Meeting of the Commission
Wednesday, January 31, 2018
9:00 A.M.   Agenda
                                             Open Session

Teleconference Meeting

Wisconsin Elections Commission Offices
212 E. Washington Avenue, Third Floor
Madison, Wisconsin

A.   Call to Order

**B.   Administrator's Report of Appropriate Meeting
         Notice**

C.   Request for Review of Voting Equipment Software Components   3

D.   Commission Administrator Status/Tabled Motion   19

E.   Closed Session

    1.   Potential Litigation
    2.   Personnel Matter

19.85 (1) (g)	The Commission may confer with legal counsel concerning litigation strategy.
19.85(1)(c)	The Commission may consider employment, promotion, compensation or performance evaluation data of any public employee over which the governmental body has jurisdiction or exercises responsibility.

WISCONSIN ELECTIONS COMMISSION

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MARK L. THOMSEN, CHAIR

MEMORANDUM

DATE: For the January 31, 2018 Special Commission Meeting

TO: Members, Wisconsin Elections Commission

FROM: Michael Haas
               Interim Administrator

               Prepared and Presented by:
               Nathan W. Judnic
               Legal Counsel

SUBJECT: Request for Access to Software Components

On December 6, 2016, the Wisconsin Elections Commission ("WEC" or "Commission") received an email from the Jill Stein for President campaign requesting access to the software components that were used to record and tally the votes in the November 2016 General Election pursuant to Wis. Stat. § 5.905(4). Consistent with the statute, the request designated individuals that were authorized to receive access to the software components and requested that any written agreements the designated individuals needed to sign should be provided to the campaign so that access could be granted.

Ultimately, the Commission is the authority charged with making the final decisions as to what software components are reviewed, what agreement is in place to ensure confidentiality of the information reviewed, and what procedures should be in place to facilitate the review.

Since the initial request was received, the Commission staff have had many conversations with both representatives of the Jill Stein campaign and representatives of the two major voting equipment vendors in Wisconsin, Elections Systems & Software ("ES&S") and Dominion Voting Systems, Inc. ("Dominion") to collect information on what these parties believe should be subject to review under the statute, what sort of non-disclosure agreement should be signed prior to access being granted, and what additional parameters that need to be in place to facilitate a review allowed under the statute.

The information received from these parties was extremely helpful in crafting a non-disclosure agreement that comports with the requirements under Wis. Stat. § 5.905(4). Prior to software component access being granted to individuals identified by the Jill Stein campaign, the agreement will need to be executed and filed with the Commission and is included at Attachment 1. The agreement obligates the individuals signing it "to exercise the highest degree of reasonable care to

maintain the confidentiality of all proprietary information to which the person is provided access…"
Wis. Stat. § 5.905(4).

The information received from these parties also made it clear, that the Commission staff did not have the in-house technical expertise to advise the Commission on what software components are used to record and tally votes within the complex code of the broad array of systems used in use. The Commission authorized staff to seek technical expertise by utilizing a US E.A.C. certified testing laboratory to review the many lines of code encompassed in these systems and provide an opinion as to what specific software components count and tally votes. The Commission contracted with Pro V & V, Inc. to review the code of equipment manufactured by ES&S and Dominion and provide technical packages of code that meet the statutory definition of what should be subject to review. Essentially, Pro V & V, Inc. was tasked with going through the code and segregating the portions of code that in their opinion counts and tallies votes. In addition to these technical packages of code, Pro V & V, Inc. provided a report detailing the process used to make its determination and a listing of the results. The report issued by Pro V & V, Inc. is included at Attachment 2.

The final decisions for the Commission relate to the parameters and logistics of the actual software components review once an agreement has been signed and access is provided to the individuals identified by the Jill Stein campaign. Again, the information provided by both the Jill Stein campaign and the equipment vendors has been useful in developing reasonable review parameters.

The Commission staff recommends that the Commission adopt the following software components review parameters:

1. Only individuals identified in writing by the Jill Stein for President campaign ("Recipients") shall be granted access to the software components provided by the Commission upon execution of the Confidentiality Non-Disclosure Agreement provided to the individual granted access.

2. Only the software components determined by the Commission to record and tally votes ("software components subject to review") shall be subject to review.

3. The software components review shall take place in a designated secure location selected by the Commission.

4. The software components subject to review shall be made available for review in a secure inspection room under the following conditions:

   a. At least two (2) days prior to any review, the Recipient shall provide the designated representative(s) of ES&S and Dominion ("Vendor") and the Commission with a written examination plan concerning the specific details of all examinations to be conducted. Such examination plan shall contain a summary overview of the review intended and thereafter any supplements thereto. Vendor shall be permitted to be present at all times during such examination, but shall not interfere with the review process. An examination plan shall be limited to only those processes that are directly relevant to recording and tallying the votes in Wisconsin. Accordingly, no examination plan shall include any attempt of copying or reