the county.

History: 1981 c. 335, 391; 1991 a. 269 s. 43d; 1995 a. 158; 1997 a. 94.

A party seeking fees under sub. (2) must show that the prosecution of an action could reasonably be regarded as necessary to obtain the information and that a "causal nexus" exists between that action and the agency's surrender of the information. State ex rel. Vaughan v. Faust, 143 Wis. 2d 868, 422 N.W.2d 898 (Ct. App. 1988).

If an agency exercises due diligence but is unable to respond timely to a records request, the plaintiff must show that a mandamus action was necessary to secure the records release to qualify for award of fees and costs under sub. (2). Racine Education Association. v. Racine Board of Education, 145 Wis. 2d 518, 427 N.W.2d 414 (Ct. App. 1988).

Assuming sub. (1) (a) applies before mandamus is issued, the trial court retains discretion to refuse counsel's participation in an *in camera* inspection. Milwaukee Journal v. Call, 153 Wis. 2d 313, 450 N.W.2d 515 (Ct. App. 1989).

If the trial court has an incomplete knowledge of the contents of the public records sought, it must conduct an *in camera* inspection to determine what may be disclosed following a custodian's refusal. State ex rel. Morke v. Donnelly, 155 Wis. 2d 521, 455 N.W.2d 893 (1990).

A *pro se* litigant is not entitled to attorney fees. State ex rel. Young v. Shaw, 165 Wis. 2d 276, 477 N.W.2d 340 (Ct. App. 1991).

A favorable judgment or order is not a necessary condition precedent for finding that a party prevailed against an agency under sub. (2). A causal nexus must be shown between the prosecution of the mandamus action and the release of the requested information. Eau Claire Press Co. v. Gordon, 176 Wis. 2d 154, 499 N.W.2d 918 (Ct. App. 1993).

Actions brought under the open meetings and open records laws are exempt from the notice provisions of s. 893.80 (1). Auchinleck v. Town of LaGrange, 200 Wis. 2d 585, 547 N.W.2d 587 (1996).

An inmate's right to mandamus under this section is subject to s. 801.02 (7), which requires exhaustion of administrative remedies before an action may be commenced. Moore v. Stahowiak, 212 Wis. 2d 744, 569 N.W.2d 711 (Ct. App. 1997).

Actual damages are the liability of the agency. Punitive damages and forfeitures can be the liability of either the agency or the legal custodian, or both. Section 895.46 (1) (a) probably provides indemnification for punitive damages assessed against a custodian, but not for forfeitures. 72 Atty. Gen. 99.

19.39 Interpretation by attorney general. Any person may request advice from the attorney general as to the applicability of this subchapter under any circumstances. The attorney general may respond to such a request.

History: 1981 c. 335.

SUBCHAPTER III

CODE OF ETHICS FOR PUBLIC OFFICIALS AND EMPLOYEES

19.41 Declaration of policy. (1) It is declared that high moral and ethical standards among state public officials and state employees are essential to the conduct of free government; that the legislature believes that a code of ethics for the guidance of state public officials and state employees will help them avoid conflicts between their personal interests and their public responsibilities, will improve standards of public service and will promote and strengthen the faith and confidence of the people of this state in their state public officials and state employees.

(2) It is the intent of the legislature that in its operations the board shall protect to the fullest extent possible the rights of individuals affected.

History: 1973 c. 90; Stats. 1973 s. 11.01; 1973 c. 334 s. 33; Stats. 1973 s. 19.41; 1977 c. 277.

19.42 Definitions. In this subchapter:

(1) "Anything of value" means any money or property, favor, service, payment, advance, forbearance, loan, or promise of future employment, but does not include compensation and expenses paid by the state, fees and expenses which are permitted and reported under s. 19.56, political contributions which are reported under ch. 11, or hospitality extended for a purpose unrelated to state business by a person other than an organization.

(2) "Associated", when used with reference to an organization, includes any organization in which an individual or a member of his or her immediate family is a director, officer or trustee, or owns or controls, directly or indirectly, and severally or in the aggregate, at least 10% of the outstanding equity or of which an

individual or a member of his or her immediate family is an authorized representative or agent.

(3) "Board" means the ethics board.

(3m) "Candidate," except as otherwise provided, has the meaning given in s. 11.01 (1).

NOTE: Sub. (3m) is created eff. 7–1–03 by 2001 Wis. Act 109.

(4) "Candidate for state public office" means any individual who files nomination papers and a declaration of candidacy under s. 8.21 or who is nominated at a caucus under s. 8.05 (1) for the purpose of appearing on the ballot for election as a state public official or any individual who is nominated for the purpose of appearing on the ballot for election as a state public official through the write-in process or by appointment to fill a vacancy in nomination and who files a declaration of candidacy under s. 8.21.

(4g) "Clearly identified," when used in reference to a communication containing a reference to a person, means one of the following:

(a) The person's name appears.

(b) A photograph or drawing of the person appears.

(c) The identity of the person is apparent by unambiguous reference.

NOTE: Sub. (4g) is created eff. 7–1–03 by 2001 Wis. Act 109.

(4r) "Communication" has the meaning given in s. 11.01 (4m).

NOTE: Sub. (4r) is created eff. 7–1–03 by 2001 Wis. Act 109.

(5) "Department" means the legislature, the University of Wisconsin System, any authority or public corporation created and regulated by an act of the legislature and any office, department, independent agency or legislative service agency created under ch. 13, 14 or 15, any technical college district or any constitutional office other than a judicial office. In the case of a district attorney, "department" means the department of administration unless the context otherwise requires.

(5m) "Elective office" means an office regularly filled by vote of the people.

(6) "Gift" means the payment or receipt of anything of value without valuable consideration.

(7) "Immediate family" means:

(a) An individual's spouse; and

(b) An individual's relative by marriage, lineal descent or adoption who receives, directly or indirectly, more than one–half of his or her support from the individual or from whom the individual receives, directly or indirectly, more than one–half of his or her support.

(7m) "Income" has the meaning given under section 61 of the internal revenue code.

(7s) "Internal revenue code" has the meanings given under s. 71.01 (6).

(7u) "Local governmental unit" means a political subdivision of this state, a special purpose district in this state, an instrumentality or corporation of such a political subdivision or special purpose district, a combination or subunit of any of the foregoing or an instrumentality of the state and any of the foregoing.

(7w) "Local public office" means any of the following offices, except an office specified in sub. (13):

(a) An elective office of a local governmental unit.

(b) A county administrator or administrative coordinator or a city or village manager.

(c) An appointive office or position of a local governmental unit in which an individual serves for a specified term, except a position limited to the exercise of ministerial action or a position filled by an independent contractor.

(cm) The position of member of the board of directors of a local exposition district under subch. II of ch. 229 not serving for a specified term.

(d) An appointive office or position of a local government which is filled by the governing body of the local government or the executive or administrative head of the local government and in which the incumbent serves at the pleasure of the appointing authority, except a clerical position, a position limited to the exercise of ministerial action or a position filled by an independent contractor.

(7x) "Local public official" means an individual holding a local public office.

(8) "Ministerial action" means an action that an individual performs in a given state of facts in a prescribed manner in obedience to the mandate of legal authority, without regard to the exercise of the individual's own judgment as to the propriety of the action being taken.

(9) "Nominee" means any individual who is nominated by the governor for appointment to a state public office and whose nomination requires the advice and consent of the senate.

(10) "Official required to file" means:

(a) A member of the elections board.

(b) A member of a technical college district board or district director of a technical college, or any individual occupying the position of assistant, associate or deputy district director of a technical college.

(c) A state public official identified under s. 20.923 except an official holding a state public office identified under s. 20.923 (6) (h).

(d) A state public official whose appointment to state public office requires the advice and consent of the senate, except a member of the board of directors of the Bradley Center Sports and Entertainment Corporation created under ch. 232.

(e) An individual appointed by the governor or the state superintendent of public instruction pursuant to s. 17.20 (2) other than a trustee of any private higher educational institution receiving state appropriations.

(f) An auditor for the legislative audit bureau.

(g) The chief clerk and sergeant at arms of each house of the legislature.

(h) The members and employees of the Wisconsin Housing and Economic Development Authority, except clerical employees.

(i) A municipal judge.

(j) A member or the executive director of the judicial commission.

(k) A division administrator of an office created under ch. 14 or a department or independent agency created or continued under ch. 15.

(L) The executive director, executive assistant to the executive director, internal auditor, chief investment officer, chief financial officer, chief legal counsel, chief risk officer and investment directors of the investment board.

(m) The executive director, members and employees of the World Dairy Center Authority, except clerical employees.

(n) The chief executive officer and members of the board of directors of the University of Wisconsin Hospitals and Clinics Authority.

(o) The chief executive officer and members of the board of directors of the Fox River Navigational System Authority.

(p) A member, the executive director, or the deputy director of the sentencing commission.

(11) "Organization" means any corporation, partnership, proprietorship, firm, enterprise, franchise, association, trust or other legal entity other than an individual or body politic.

(12) "Security" has the meaning given under s. 551.02 (13), except that the term does not include a certificate of deposit or a deposit in a savings and loan association, savings bank, credit union or similar association organized under the laws of any state.

(13) "State public office" means:

(a) All positions to which individuals are regularly appointed by the governor, except the position of trustee of any private higher educational institution receiving state appropriations and the

is in the public interest. The board shall set forth in writing as a matter of public record its reason for the extension or waiver.

History: 1973 c. 90; Stats. 1973 s. 11.03; 1973 c. 333; 1973 c. 334 s. 33; Stats. 1973 s. 19.43; 1977 c. 223, 277; 1979 c. 221; 1983 a. 166 ss. 5, 16; 1983 a. 484, 538; 1985 a. 29, 304; 1987 a. 399; 1989 a. 31; 1993 a. 266.

Cross Reference: See also chs. Eth 2 and 5, Wis. adm. code.

The extent of confidentiality of investment board nominees' statements of economic interests rests in the sound discretion of the senate committee to which the nomination is referred under sub. (3). 68 Atty. Gen. 378.

The possible conflict between requirements of financial disclosure and confidentiality requirements for lawyers is discussed. 68 Atty. Gen. 411.

Sub. (8) does not authorize the ethics board to extend the date by which a candidate must file a statement of economic interest and cannot waive the filing requirement. 81 Atty. Gen. 85.

19.44 Form of statement. (1) Every statement of economic interests which is required to be filed under this subchapter shall be in the form prescribed by the board, and shall contain the following information:

(a) The identity of every organization with which the individual required to file is associated and the nature of his or her association with the organization, except that no identification need be made of:

1. Any organization which is described in section 170 (c) of the internal revenue code.

2. Any organization which is organized and operated primarily to influence voting at an election including support for or opposition to an individual's present or future candidacy or to a present or future referendum.

3. Any nonprofit organization which is formed exclusively for social purposes and any nonprofit community service organization.

4. A trust.

(b) The identity of every organization or body politic in which the individual who is required to file or that individual's immediate family, severally or in the aggregate, owns, directly or indirectly, securities having a value of $5,000 or more, the identity of such securities and their approximate value, except that no identification need be made of a security or issuer of a security when it is issued by any organization not doing business in this state or by any government or instrumentality or agency thereof, or an authority or public corporation created and regulated by an act of such government, other than the state of Wisconsin, its instrumentalities, agencies and political subdivisions, or authorities or public corporations created and regulated by an act of the legislature.

(c) The name of any creditor to whom the individual who is required to file or such individual's immediate family, severally or in the aggregate, owes $5,000 or more and the approximate amount owed.

(d) The real property located in this state in which the individual who is required to file or such individual's immediate family holds an interest, other than the principal residence of the individual or his or her immediate family, and the nature of the interest held. An individual's interest in real property does not include a proportional share of interests in real property if the individual's proportional share is less than 10% of the outstanding shares or is less than an equity value of $5,000.

(e) The identity of each payer from which the individual who is required to file or a member of his or her immediate family received $1,000 or more of his or her income for the preceding taxable year, except that if the individual who is required to file identifies the general nature of the business in which he or she or his or her immediate family is engaged, then no identification need be made of a decedent's estate or an individual, not acting as a representative of an organization, unless the individual is a lobbyist as defined in s. 13.62. In addition, no identification need be made of payers from which only dividends or interest, anything of pecuniary value reported under s. 19.56 or reportable under s. 19.57, or political contributions reported under ch. 11 were received.

(f) If the individual who is required to file or a member of his or her immediate family received $1,000 or more of his or her income for the preceding taxable year from a partnership, limited liability company, corporation electing to be taxed as a partnership under subchapter S of the internal revenue code or service corporation under ss. 180.1901 to 180.1921 in which the individual or a member of his or her immediate family, severally or in the aggregate, has a 10% or greater interest, the identity of each payer from which the organization received $1,000 or more of its income for its preceding taxable year, except that if the individual who is required to file identifies the general nature of the business in which he or she or his or her immediate family is engaged then no identification need be made of a decedent's estate or an individual, not acting as a representative of an organization, unless the individual is a lobbyist as defined in s. 13.62. In addition, no identification need be made of payers from which dividends or interest are received.

(g) The identity of each person from which the individual who is required to file received, directly or indirectly, any gift or gifts having an aggregate value of more than $50 within the taxable year preceding the time of filing, except that the source of a gift need not be identified if the donation is permitted under s. 19.56 (3) (e), (em) or (f) or if the donor is the donee's parent, grandparent, child, grandchild, brother, sister, parent–in–law, grandparent–in–law, brother–in–law, sister–in–law, uncle, aunt, niece, nephew, spouse, fiance or fiancee.

(h) Lodging, transportation, money or other things of pecuniary value reportable under s. 19.56 (2).

(2) Whenever a dollar amount is required to be reported pursuant to this section, it is sufficient to report whether the amount is not more than $50,000, or more than $50,000.

(3) (a) An individual is the owner of a trust and the trust's assets and obligations if he or she is the creator of the trust and has the power to revoke the trust without obtaining the consent of all of the beneficiaries of the trust.

(b) An individual who is eligible to receive income or other beneficial use of the principal of a trust is the owner of a proportional share of the principal in the proportion that the individual's beneficial interest in the trust bears to the total beneficial interests vested in all beneficiaries of the trust. A vested beneficial interest in a trust includes a vested reverter interest.

(4) Information which is required by this section shall be provided on the basis of the best knowledge, information and belief of the individual filing the statement.

History: 1973 c. 90; Stats. 1973 s. 11.04; 1973 c. 334 ss. 33, 57, 58; Stats. 1973 s. 19.44; 1977 c. 277; 1979 c. 110 s. 60 (4), (11); 1983 a. 61; 1983 a. 166 ss. 6, 16; 1983 a. 538; 1989 a. 303, 338; 1991 a. 39; 1993 a. 112, 490; 1995 a. 27.

Cross Reference: See also chs. Eth 2 and 5, Wis. adm. code.

Law Revision Committee Note, 1983: Under the ethics code, each state public official and candidate for state public office must file a statement of economic interests with the ethics board listing the businesses, organizations and other legal entities from which they and their families received substantial income during the preceding taxable year. However, the ethics code does not require identification of individual persons from whom the income is received. This bill provides that if the individual filing the statement of economic interests identifies the general nature of the business in which the individual or a member of his or her family is engaged, then no identification need be made of the estate of any deceased individual from which income was received. This bill makes it unnecessary to identify a decedent's estate which was indebted to a state public official or candidate for state public office, and makes it unnecessary to identify decedents' estates which are represented by lawyer–public officials.

A beneficiary of a future interest in a trust must identify the securities held by the trust if the individual's interest in the securities is valued at $5,000 or more. 80 Atty. Gen. 183.

19.45 Standards of conduct; state public officials. (1) The legislature hereby reaffirms that a state public official holds his or her position as a public trust, and any effort to realize substantial personal gain through official conduct is a violation of that trust. This subchapter does not prevent any state public official from accepting other employment or following any pursuit which in no way interferes with the full and faithful discharge of his or her duties to this state. The legislature further recognizes that in a representative democracy, the representatives are drawn from society and, therefore, cannot and should not be without all personal and economic interest in the decisions and policies of government; that citizens who serve as state public officials retain their rights as citizens to interests of a personal or economic na-

ture; that standards of ethical conduct for state public officials need to distinguish between those minor and inconsequential conflicts that are unavoidable in a free society, and those conflicts which are substantial and material; and that state public officials may need to engage in employment, professional or business activities, other than official duties, in order to support themselves or their families and to maintain a continuity of professional or business activity, or may need to maintain investments, which activities or investments do not conflict with the specific provisions of this subchapter.

(2) No state public official may use his or her public position or office to obtain financial gain or anything of substantial value for the private benefit of himself or herself or his or her immediate family, or for an organization with which he or she is associated. This subsection does not prohibit a state public official from using the title or prestige of his or her office to obtain contributions permitted and reported as required by ch. 11.

(3) No person may offer or give to a state public official, directly or indirectly, and no state public official may solicit or accept from any person, directly or indirectly, anything of value if it could reasonably be expected to influence the state public official's vote, official actions or judgment, or could reasonably be considered as a reward for any official action or inaction on the part of the state public official. This subsection does not prohibit a state public official from engaging in outside employment.

(3m) No state public official may accept or retain any transportation, lodging, meals, food or beverage, or reimbursement therefor, except in accordance with s. 19.56 (3).

(4) No state public official may intentionally use or disclose information gained in the course of or by reason of his or her official position or activities in any way that could result in the receipt of anything of value for himself or herself, for his or her immediate family, or for any other person, if the information has not been communicated to the public or is not public information.

(5) No state public official may use or attempt to use the public position held by the public official to influence or gain unlawful benefits, advantages or privileges personally or for others.

(6) No state public official, member of a state public official's immediate family, nor any organization with which the state public official or a member of the official's immediate family owns or controls at least 10% of the outstanding equity, voting rights, or outstanding indebtedness may enter into any contract or lease involving a payment or payments of more than $3,000 within a 12–month period, in whole or in part derived from state funds unless the state public official has first made written disclosure of the nature and extent of such relationship or interest to the board and to the department acting for the state in regard to such contract or lease. Any contract or lease entered into in violation of this subsection may be voided by the state in an action commenced within 3 years of the date on which the ethics board, or the department or officer acting for the state in regard to the allocation of state funds from which such payment is derived, knew or should have known that a violation of this subsection had occurred. This subsection does not affect the application of s. 946.13.

(7) (a) No state public official who is identified in s. 20.923 may represent a person for compensation before a department or any employee thereof, except:

1. In a contested case which involves a party other than the state with interests adverse to those represented by the state public official; or

2. At an open hearing at which a stenographic or other record is maintained; or

3. In a matter that involves only ministerial action by the department; or

4. In a matter before the department of revenue or tax appeals commission that involves the representation of a client in connection with a tax matter.

(b) This subsection does not apply to representation by a state public official acting in his or her official capacity.

(8) Except in the case where the state public office formerly held was that of legislator, legislative employee under s. 20.923 (6) (bp), (f), (g) or (h), chief clerk of a house of the legislature, sergeant at arms of a house of the legislature or a permanent employee occupying the position of auditor for the legislative audit bureau:

(a) No former state public official, for 12 months following the date on which he or she ceases to be a state public official, may, for compensation, on behalf of any person other than a governmental entity, make any formal or informal appearance before, or negotiate with, any officer or employee of the department with which he or she was associated as a state public official within 12 months prior to the date on which he or she ceased to be a state public official.

(b) No former state public official, for 12 months following the date on which he or she ceases to be a state public official, may, for compensation, on behalf of any person other than a governmental entity, make any formal or informal appearance before, or negotiate with, any officer or employee of a department in connection with any judicial or quasi–judicial proceeding, application, contract, claim, or charge which might give rise to a judicial or quasi–judicial proceeding which was under the former official's responsibility as a state public official within 12 months prior to the date on which he or she ceased to be a state public official.

(c) No former state public official may, for compensation, act on behalf of any party other than the state in connection with any judicial or quasi–judicial proceeding, application, contract, claim, or charge which might give rise to a judicial or quasi–judicial proceeding in which the former official participated personally and substantially as a state public official.

(9) The attorney general may not engage in the private practice of law during the period in which he or she holds that office. No justice of the supreme court and no judge of any court of record may engage in the private practice of law during the period in which he or she holds that office. No full–time district attorney may engage in the private practice of law during the period in which he or she holds that office, except as authorized in s. 978.06 (5).

(10) This section does not prohibit a legislator from making inquiries for information on behalf of a person or from representing a person before a department if he or she receives no compensation therefor beyond the salary and other compensation or reimbursement to which the legislator is entitled by law, except as authorized under sub. (7).

(11) The legislature recognizes that all state public officials and employees and all employees of the University of Wisconsin Hospitals and Clinics Authority should be guided by a code of ethics and thus:

(a) The administrator of the division of merit recruitment and selection in the department of employment relations shall, with the board's advice, promulgate rules to implement a code of ethics for classified and unclassified state employees except state public officials subject to this subchapter, unclassified personnel in the University of Wisconsin System and officers and employees of the judicial branch.

(b) The board of regents of the University of Wisconsin System shall establish a code of ethics for unclassified personnel in that system who are not subject to this subchapter.

(c) The supreme court shall promulgate a code of judicial ethics for officers and employees of the judiciary and candidates for judicial office which shall include financial disclosure requirements. All justices and judges shall, in addition to complying with this subchapter, adhere to the code of judicial ethics.

(d) The board of directors of the University of Wisconsin Hospitals and Clinics Authority shall establish a code of ethics for employees of the authority who are not state public officials.

(12) No agency, as defined in s. 16.52 (7), or officer or employee thereof may present any request, or knowingly utilize any interests outside the agency to present any request, to either house

of the legislature or any member or committee thereof, for appropriations which exceed the amount requested by the agency in the agency's most recent request submitted under s. 16.42.

(13) No state public official holding an elective office may, directly or by means of an agent, give, or offer or promise to give, or withhold, or offer or promise to withhold, his or her vote or influence, or promise to take or refrain from taking official action with respect to any proposed or pending matter in consideration of, or upon condition that, any other person make or refrain from making a political contribution, or provide or refrain from providing any service or other thing of value, to or for the benefit of a candidate, a political party, any other person who is subject to a registration requirement under s. 11.05, or any person making a communication that contains a reference to a clearly identified state public official holding an elective office or to a candidate for state public office.

NOTE: Sub. (13) is created eff. 7-1-03 by 2001 Wis. Act 109.

History: 1973 c. 90; Stats. 1973 s. 11.05; 1973 c. 334 ss. 33, 57; Stats. 1973 s. 19.45; 1977 c. 29; 1977 c. 196 s. 130 (2); 1977 c. 223, 277; 1977 c. 418 s. 923 (14); 1977 c. 419, 447; 1979 c. 120; 1983 a. 27 ss. 112, 2200 (15); 1983 a. 166 ss. 7, 16; 1985 a. 332 s. 251 (1); 1987 a. 365; 1989 a. 31, 338; 1991 a. 39, 316; 1995 a. 27; 1997 a. 27; 2001 a. 109.

Cross Reference: See also s. ER-MRS 24.01, Wis. adm. code.

A county board may provide for a penalty in the nature of a forfeiture for a violation of a code of ethics ordinance but may not bar violators from running for office. A violation is not a neglect of duties under s. 59.10 [now 59.15] or an *ipso facto* cause for removal under s. 17.09 (1). 66 Atty. Gen. 148. See also 67 Atty. Gen. 164.

The ethics law does not prohibit a state public official from purchasing items and services that are available to the official because he or she holds public office. If the opportunity to purchase the item or service itself has substantial value, the purchase of the item or service is prohibited. 80 Atty. Gen. 201.

Sub. (12) is an unconstitutional infringement on free speech. Barnett v. State Ethics Board, 817 F. Supp 67 (1993).

19.451 Discounts at certain stadiums. No person serving in a national, state or local office, as defined in s. 5.02, may accept any discount on the price of admission or parking charged to members of the general public, including any discount on the use of a sky box or private luxury box, at a stadium that is exempt from general property taxes under s. 70.11 (36).

History: 1991 a. 37.

19.46 Conflict of interest prohibited; exception. **(1)** Except in accordance with the board's advice under sub. (2) and except as otherwise provided in sub. (3), no state public official may:

(a) Take any official action substantially affecting a matter in which the official, a member of his or her immediate family, or an organization with which the official is associated has a substantial financial interest.

(b) Use his or her office or position in a way that produces or assists in the production of a substantial benefit, direct or indirect, for the official, one or more members of the official's immediate family either separately or together, or an organization with which the official is associated.

(2) Any individual, either personally or on behalf of an organization or governmental body, may request of the board an advisory opinion regarding the propriety of any matter to which the person is or may become a party; and any appointing officer, with the consent of a prospective appointee, may request of the board an advisory opinion regarding the propriety of any matter to which the prospective appointee is or may become a party. The board shall review a request for an advisory opinion and may advise the person making the request. Advisory opinions and requests therefor shall be in writing. The board's deliberations and actions upon such requests shall be in meetings not open to the public. It is prima facie evidence of intent to comply with this subchapter or subch. III of ch. 13 when a person refers a matter to the board and abides by the board's advisory opinion, if the material facts are as stated in the opinion request. The board may authorize the executive director to act in its stead in instances where delay is of substantial inconvenience or detriment to the requesting party. No member or employee of the board may make public the identity of the individual requesting an advisory opinion or of individuals or organizations mentioned in the opinion.

(3) This section does not prohibit a state public official from taking any action concerning the lawful payment of salaries or employee benefits or reimbursement of actual and necessary expenses, or prohibit a state public official from taking official action with respect to any proposal to modify state law or the state administrative code.

History: 1973 c. 90; Stats. 1973 s. 11.06; 1973 c. 334 ss. 33, 57, 58; Stats. 1973 s. 19.46; 1975 c. 422; 1977 c. 223, 277, 449; 1983 a. 166; 1985 a. 29; 1989 a. 338.

19.47 Operation. **(1)** The office of the board shall be in Madison, but the board may, after proper public notice and in compliance with subch. V, meet or exercise any or all of its powers at any other place in this state.

(2) The board shall appoint an executive director outside the classified service to serve at the pleasure of the board. The executive director shall appoint such other personnel as he or she requires to carry out the duties of the board. The executive director shall perform such duties as the board assigns to him or her in the administration of this subchapter and subch. III of ch. 13.

(3) All members and employees of the board shall file statements of economic interests with the board.

(4) Any action by the board, except an action relating to procedure of the board, requires the affirmative vote of 4 of its members.

(5) No later than September 1 of each year, the board shall submit a report concerning its actions in the preceding fiscal year to the governor and the chief clerk of each house of the legislature, for distribution to the legislature under s. 13.172 (2). Such report shall contain the names and duties of all individuals employed by the board and a summary of its determinations and advisory opinions. The board shall make sufficient alterations in the summaries to prevent disclosing the identities of individuals or organizations involved in the decisions or opinions. The board shall make such further reports on the matters within its jurisdiction and such recommendations for further legislation as it deems desirable.

(6) The joint committee on legislative organization shall be advisory to the board on all matters relating to operation of the board.

History: 1973 c. 90; Stats. 1973 s. 11.07; 1973 c. 334 ss. 33, 57, Stats. 1973 s. 19.47; 1975 c. 426 s. 3; 1977 c. 26, 277; 1983 a. 27, 166, 378; 1987 a. 186; 1989 a. 338; 1991 a. 39, 189.

19.48 Duties of the board. The board shall:

(1) Promulgate rules necessary to carry out this subchapter and subch. III of ch. 13. The board shall give prompt notice of the contents of its rules to state public officials who will be affected thereby.

(2) Prescribe and make available forms for use under this subchapter and subch. III of ch. 13, including the forms specified in s. 13.685 (1).

(3) Accept and file any information related to the purposes of this subchapter or subch. III of ch. 13 which is voluntarily supplied by any person in addition to the information required by this subchapter.

(4) Preserve the statements of economic interests filed with it for a period of 6 years from the date of receipt in such form, including microfilming, optical imaging or electronic formatting, as will facilitate document retention, except that:

(a) Upon the expiration of 3 years after an individual ceases to be a state public official the board shall, unless the former state public official otherwise requests, destroy any statement of economic interests filed by him or her and any copies thereof in its possession.

(b) Upon the expiration of 3 years after any election at which a candidate for state public office was not elected, the board shall destroy any statements of economic interests filed by him or her as a candidate for state public office and any copies thereof in the board's possession, unless the individual continues to hold anoth-

position entitling him to continued civil service protections after the reclassification. Bahr v. State Investment Bd. 186 Wis. 2d 379, 521 N.W.2d 152 (Ct. App. 1994).

Sub. (1) provides a permanent civil service employee with a property interest in employment requiring the the appointing authority to provide notice to the employee prior to any disciplinary action. The employee is entitled to a hearing to address the employer's reasons for any disciplinary action. An employer at a hearing cannot not introduce evidence of subsequent misconduct without adequate notice and hearing. Board of Regents of the University of Wisconsin System, v. Wisconsin Personnel Commission, 2002 WI 79, 254 Wis. 2d 148, 646 N.W.2d 759.

230.35 State office hours; standard workweek; leaves of absence; holidays. (1) (a) Except as provided in subs. (1m), (1r), and (1s), appointing authorities shall grant to each person in their employ, except limited–term employees, based on accumulated continuous state service, annual leave of absence without loss of pay at the rate of:

1. Eighty hours each year for a full year of service during the first 5 years of service;

2. One hundred twenty hours each year for a full year of service during the next 5 years of service;

2m. One hundred thirty–six hours each year for a full year of service during the next 5 years of service;

3. One hundred sixty hours each year for a full year of service during the next 5 years of service;

3m. One hundred seventy–six hours each year for a full year of service during the next 5 years of service;

4. Two hundred hours each year for a full year of service after 25 years of service.

(b) An employee, with the approval of his or her appointing authority, may anticipate the annual leave which he or she could earn during the current calendar year except that no employee shall be eligible to take annual leave until he or she has completed the first 6 months of a probationary period for an original appointment.

(c) When the rate of annual leave changes during the 5th, 10th, 15th, 20th or 25th calendar year, the annual leave for that year shall be prorated.

(d) Annual leaves of absence shall not be cumulative except under sub. (1p) and except that unused annual leave shall, subject to the rules of the secretary, be used in the year following the one in which it was earned, but no employee shall lose any unused annual leave because the employee's work responsibilities prevented the usage of the unused annual leave during the first 6 months of the year following the year in which it was earned.

(e) Permanent classified employees, permanent part–time employees and seasonal employees with permanent seasonal status in class who are regularly employed for less than 12 months out of a year shall be granted proportional annual leave consistent with par. (a). These employees, with the approval of their appointing authority, may anticipate the vacation which they will earn during their current period of employment.

(f) An employee under this subsection earns annual leave any time he or she is on temporary layoff for a period not to exceed 20 working days.

(g) The continuous service of an employee eligible for annual leave shall not be considered interrupted if the employee either:

1. Was on an approved leave of absence, including but not limited to military leave, leave to serve in the unclassified service, leave to participate in providing specialized disaster relief services, leave for absence due to injury or illness arising out of state employment and covered by ch. 102; or

2. Left the service through resignation or layoff and is reemployed or recalled within 5 years.

(gm) Each employee of the state on October 17, 1971 shall be granted credit towards accumulated continuous service for all service in Wisconsin as a national guard technician which has not been credited under any other provision of this section.

(h) The length of time between an employee's resignation and reemployment under par. (g) 2. shall not be counted in computing years of continuous service under this subsection. Employees subject to par. (e) shall be deemed to have completed one full year of service for each such seasonal, sessional or other part–time annual period of service in computing years of continuous service under this subsection.

(j) The appointing authority shall respect the wishes of the eligible employees as to the time of taking their annual leave insofar as the needs of the service will permit.

(m) Payment for any unused authorized leave to which an employee is entitled upon termination, shall be made in a separate and distinct amount.

(1m) (a) Employees appointed to any of the following positions shall be entitled to annual leave of absence at the rate provided under par. (bt):

1. A career executive position under the program established under s. 230.24.

2. A position designated in s. 19.42 (10) (L) or 20.923 (4), (7), (8), and (9).

3. A position authorized under s. 230.08 (2) (e).

4. A position designated as an attorney position in which the employee is employed and acts as an attorney, unless the attorney position is a limited term appointment under s. 230.26.

5. A position held by an employee of the state fair park board who was employed on October 29, 1999, in a career executive position under the program established under s. 230.24.

(bt) An employee appointed to a position listed under par. (a) shall be entitled to annual leave of absence without loss of pay based upon accumulated continuous state service at the rate of:

1. 120 hours each year for a full year of service during the first 5 years of service;

2. 160 hours each year for a full year of service during the next 5 years of service;

3. 176 hours each year for a full year of service during the next 5 years of service;

4. 200 hours each year for a full year of service during the next 5 years of service;

5. 216 hours each year for a full year of service after 20 years of service.

(e) Employees who previously were covered under sub. (1) (a), or other statutory provision regarding annual leave, who become subject to this subsection shall have their present continuous service credits for annual leave purposes applied to the career executive schedule at the appropriate rate. In no case shall the employee receive a reduction in annual leave hours earned by such change in schedules.

(eb) An employee under this subsection earns annual leave any time he or she is on temporary layoff for a period not to exceed 20 working days.

(f) The continuous service of an employee eligible for annual leave under this subsection shall not be considered interrupted if the employee was on an approved leave of absence to participate in providing specialized disaster relief services or if the employee leaves the service and is reemployed by the state in another position covered under this subsection. If reemployed in a position not covered under this subsection the employee shall be required to meet the continuous service requirements of sub. (1) (g). This paragraph applies to all persons who are employees covered under this subsection on or after July 1, 1973.

(1p) (a) Employees at the 160–hour or 176–hour rate under sub. (1) or (1m) may, in the year earned, elect to receive not more than 40 of those hours of earned annual leave as credit for termination leave or as accumulated sabbatical leave.

(b) Employees at the 200–hour or 216–hour rate under sub. (1) or (1m) may, in the year earned, elect to receive not more than 80 of those hours of earned annual leave among one or more of these options:

1. Not to exceed 40 hours in cash;

3. As credit for termination leave;

d. The employee has permanent status, if the employee's position is included in the classified service.

e. The leave of absence conforms with any rules of the secretary regarding leaves of absence to provide specialized disaster relief services.

2m. The governor may authorize appointing authorities to grant a leave of absence to any employee who satisfies the conditions listed in subd. 2. b. to e. to allow that employee to provide specialized disaster relief services in connection with a particular disaster that occurred outside this state. The governor may specify a disaster under this subdivision at any time after the disaster occurs.

3. A leave of absence granted under subd. 2. or 2m. may not exceed 30 workdays each year.

4. An employee who is granted a leave of absence under subd. 2. or 2m. shall receive his or her base state pay without interruption during the leave of absence. For purposes of determining seniority, pay or pay advancement and performance awards, the service of the employee shall be considered uninterrupted by a leave of absence granted under subd. 2. or 2m.

5. The secretary may promulgate any rules necessary to implement this paragraph.

6. For employees who are included in a collective bargaining unit for which a representative is recognized or certified under subch. V of ch. 111, this paragraph shall apply unless otherwise provided in a collective bargaining agreement.

(4) (a) Except as otherwise provided in sub. (5) (c), the office of the agencies of state government shall be kept open on all days of the year except Saturdays, Sundays and the following holidays:

1. January 1.

1m. The 3rd Monday in January, which shall be the day of celebration for January 15.

3. The last Monday in May, which shall be the day of celebration for May 30.

4. July 4.

5. The first Monday in September.

6. The 4th Thursday in November.

7. December 24.

8. December 25.

9. December 31.

10. The day following if January 1, July 4 or December 25 falls on Sunday.

(b) Compensatory time off or payment, either of which shall be at the rate of time and one–half, shall be granted to state employees for all work performed on the holidays enumerated in par. (a) 1. to 9.

(c) All employees except limited term employees shall receive 9 paid holidays annually in addition to any other authorized paid leave, the time to be at the discretion of the appointing authorities.

(d) In addition to the holidays granted under par. (c), all employees except limited term employees shall earn 3.5 paid personal holidays each calendar year. Eligibility to take the personal holidays during the year earned is subject to the following:

1. Employees serving the first 6 months of a probationary period for an original appointment or as a trainee may anticipate the personal holidays earned during each year and be eligible to take the personal holidays during the probationary period, subject to subsequent completion of the first 6 months of the probationary period and also subject to subd. 3. If an employee does not complete the first 6 months of probationary service, any holiday time taken under this paragraph shall then be considered approved leave without pay, and the agency shall recover from the employee the value of such time.

2. Employees who have completed the first 6 months of a probationary period for an original appointment or as a trainee shall be eligible to take the paid holidays throughout the calendar year earned, subject to subd. 3.

3. Such holidays shall be taken at the discretion of the appointing authority who shall respect the wishes of the eligible employees as to the time of taking the holidays under this paragraph insofar as the needs of the service will permit.

4. Personal holidays earned each year shall be noncumulative. However, if an appointing authority denies an employee the opportunity to take a personal holiday during the calendar year earned, the employee shall be permitted to carry over such day to the next year. In no event may such denial and carry–over occur in subsequent successive years.

(e) Appointing authorities shall give employees time off for voting under s. 6.76 without any deduction of compensation for time lost thereby.

(f) Monday to Friday the offices of the agencies of state government shall open at 7:45 a.m. and close at 4:30 p.m., with intermissions from 11:45 a.m. to 12:30 p.m. Agencies may, with the permission of the governor, adjust opening and closing hours and intermission periods to relieve traffic congestion or as the needs of the service otherwise require.

(5) (a) Except as provided under s. 230.215 (5), the standard basis of employment for the state service is 40 hours each 7 consecutive calendar day period, except that when the needs of an employing unit cannot be fulfilled by adhering to the standard basis of employment, additional hours of work may be required by the appointing authority. During a proclaimed national emergency, the governor may extend the workweek and adjust the working hours to use the available manpower of any or all agencies as he or she deems essential.

(b) The standard basis of employment shall be divided into 5 work days of 8 hours each except as provided under s. 230.215 (5), and except that when the conditions of employment cannot be satisfied by adhering to this division or when the public would not be inconvenienced, deviations may be permitted upon recommendation of the appointing authority and subsequent approval by the secretary.

(c) The governor may order some or all of the offices and other work stations of the departments of state government closed for specified periods of time or may order such other deviations in office hours or the standard basis of employment as may be necessitated by weather conditions, energy shortages or emergency situations. The governor's order may specify how any time off or other deviation occasioned by the order may be covered for state employees.

History: 1971 c. 91, 125, 183, 211, 226; 1971 c. 270 ss. 70, 71, 83, 104; Stats. 1971 s. 16.30; 1973 c. 51, 243; 1975 c. 28, 39, 41; 1975 c. 147 s. 54; 1975 c. 189, 199, 421, 422; 1977 c. 44; 1977 c. 187 s. 135; 1977 c. 196 ss. 56, 118, 130 (3), (5), (12), 131; 1977 c. 273; 1977 c. 418 ss. 726, 727, 924 (13m); Stats. 1977 s. 230.35; 1979 c. 34, 89; 1979 c. 110 s. 60 (11); 1979 c. 221; 1981 c. 20, 96, 140; 1983 a. 27 s. 2200 (15); 1983 a. 30 ss. 4 to 11, 14; 1983 a. 71, 140; 1983 a. 192 ss. 220, 221, 304; 1985 a. 119; 1987 a. 63, 287, 340, 399, 403; 1989 a. 56 s. 259; 1991 a. 39; 1993 a. 12, 47; 1995 a. 37, 178; 1997 a. 118, 307; 1999 a. 42, 85, 101, 125; 2001 a. 16, 109.

Cross Reference: See also chs. ER 18 and 28, Wis. adm. code.

230.36 Hazardous employment, injuries, pay continued. (1m) In this section:

(a) "Injury" means physical harm to an employee caused by accident or disease.

(b) "Performance of duties" means duties performed in the line of duty by any of the following:

1. A forest ranger or field employee of the department of natural resources who is subject to call for forest fire control duty or fire watcher employed at the Wisconsin Veterans Home at King or at the facilities operated by the department of veterans affairs under s. 45.385, and lifeguard, at all times while:

a. Driving or riding in a vehicle, aircraft or boat under circumstances which require hazardous maneuvering or speed in excess of the normal or posted limits in the performance of fire control duties;

b. Engaged in an effort to save lives, recover dead bodies, or protect public or private property;

(2) The supplemental schedule, Form EB–2JF, shall identify the committees conducting the fundraiser, the candidates on whose behalf the joint fundraiser is conducted, the percentage of the net proceeds distributed to the candidate, and the escrow depository account. A copy of the escrow agreement shall be attached to form EB–2JF.

(3) The sponsors of the joint fundraiser shall prepare a regular campaign finance report, Form EB–2, or a public funding campaign finance report, Form EB–24, to report expenses qualifying for exclusion under s. 11.31 (6), Stats. The campaign finance report shall report all contributions and disbursements. The sponsors shall give a copy of the report to each candidate or committee receiving any share of the net proceeds from the fundraiser within 25 days after the fundraiser is held. The sponsors shall file the campaign finance report with the filing officer when the next campaign finance report is due under s. 11.20 (3) and (4), Stats. If the sponsors have not received and paid all the bills for the joint fundraiser by the time the sponsors file the first campaign finance report, the sponsors shall continue to file a regular campaign finance report as required until termination.

(4) The candidates or committees receiving any of the net proceeds from the joint fundraiser shall report on their regular campaign finance report their share of the net proceeds as a single contribution from the joint fundraiser, attaching a copy of the campaign finance report received from the sponsors. If any contributor to the joint fundraiser also makes an individual contribution to the candidate's campaign during the calendar year of the joint fundraiser, and the contributor's total contributions exceed $20 in that period, the candidate who receives the additional contribution from the contributor shall report the additional contribution as an itemized contribution with the applicable information about the contributor under s. 11.06 (1) (a) and (b), Stats. The amount of any itemized contribution shall be subtracted from the reportable amount of the single contribution from the joint fundraiser.

History: Cr. Register, June, 1987, No. 378, eff. 7–1–87.

ElBd 1.15 Filing reports of late campaign activity. **(1)** Any registrant required to file a special report of late campaign activity pursuant to ss. 11.12 (5), (6) and 11.23 (6), Stats., shall comply with the provisions of this section.

(2) A registrant required to file a special report disclosing the receipt of contributions from a single source, totaling $500 or more cumulatively during the 15 day period immediately preceding a primary or an election, shall use Form EB–3 or use a format which is acceptable to the filing officer and which contains the information required by the board on Form EB–3.

(3) A registrant required to file a special report of late independent disbursement exceeding $20 during the 15 day period immediately preceding a primary or an election shall use Form EB–7 or shall use a format which is acceptable to the filing officer and which contains the information required by the board on form EB–7.

(4) A special report of late campaign activity is timely filed when it is in the physical possession of the filing officer within the time prescribed for filing. Except as provided in sub. (6), any special report of late campaign activity also shall be treated as timely filed when it is mailed with the U.S. postal service, by first class mail, with sufficient prepaid postage, addressed to the appropriate filing officer, and postmarked not later than the date prescribed by law for the filing of such report.

(5) If the date on which a special report of late campaign activity is due is a Saturday, Sunday, or legal holiday, the special report shall not be due until the next business day.

(6) If a special report of late campaign activity is required to be filed on the day of or the day immediately preceding a primary or an election, the report is not timely filed unless it is actually received at the office of the appropriate filing officer before the close of business on that day, unless that day is a Saturday, Sunday, or legal holiday.

(7) If the filing officer for a special report of late campaign activity is the state elections board, a registrant filing the report on the day of or the day immediately preceding a primary or an election may file by sending a facsimile (FAX) copy by telecopier on the date, if the signed original of the report is received through the U.S. mail with a postmark not later than the date due.

History: Cr. Register, January, 1992, No. 433, eff. 2–1–92.

ElBd 1.20 Treatment and reporting of in–kind contributions. **(1)** In this section:

(a) "Actual value" means the fair market value.

(b) "Authorized person" means a candidate, treasurer, agent, other person whom a candidate designates, or a person whom any other registrant designates to authorize a proposed in–kind contribution.

(c) "Contributor" means any individual or registrant who proposes to make an in–kind contribution.

(d) "Date of contribution" means the time as of which the benefit, of the thing of value given or of the service performed, is conferred upon the candidate's campaign or upon the registrant.

(e) "In–kind contribution" means a disbursement by a contributor to procure a thing of value or service for the benefit of a registrant who authorized the disbursement.

(f) "Registrant" has the same meaning as provided in s. 11.01 (18m), Stats.

(2) Before making an in–kind contribution to a candidate or other registrant, the prospective contributor shall notify an authorized person and obtain that person's oral or written consent to the contribution.

(3) When an individual other than a registrant receives authorization to make an in–kind contribution, the authorized person shall obtain from the contributor, in writing: the contributor's name and address and, where applicable, the contributor's occupation and the name and address of his or her principal place of employment; the nature of the contribution, its actual value and the date of the contribution.

(4) When a registrant receives authorization to make an in–kind contribution, the registrant shall provide to the authorized person, in writing, before the closing date of the next campaign finance report in which the contribution is required to be listed: the registrant's name and address; the nature of the contribution and its actual value; and the date of the contribution.

(5) If a contributor does not know the actual value of an in–kind contribution, the contributor shall give an authorized person a good–faith and reasonable estimate of the fair market value, before the closing date of the next campaign finance report in which the contribution is required to be listed. When the contributor receives bills or other statements reflecting the actual value of the in–kind contribution, the contributor shall immediately forward that information to an authorized person.

(6) An in–kind contribution shall be reported as received and accepted by the candidate or registrant on the date that the benefit, of the material supplied or the service performed, is conferred upon the candidate or other registrant.

(7) A candidate or registrant shall report the value of the in–kind contribution disclosed to him or her by the contributor. If a contributor estimates the fair market value, a candidate or registrant shall report the estimated value. After being informed of the actual value, by the contributor, a candidate or registrant shall report the actual value on the next campaign finance report.

(8) Without the proper authorization to make an in–kind contribution, a contributor may not make the proposed in–kind contribution unless the contribution qualifies as an independent expenditure under s. 11.06 (7), Stats., and under s. ElBd 1.42.

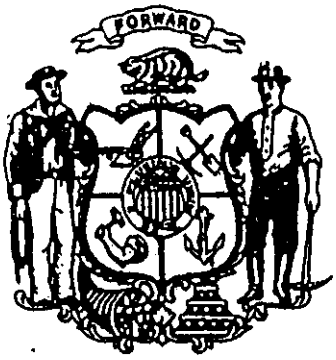
THE

WISCONSIN STATE SENATE

GUIDELINES

FOR

INCUMBENTS



Prepared by the Senate Chief Clerk
May, 2000

Introduction

In any election year, questions arise regarding election laws and policies and how they may effect the day-to-day operation of a Senator's office during a re-election campaign.

One simple rule to remember: State offices and their supplies are not to be used for any campaign activity.

This manual will include the major Ethics Board rulings, Elections Board decisions and provide guidance given by the ***Wisconsin State Statutes*** to help guide legislative offices.

Areas where questions often arise are: 1) use of state telephones, fax machines, computers and copy machines, 2) legislative employees' campaign activities, 3) use of legislative newsletters, road maps, business cards, as well as other state publications and mailing privileges near the time of a re-election campaign, and 4) the treatment of contributions to election campaigns; and reimbursement for in-district travel.

It is hoped that this manual will help clarify and answer any questions that incumbents up for re-election and their offices have concerning Wisconsin's ethics and election laws.

PART I

THE USE OF STATE EQUIPMENT AND SUPPLIES

In November 1977, the Senate established a written policy that state equipment and supplies are strictly for conducting official state business and are not to be used at all for political campaign activities.

* **Telephone Calls** -- The state will pay for all telephone calls made from a Senate office to conduct official state business.

Telephone calls made from a senate office for personal reasons are to be paid by the individual making the call. The Senate Chief Clerk should be reimbursed for all personal telephone calls. .

Along with the senate policy, the state Ethics Board has ruled that phone calls made to a candidate's campaign headquarters may be charged to the state if the phone call arises due "to the official's performance of his or her public responsibilities."

According to the board, it does not matter to whom the phone call was made. The determining factor, whether a call may be billed to the state, is if the telephone call is placed for state business. (Refer to: Ethics Board 169, 1979)

> *EXAMPLE:* The Senator's staff places a call to the Senator, at the campaign headquarters, concerning legislative affairs.
>
> The state will pay for these calls.

The Ethics Board advises offices to maintain a log of calls made to campaign headquarters or other calls to possible campaign related locations. Having such a record could help prevent any misunderstandings with the public and/or the media, or any inadvertent violations of state law.

* **Use of State Equipment** -- Statute 11.36 has been construed to apply to other state equipment by established Senate policy.

It has been interpreted to mean that no office equipment, such as copiers, computers, fax machines, etc., may be used for personal business or political purposes.

PART II

STATE EMPLOYEE ACTIVITY WHILE ON STATE TIME

Many of the same principles that apply to state supplies and equipment also apply to state employees and their activities on political campaigns.

* **Activity on Political Campaigns** -- Senate policy and state law, s. 11.36, states, that "no staff member may engage in activities for private business, or political purposes while on state time."

In order to participate in campaign activities, the staff member must be on a "non-paid leave of absence" or use accumulated compensatory time or use vacation time. Accumulated sick leave cannot be used to work on campaign activities.

The Elections Board, in a 1976 ruling, said that no state employee, while on state time, could receive any contribution or service which is primarily for a political purpose and not incidental to the employee's official duties. The Board recognized that, at times, some situations could arise that would be political in nature, but unavoidable because of their relation to the employee's official duties. (see El. Bd. 76-2)

The Ethics Board has reiterated the Elections Board policy against state employees doing political work on state time. In order to avoid conflicts of interest, the board recommends that legislative employees "not hold any official position in the legislator's campaign committee." (Ethics Board, 138)

PART III

LEGISLATIVE NEWSLETTERS AND STATE PUBLICATIONS

Publication and distribution of newsletters and state publications by legislators and their offices have been restricted by the Elections Board and state statutes. Distribution of these materials during certain time periods may violate state law.

It clearly states in s. 11.33 that:

> "11.33(1)(a) No person elected to state or local office who becomes a candidate for national, state or local office may use public funds for the cost of materials or distribution for 50 or more pieces of substantially identical material distributed after:
>
> 1133(1)(a)1 In the case of a candidate who is nominated by nomination papers, the first day authorized by law for circulation of nomination papers as a candidate.
>
> 11.33(1)(a)2 In the case of a candidate who is nominated at a primary election by write-in votes, the day the board of canvassers issues its determination that the person is nominated.
>
> 11.33(1)(a)3 In the case of a candidate who is nominated at a caucus, the date of the caucus.
>
> 11.33(a)(a)4 In the case of any other candidate who is nominated by filing a declaration of candidacy the first day of the month preceding the month which includes the last day for filing the declaration.
>
> 11.33(1)(b) This subsection applies until after the date of the election or after the date of the primary election if the person appears as a candidate on a primary election ballot and is not nominated at the primary election.

11.33(2) This section does not apply to use of public funds for the costs of the following, when not done for a political purpose:

11.33(2)(a) Answers to communications of constituents.

11.33(2)(c) Actions by a state or local government administrative officer pursuant to a specific law, ordinance or resolution which authorizes or directs the actions to be taken.

11.33(2)(d) Communications not exceeding 500 pieces by members of the legislature relating solely to the subject matter of a special session or extraordinary session, made during the period between the date that the session is called or scheduled and 14 days after adjournment of the session.

11.33(3) Except as provided in sub.(2), it is not a defense to a violation of sub. (1) that a person was not acting with a political purpose. This subsection applies irrespective of the distributor's intentions as to political office, the content of the materials, the manner of distribution, the pattern and frequency of distribution and the value of the distributed materials."

In other words, Senators who are candidates for re-election or seeking another office may not send or distribute any materials which are paid for by the state beginning the first day that nomination papers are allowed to be circulated, June 1 for fall elections, December 1 for spring elections.

Electronic copies of documents count as a single copy for purpose of determining the total distributed. A copy of a document on a member's web page or sent as an attachment to an e-mail is to be counted in the total to determine the "up to 50" pieces.

*** Distribution of Newsletters --**

Effective June 1 or December 1 it is illegal for state Senators up for election or their offices to send out 50 or more pieces of identical mail to constituents.

A note of warning: Replies to solicited responses to request materials is also prohibited during this time period.

This means that a newsletter should not include an offer to constituents to reply and receive a map, Blue Book or any other printed material from that Senator's office, after June 1 or December 1 depending on the election dates requests could not be fulfilled.

The only exception to this rule is mailings made by the Secretary of State necessary to carry out the duties of that office.

*** Purchase of Materials for Distribution --**

State law also makes it illegal for offices to purchase materials for distribution effective the first day nomination papers may be circulated. This means the offices cannot use office funds to purchase additional state highway maps, brochures, etc. for distribution.

The Elections Board has elaborated further that whether an official's purchase and distribution of state publications to constituents are subject to the campaign finance laws reporting and identification requirements, or if it is a violation of election bribery statute depends on whether the distribution is made for "political purposes." (Elections Board, 1976, 76-12)

"Political purpose" is determined by several factors including: whether the office holder plans on seeking re-election, the time of the distribution, the pattern and frequency of the distribution, and the value of the materials.

Even if the distribution occurred before nomination papers were circulated and it was determined, citing the factors, that the distribution was strictly for a political purpose then it would be subject to campaign finance reporting and identification requirements. The distribution could also be found in violation of state election bribery laws, s. 12.11.

* **Legislative Newsletters and Campaign Finance Laws** -- It is illegal for a Senate office to use campaign funds to pay for any of the costs toward a legislative newsletter. This would deem the newsletter was primarily for a "political purpose." (Elections Board, 1976, 76-16)

* **Distribution of Legislative Business Cards** -- Business cards used by Senators must be distributed carefully. The Elections Board has ruled that if the cards are distributed as part of a legislator's duties, the cards are not subject to statutory campaign finance identification requirements. However, the 50 piece limit does apply during the time periods specified in s. 11.33.

However, if the cards are distributed at random to people "who are without normal cause to have business" with the legislator, then the statutory identification is necessary. (Elections Board Opinion, 1974, 74-6)

PART IV

CAMPAIGN FINANCE

Campaign finance is probably the most scrutinized area of the election process. This manual was not designed to go through the intricacies of the finance laws, however, a brief summary of Elections Board and Ethics Board rulings might be helpful in avoiding any violations of state law.

*** Contributions to the Senator's Campaign Committee** -- First, it is clear from the previous discussions in this manual that solicitation of donations by state employees on state time is a direct violation of state law, s. 11.36.

Rulings of the Elections Board can be divided into three areas: Amount of contributions permitted; manner in which contributions can be made and which need to be reported; and use of the candidate's campaign funds and their treatment by state law.

Contribution limits, set by state law apply to each Senate campaign cycle, every four years, and not per calendar year according to Elections Board opinion, 1975, 75-7. Contribution limits are listed in s. 11.26.

Another type of "contribution" -- the use of a hall without charge -- need not be reported as an in-kind contribution if the hall or room is also provided without charge to non-political organizations. (Elections Board, 1976, 1976-1).

Use of charge cards for donations in excess of $50 is permitted, according to the Elections Board, if such use "produces a document identifying (the) name of (the) contributor and amount contributed, s. 11.16 (2)." (Elections Board, 1976, 76-13).

The Elections' Board has ruled that a candidate's own contributions count toward the threshold of individual seed money required for public financing eligibility. (Elections Board, 1978, 78-9).

A major change is Wisconsin's campaign finance law occurred when the U.S. Supreme Court ruled that states could not prohibit corporations from contributing to a campaign in support of a referendum (First National Bank of Boston v. Fuzziest, 98 S. Ct. 1407 (1978).

However, Attorney General Bronson LaFollette ruled in OAG 22-79 and OAG 57-789 that the remaining parts of the affected statute, s. 11.38 (1) (a), still apply to

corporations. Thus, corporations are prohibited from contributing directly to candidates.

It is very important that all candidates remain aware of the limitations and regulations set forth in the statutes concerning contributions.

* **Lobbyists Contributions to Officials and Candidates** -- A lobbyist or an organization, principle, employing a lobbyist may make a campaign contribution at any time to candidates or the candidates' campaign committees who are running for federal, local or non-partisan state office.

Laws administered by the Ethics Board restrict candidates running for a partisan state office or candidates who already hold a partisan state office, such as a state senator, from receiving contributions from lobbyists, political action committees (PACs) or principles except between June 1 and the date of the general election, s.13.625 (1)(c) and (2).

The Dane County Circuit Court has overturned part of this law. It said that partisan state officials and candidates for partisan state offices may accept contributions from PACs that are controlled by principles at any time.

The State Senate has a policy relating to campaign committee activity. It reads as follows:

1. No legislative campaign committee as defined in section 11.01 of the statutes may accept any contribution from a lobbyist or political action committee during any regular session floor period, or special or extraordinary session of the legislature.
2. No personal or legislative campaign committee as defined in section 11.01 of the statutes may schedule a fundraising social event in Dane County during a floor period of the legislature as scheduled by Joint Resolution at the beginning of the legislative session.

3. During the period between the first day authorized for filing nomination papers for any special election to the Senate and the date of the special election a legislative campaign committee in paragraph 1 may solicit and accept a contribution from a political action committee.
4. During the period between the first day authorized for filing nomination papers for any office for which a current member of the senate is a candidate and the date of the election for that office, that member's personal campaign committee for that election may schedule a fund raising social event during a scheduled floor period within the boundaries of the district for the office for which the current member of the senate is a candidate, regardless of the restriction in paragraph 2.

PART V

IN-DISTRICT TRAVEL

Senate policy provides: "Senators may be reimbursed actual and necessary expenses for representing this state in their districts or within any county which may be a part of their districts."

"No Senator may be reimbursed under this policy for expenses on any day for which a claim is made under s. 13.123 (1), i.e. per diem.

"Reimbursements for in-district travel will be charged against the Senator's office expense allotment. No Senator may be reimbursed for in-district travel after the date a candidate may circulate nomination papers for the office a Senator may be seeking election or re-election for.

CONCLUSION

Wisconsin election laws are strict. It is important that incumbents, candidates and legislative employees alike are aware of what the law says.

APPENDIX I

TEXT OF ETHICS BOARD DECISIONS (ADVICE) USED IN THIS MANUAL

Ethics Board 138

"The State Of Wisconsin Ethics Board advises you that you should not engage in campaign activities (a) with the use of the state's supplies, services or facilities not generally available to all citizens, (b) during hours for which you are compensated by the State of Wisconsin, or (c) at your office in the Capitol regardless whether the activity takes place during regular office hours. Moreover, you should attempt to refer campaign related inquiries received at your office to the legislator or legislator's campaign co+mmittee."

Ethics Board 174

"Wisconsin's Code of Ethics for Public Officials poses no obstacle to your using the legislature's Word Processing Center to prepare letters inviting your constituents to discuss state government and pending legislation with you at a time you are not a candidate for election to any public office. However,
both Wisconsin's election laws and the legislature's own guidelines may have some applications."

APPENDIX II

TEXT OF ELECTIONS BOARD OPINIONS

Elections Board, 1976, 76-2

"Sections 11. 36, Stats., prohibits any officer or employee of this state from receiving from any other officer or employee of this state, while on state time or engaged in his official duties, any contribution or service which is primarily for a political purpose and not incidental to the officer's or employees' official duties.

Elections Board, 1976, 76-16

"Legislative newsletters and campaign finance laws: Campaign funds cannot be used to pay any part of the cost incurred for newsletters funded in any part by state funds; use of state employees on state time to prepare newsletters intended primarily for political purposes is unlawful; test established for determining whether a state-funded newsletter is primarily for political purposes." (s. 11.36, s. 11.33, Elections Board opinion, 1976, 76-2)

Elections Board, 1976, 76-12

Prohibition on mass mailing after filing of nomination papers: Secretary of State's office may use state funds for regular mass mailings necessary to carry out duties of office after filing nomination papers and before election, provided that mailings are not directed toward political purposes." (s. 11.13)

Elections Board, 1976, 74-6

"A candidate-incumbent who distributes business cards to members of the public who are without normal cause to have business with him would be required to include statutory identification. If such a person places newspaper ads identifying himself, the information may also be required, absent a non-political rationale for such placement.

Elections Board, 1976, 76-13

"Contributions: Use of charge card contributions over $50 is permissible where such use produces documents identifying name of contributor and amount contributed." (s. 11.16 (2))

Elections Board, 1976, 76-1

"Use of a hall or room without charge need not be reported as an in-kind contribution if the hall or room is also provided without charge to non-political organizations."

Elections Board, 1975, 75-7

"The contribution limitations of s. 11.26 (1) and (10) apply per campaign and not per calendar year."

APPENDIX III

TEXT OF STATE STATUTES

*** 11.16 Campaign contributions and disbursements; restrictions.** (2) LIMITATION ON CASH CONTRIBUTIONS. Every contribution of money exceeding $50 shall be made by negotiable instrument or evidenced by an itemized credit card receipt bearing on the face the name of the remitter...

*** 11.26 Limitation on contributions -- (1)** No individual may make any contribution or contributions to a candidate for election or nomination to any of the following offices and to any individual or committee under s. 11.06

(7) acting solely in support of such a candidate or solely in opposition to the candidate's opponent to the extent of more than a total of the amounts specified per candidate:

(b) Candidates for state senator, $1,000.

(10) No candidate for state office who files a sworn statement and application to receive a grant from the Wisconsin elections campaign fund may make contributions of more than 200% of the amounts specified in sub. (1) to the candidate's own campaign from the candidate's personal funds or property or the personal funds or property which are owned jointly or as marital property with the candidate's spouse, unless the board determines that the candidate is
not eligible to receive a grant, the candidate withdraws his or her (WECF) application...

*** 11.33 Use of Government Materials by Candidates --**
(1) (a) "No person elected to state or local office who becomes a candidate for national, state or local office may use public funds for the cost of materials or distribution for 50 or more pieces of substantially identical material distributed after:

1. In the case of a candidate who is nominated by nomination papers, the first day authorized by law for circulation of nomination papers as a candidate.

2. In the case of a candidate who is nominated at a primary election by write-in votes, the day the board of canvassers issues its determination that the person is nominated.

3. In the case of a candidate who is nominated at a caucus, the date of the caucus.

4. In the case of any other candidate who is nominated solely by filing a declaration of candidacy, the first day of the month preceding the month which includes the last day for filing the declaration.

(b) This subsection applies until after the date of the election or after the date of the primary election, if the person appears as a candidate on a primary election ballot and is not nominated at the primary election.

(2) This section does not apply to use of public funds for costs of the following, when not done for a political purpose:

(a) Answers to communications of constituents.
(c) Actions taken by a state or local government administrative officer pursuant to specific law, ordinance or resolution which authorizes or directs the actions to be taken.

(d) Communications not exceeding 500 pieces by members of the legislature relating solely to the subject matter of a special session or extraordinary session, made during the period between the date that the session is called or scheduled and 14-days after adjournment of the session.

(3) Except as provided in sub. (2), it is not a defense to a violation of sub. (1) that a person was not acting with a political purpose. This subsection applies irrespective of the distributor's intentions as to political office, the content of the materials, the manner of distribution, the pattern and frequency of distribution and the value of the distributed materials.

*** 11.34 Solicitation of contributions from candidates restricted -- (1)** No person may demand, solicit, take, invite or receive from a candidate any gift of any thing of value for a religious, charitable or fraternal cause or for any organization other than a political committee or group. No candidate may make, intimate or promise such a gift.

(2) This section does not apply to payment of a regular subscription or contribution by a person to an organization of which the person is a member or to which the person may have been a regular contributor prior to the person's candidacy or to ordinary contributions at a regular church service.

11.36 Political solicitation involving public officials and employees restricted -- (1) No person may solicit or receive from any state officer or employee or from any officer or employee of the University of Wisconsin Hospitals and Clinics Authority any contribution or service for any political purpose while the officer or employee is engaged in his or her official duties, except that an elected state official may solicit and receive services not constituting a contribution from a state officer or employee or an officer or employee of the University of Wisconsin Hospitals and Clinics Authority with respect to a referendum only. Agreement to perform services authorized under this subsection may not be a condition of employment for any such officer or employee.

(2) No person may solicit or receive from any officer or employee of a political subdivision of this state any contribution or service for any political purpose during established hours of employment or while the officer or employee is engaged in his or her official duties.

(3) Every person who has charge or control in a building, office or room occupied for any purpose by this state or any political subdivision thereof shall prohibit the entry of any person into that building, office or room for the purpose of making or receiving a contribution.

(4) No person may enter or remain in any building, office or room occupied for any purpose by the state or any political subdivision thereof or send or direct a letter or other notice thereto for the purpose of requesting or collecting a contribution.

(5) In this section, "political purpose" includes an act done for the purpose of influencing the election or nomination for election of a person to national office, and "contribution" includes an act done for that purpose.

(6) This section does not apply to response by a legal custodian or subordinate of the custodian to a request to locate, reproduce or inspect a record under s. 19.35, if request is processed in the same manner as the custodian or subordinate responds to other requests to locate, reproduce or inspect a record under s. 19.35.

* **11.38 Contributions and disbursements by corporations and cooperatives. (1)** (a) 1. No foreign or domestic corporation, or association organized under ch. 185, may make any contribution or disbursement, directly or indirectly, either independently or through any political party, committee, group, candidate or individual for any purpose other than to promote or defeat a referendum.

*** 12.11 Election bribery. (1)** Any person who does any of the following violates this chapter:

(a) Offers, gives, lends or promises to give or lend, or endeavors to procure, any thing of value, or any office or employment or any privilege or immunity to, or for, any elector, or to or for any other person, in order to induce any elector to:

1. Go to or refrain from going to the polls.
2. Vote or refrain from voting.
3. Vote or refrain from voting for or against a particular person.
4. Vote or refrain from voting for or against a particular referendum; or on account of any elector having done any of the above.

(b) Receives, agrees or contracts to receive or accept any money, gift, loan, valuable consideration, office or employment personally or for any other person, in consideration that the person or any elector will, so act or has so acted.

(c) Advances, pays or causes to be paid any money to or for the use of any person with the intent that such money or any part thereof will be used to bribe electors at any election.

(4) The term "anything of value" as used in this section includes any amount of money, or any object which has utility independent or any political message it contains and the value of which exceeds $1. The prohibitions of this section apply to the distribution of

(5) material printed at public expense and available for free distribution if such materials are accompanied by a political message.

*** 13.625 Prohibited Practices. (1)(b)** Furnish to any agency official or legislative employee of the state or to any elective state office, or to the official's employee's or candidate's personal campaign committee:

1. Lodging.
2. Transportation.
3. Food, meals, beverages, money or any other thing of pecuniary value, except that a lobbyist may make a campaign contribution to a partisan elective state official or candidate for national, state or local office or to the official's or candidate's personal campaign committee; but a lobbyist may make a contribution to which par. (c) applies only as authorized in par. (c).

(c) Except as permitted in this subsection, make a campaign contribution, as defined in s. 11.01 (6), to a partisan elective state official for the purpose of promoting the official's election to any national, state or local office, or to a candidate for a partisan elective state office to be filed at the general election or a special election, or the official's or candidate's personal campaign committee. A campaign contribution to a partisan elective state official or candidate for partisan elective state office or his or her personal campaign committee may be made in the year of a candidate's election between June 1 and the day of the general election,...

(2) No principal may engage in the practices prohibited under sub. (1) (b) and (c). This subsection does not apply to the furnishing of transportation, lodging, food, meals, beverages or any other thing of pecuniary value which is also made available to the general public.

RECEIVED

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CLERK OF SUPREME COURT
OF WISCONSIN

STATE OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CASE NO.: 03-0442-CR
LC CASE NO: 02-CF-2451

CHARLES CHVALA,

Defendant-Appellant.

DEFENDANT-APPELLANT-PETITIONER'S REPLY BRIEF TO THE WISCONSIN SUPREME COURT

APPEAL FROM THE WISCONSIN COURT OF APPEALS, DISTRICT IV DANE COUNTY JUDGE DANIEL MOESER

Respectfully submitted this 27th day of September 2004.

LAWTON & CATES, S.C.

Attorney James A. Olson
State Bar No. 1009442

Attorney Dixon R. Gahnz
State Bar No. 1024367

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INTRODUCTION

The State ignores that SDC employees can do campaign work on compensatory and vacation time. The State ignores the difference between justiciable and non-justiciable evidence. The State ignores that personnel decisions are immune under the speech or debate clause. Finally, the State, after several attempts, cannot articulate a judicially manageable standard to establish a duty under Wis. Stats. § 946.12(3).

I. SEPARATION OF POWERS CONSIDERATIONS EMBODIED IN THE SPEECH OR DEBATE CLAUSE PROHIBITS PROSECUTION IN THIS CASE.

A. The State's Theory Of The Case Will Require An Impermissible Intrusion Into The Legislative Sphere.

The crux of Counts 7 - 10 is that: 1) Senator Chvala directed SDC employees to engage in political activity; 2) while they were being paid by the State. The State attempts to define political activity as campaign activity but ultimately ends up defining the term through its reliance on Wis. Stats. § 11.01(16). (Response Brief, 44 - 45). However, the same ambiguity pointed out in Senator Chvala's initial brief remains. The State's Complaint and brief totally ignore the second requirement – that the

political activity was performed on state time. (Response Brief, pp. 45-51).[1]

The State concedes that there was no set working hours for the SDC employees. (Response Brief, 46). However, the State attempts to sidestep this second requirement by arguing:

> If as alleged in this case, a state employee was engaged full-time in campaign work as part of the forty hours they were obligated to work for the state, then a clear violation exists. For example, Wendy Kloiber was working full-time on the Hansen campaign during the weeks leading up to the November 2000 election (1:35). Other caucus workers were working 90% of their time on campaigns (1:28). (Response Brief p. 47)

This is a gross over-simplification. A person can be working full-time on a campaign while they are taking vacation time or compensatory time. In fact, the Complaint alleges that three of the candidates, who were direct recipients of the campaign assistance, believed that the SDC staffers were using compensatory time or vacation time while working on the campaign. (Complaint, ¶¶86, 123, 137).

The fact that campaign work might have been done on weekdays between the hours of 9:00 A.M. - 5:00 P.M. does not allege a violation. Wendy Kloiber could have been

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[1] The State claims that Senator Chvala waived his claim that the term "working hours" is ambiguous by failing to raise it before the lower court. Senator Chvala did raise the argument below at pages 17 - 18 of his reply brief before the court of appeals.

using compensatory time or vacation time in the final weeks before the election to perform the campaign activities.

A violation would only be proven if it was shown that the employee who performed such work between 9:00 A.M. - 5:00 P.M. did not have sufficient compensatory time nor vacation time to do purely campaign work during those hours. However, such proof would run afoul of the speech or debate clause.

The issue of justiciability is at the core of the speech or debate clause. The State must establish that the alleged work performed by staff members is purely campaign activity as opposed to activity that is legislative or a combination of legislative and campaign activity. For this reason, the Court of Appeals held that opposition research, monitoring press clippings, and monitoring votes were non-justiciable activities as it is conceivable that such activities could be construed as furthering the legislative process. State v. Chvala, 2004 WI APP 53, ¶¶ 58, 64.

The finding that certain activities by the SDC employees are non-justiciable is fatal to the prosecution for a number of reasons.

1. The State cannot present any proof concerning non-justiciable activities since to do so would intrude into the inner workings of the legislative branch in violation of the speech or debate clause.

2. The State's definition of campaign activity includes non-justiciable activities.

3. Since the State is barred from presenting proof of non-justiciable activities it will be impossible to establish the amount of compensatory time that the employee had accrued.

4. Since campaign activity could be performed while the employee is using compensatory time, the State cannot prove a violation.

The Complaint alleges at Paragraphs 52:

> She [Kloiber] said some of these duties [for Senator Clausing] were legitimate constituent relation duties, but others such as fund-raising and ***opposition research*** she now understands to be purely political and improper for state employees. (Emphasis added)

This allegation shows that the State's inquiry into the nature of the duties performed by Kloiber in the John Doe proceeding probably included inquiry into non-justiciable areas such as opposition research.[2] Furthermore, this non-justiciable activity was improperly included as a basis for the Complaint.

In addition, this allegation shows that the State's definition of "campaign activity" includes non-justiciable activities. Thus, when the State argues that Kloiber worked

[2] This cannot be determined with certainty since the John Doe record is not before the court.

full-time on the Hansen campaign in the weeks leading up to the election it fails to allege that the entire time was spent on justiciable campaign activities. Rather, the allegations show that campaign activities included a mixture of justiciable and non-justiciable activities.

The upshot is that when an employee performs both justiciable and non-justiciable duties, the speech or debate clause prevents the prosecutor from even attempting to sort out the time spent on the respective duties. This was the holding in the only case that has considered this issue. People v. Ohrenstein, 549 N.Y.S.2d 962, 978, 153 A.D.2d 342 (1989).

Ohrenstein recognized that a prosecution could not proceed when an employee performed both justiciable and non-justiciable activities. Id., 970. The very act of distinguishing between the two activities meant that the court must consider non-justiciable functions and therefore violate the speech or debate clause.

Likewise, the Court in U.S. v. Rostenkowski, 59 F.3d 1291(D.C. Cir. 1995) was faced with determining whether work performed by a legislative aid for a congressman was an official duty or a personal duty. Official duties would be non-justiciable and thus could not be the basis for a prosecution. Id., 322 - 323. The Court placed the burden

on the prosecution to establish the justiciability of the activity at the pleading stage.

> Employees Eight, Ten, and Twelve are alleged to have performed "little or no official work in the congressional office." From this allegation it is not clear whether the Government means to show that these employees performed work but that what they performed was not "official." Because the Government has not shown us what "little" work they may have done was not "official," we must hold those allegations relating to employees Eight, Ten, and Twelve are non-justiciable except to the extent that the Government may prove that they did "no. . . work at all." *Id at 322.*

The allegations in Counts 7 - 10 show that the SDC employees performed some non-justiciable activities. The State has failed to consider this fact. Therefore, Counts 7 - 10 must be dismissed on the basis of the speech or debate clause.

B. Personnel Decisions Regarding Caucus Members Are Immune Under The Speech Or Debate Clause.

There are two approaches to the issue of whether or not personnel decisions made by governmental officials are privileged. The approaches are the functional approach and the employee-centric approach. Gross v. Winter, 876 F.2d 165, 170 - 171 (D.C. Cir. 1989).

The functional approach relies on the actions taken by the governmental official. In Forrester v. White, 484 U.S. 719 (1989), the functional approach was utilized for the

holding that judge's personnel decisions are not part of the adjudicative function and are thus not immune.

The employee-centric approach is set forth in Browning v. Clerk, U.S. House of Representatives, 789 F.2d 923, (D.C. Cir. 1986) and adopted by Wisconsin courts. The employee-centric approach determines whether or not the employee is integral to the functioning of the legislature. If the employee is integral to the functioning of the legislature, then personnel decisions regarding that person are privileged under the speech or debate clause.

The Court of Appeals correctly ruled:

> We agree that as a legislator, Chvala is protected by the speech and debate clause for his personnel decisions that served the important tasks undertaken by a legislator. Chvala, ¶38.

The State ignores this holding in its brief and acts as though there is no precedent on this question. The State writes that Chvala ignores the unique history of Wisconsin law and the wording of our speech or debate clause. (Response Brief, 29). The Court of Appeals was aware of the history of Wisconsin law when it ruled that the speech or debate clause applied to personnel decisions.

It is clear from the cases cited by Senator Chvala that based on Wisconsin's unique history, we have rejected the federal notion that personnel decisions are

administrative in nature. In Barland v. Eau Claire County, 216 Wis.2d 560, 593 575 N.W.2d 691 (1998), the Court specifically rejected the Forrester approach that personnel decisions were administrative in nature.

The problem with the Court of Appeals' decision is that once it recognized the speech or debate clause applied, it misapplied the privilege. The Court ruled that only personnel decisions related to the due functioning of the legislature are shielded by the speech or debate clause, and that the allegations in the complaint fall outside the due functioning of the legislature. State v. Chvala 2004 WI App. 53, ¶¶39 - 40. In essence, certain personnel decisions are immune and others are not, depending on what the decision is. That is like saying the privilege against self-incrimination applies only to people who commit property crimes. In Browning, the person was fired because of the color of her skin. It was, however a personnel decision involving a person whose job duties were integral to the legislative process. All personnel decisions with respect to these types of employees are immune under the speech or debate clause.

The State's final argument on the speech or debate clause is that a narrowly drawn statute may be used to inquire into legislative activity and that Wis. Stats. §

946.12(3) is just such a statute. (Response Brief, 37) Yet, on Page 8 of its Response Brief, the State writes:

> In enacting § 946.12(3) to prohibit the corrupt exercise of discretionary power "whether by act of commission or omission" the legislature clearly prescribed a broad range of conduct which could be misconduct in public office.

II. THE POLITICAL QUESTION DOCTRINE PRECLUDES THIS PROSECUTION.

The State begins its response to this section with the proposition that Senator Chvala must prove beyond a reasonable doubt that the political question doctrine precludes this prosecution. This is a misstatement of the law. Senator Chvala is not seeking to have a statute invalidated. Rather, he is asking this Court to apply constitutional doctrines to a set of facts to determine if the case may proceed against him.

The Court is to review this case de novo, and there is no burden of proof applied. The Court of Appeals correctly noted, "Whether a statute violates the speech and debate clause presents a question of constitutional interpretation. See generally State v. Beno, 116 Wis. 2d, 141." State v. Chvala, 2004 WI App. 53, ¶30. The Court also held, "Whether a statute violates the doctrine of separation of powers presents a question of law. Barland

v. Eau Claire County, 216 Wis.2d 560, 572, 575 N.W.2d 691, (1998)." Chvala, ¶44.

The State next attempts to distinguish People v. Ohrenstein, 549 N.Y.S.2d 962, 153 A.D.2d 342 (1989) and United States ex. rel. Joseph v. Cannon, 642 F.2d 1373 (D.C. Cir. 1981) on the grounds that those two cases provided no judicially manageable standards by which to judge the activities. The State maintains that such standards exist in the form of the Senate Policy Manual. (Response Brief, 50 - 51). It has been amply demonstrated that the Senate Policy Manual does not offer sufficient guidance to resolve the central question in this case. How much political work on state time is a felony? The following passage from Ohrenstein succinctly sets forth the political question problem posed by this prosecution:

> Thus the prosecution's objection to defendant's use of Senate staff for the campaigns is not based on the fact that it is a political activity but on the belief it is too political.

People v. Ohrenstein, 563 N.Y.S.2d 744, 748(Ct. App. NY 1990).

The State's response is that a candidate is free to campaign on personal time and that none of the hypothetical situations proposed by Senator Chvala are present in this case. That is inaccurate. (Response Brief, 49). The Court of Appeals held that opposition research and

targeting Senators was not justiciable. Chvala, ¶¶58, 64. It is clear that some of the charged activities were too political for the prosecutor but legislative enough for the Court of Appeals. The point is that the State's theory of the case provides no judicially manageable standard for resolving which activities are too political and which activities that are "too political" were conducted on "state time".

III. THE PROSECUTION IS UNCONSTITUTIONALLY VAGUE.

A. Senator Chvala Has Standing To Challenge The Statute.

The State's standing challenge is that the Complaint alleges that Senator Chvala knew the alleged activities were wrong, and therefore he is not entitled to challenge the statute. The State relies on State v. Tronca, 84 Wis. 2d 68, 267 N.W.2d 216 (1978) as the basis for this argument. The difference between Tronca and this case is that the standing issue in Tronca was decided after a trial. The State's position on standing would allow them to defeat any attacks on the constitutionality of a statute simply by alleging in an unproven Complaint that the Defendant knew it was wrong to do whatever the alleged act was.

B. None Of The Alleged Sources Of Duty Give Senator Chvala Adequate Notice.

The State's attempt to mix and match statutes, guidelines and policies to come up with a crime was rejected under Ohrenstein where the Court wrote:

> "[ADA] Mr. Cherkasky: I know the fact -- There is specific questions. I will -- What we have presented to you are -- there is no one statute that states use or there's no specific statute addressed to the use of political workers in campaigns just that title. What we ask you to consider are the larceny statutes, the documents statutes, the theft **[***60]** of service statutes, the governmental fraud statutes to see whether in fact that conduct is illegal, the use of government workers is illegal under those statutes." (Grand Jury minutes, at 4316.)
>
> An indictment based on such non-informative and amorphous instructions fails to comport with the due process principles codified in §1.05 of the Penal Law, which require the giving of "fair warning of the nature of the conduct proscribed" and defining " the act or omission *** which constitute each offense", and is also at variance with the express direction which states that "Acts otherwise innocent and legal do not become penal unless there is a clear and positive expression of intent to make them criminal" (McKinney's Statutes § 271 subd.d). Id., 980.

The problem identified in Ohrenstein is magnified in this case by the ever-shifting target. The State argues that because it can find additional bases for the duties that its case is stronger. (Response Brief, 11).

It is not true that the State provides additional sources. It is that whenever one source is shown to be inapplicable that the State chooses another source. The

Court of Appeals completely rejected the "fiduciary duty" argument yet the State relies on it in its first line of attack in its brief. The Court of Appeals relied heavily on Wis. Stats. § 15.001 and the State ignored it in its brief to this Court. Similarly, the Court of Appeals relied upon the legislative history of Wis. Stats. §946.12(1) and the State does not even mention it in its brief. The only basis for the duty the Court of Appeals and the State agreed upon was the use of the Senate Policy Manual.

The State first claims that Senator Chvala's crimes stem from the fiduciary nature of his position. The States cites no case for this proposition and does not define the contours of the fiduciary duty.

The state relies on People v. Scharlau, 141 Ill.2d 180, 565 N.E.2d 1319 (1991) as a basis for its fiduciary duty claim. However, in Scharlau a specific statute prohibited the defendants from entering into a contract on behalf of a municipality that benefited themselves. The Defendants were convicted under that statute and for misconduct in public office for acting in excess of their lawful authority. Thus, Scharlau does not help the State since the prosecution was based on a statute that

specifically established a duty. Scharlau was not based upon common law notions of fiduciary duty.

The state also relies on State v. Schwarze, 120 Wis. 2d 453, 355 N.W.2d 842 (Ct. App. 1984), for its common law duty argument. The problem is that the Defendant in Schwarze had a statutory duty under Wis. Stats. § 120.16 to accurately report the financial affairs of the school. Thus, the fiduciary argument was based on a specific statute.

The State points to Wis. Stats. § 11.37 that proscribes the use of state vehicles for campaign use as an indication that Senator Chvala should have known that he could not have caucus members work on campaigns. The maxim of statutory construction expressio unius est exclusio alterius provides that the expression of one thing is the exclusion of another. In other words, not being able to use state vehicles for campaigns does not give notice in this case.

The State also points to Wis. Stats. § 11.36(1) as the basis for Senator Chvala's duty. It is clear from the statutory history of this section that the state's argument is untenable. Prior to 1979, Wis. Stats. § 11.36(1) applied only to officers and employees of the State of Wisconsin. The law was amended to apply to all persons in

1979. The legislature changed the law such that it did not set forth any special duty for state legislators. As a result, under State v. Schmit, 115 Wis.2d 657, 660, 340 N.W.2d 752 (Ct. App. 1983) Wis. Stats. §11.36 provides no duty in this case.

The next sections Wis. Stats. § 11.36(3) and Wis. Stats. § 12.07 have been exhaustively briefed. The only new argument is that Senator Chvala's interpretation nullifies Wis. Stats. § 12.07(4). (Response Brief, 17 - 18). That is simply not the case. The statute was designed with an exception. Senator Chvala fits within the exception, and thus the statute does not form the basis of his duties.

The State attempts to distinguish Schmit. Their arguments do not change the fact that Schmit stands for the proposition that Wis. Stats. § 946.12 is not to be used as a penalty enhancer for crimes committed by a public official. Id., 660

The State claims that Schmit is concerned with Wis. Stats. § 946.12(2) while the case at bar is concerned with Wis. Stats. § 946.12(3). The language that the Court found to be controlling is also found in Wis. Stats. §946.12(3). The key language, acting in one's capacity as a public official is contained in both subsections. As further

support that all subsections of Wis. Stats. § 946.12 require the act be done in the official's capacity as a public employee comes from the Judiciary Committee Report on The Criminal Code, Page 175, February 1953 in which the committee wrote as follows:

> COMMENT: This is the general section on misconduct in public office; the section includes conduct sometimes treated under the separate headings of malfeasance, misfeasance, nonfeasance, extortion and oppression. The section deals only with acts done by a public officer or public employe in his capacity as such officer or employe.

This comment precedes the specific comments on the various subsections and applies to all of them. Thus, Schmit apples to this case and stands for the proposition that the State is required to charge Senator Chvala with a violation of the general statute rather than bootstrapping the charge into the felony offense of misconduct in public office.

The State next argues that Dekker is inapposite because it is concerned with a challenge to the sufficiency of the Complaint whereas this case is concerned with a constitutional challenge[3]. The State fails to explain how

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[3]The State argues that this Court should not consider State v. Dekker, 112 Wis.2d 304, 332 N.W.2d 816 (Ct. App. 1983) as Senator Chvala did not raise the argument in the court below. Senator Chvala raised the notice issue in the trial court, in the Petition for Interlocutory Appeal, and in the briefs submitted to the Court of Appeals and in his briefs to this Court. The State was well aware of this issue from the onset of the case.

this distinction makes any difference. Dekker was the law of Wisconsin during the time period in question. Dekker held that it is a violation of public policy to bootstrap a work rule violation into a charge of felony misconduct in office. The notice analysis requires the Defendant to have adequate warning that his conduct is approaching the proscribed area. If there is a case that directly states that a public official cannot be charged with misconduct in public office for violating a work rule then it must follow that Senator Chvala had no notice that an alleged violation of the Senate Policy Manual could subject him to felony charges of misconduct in public office.

CONCLUSION

For the reasons stated, Counts 7 - 10 of the Complaint should be dismissed.

Dated this 27th day of September 2004.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stats. §809.19(8)(b) and (c) for a brief produced using the following font:

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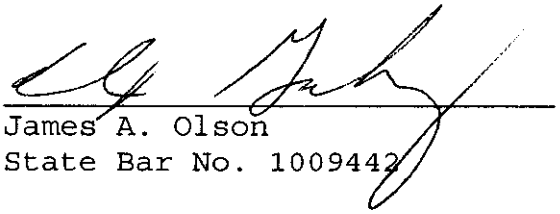
Dated this 27th day of September 2004.

BY: LAWTON & CATES, S.C.



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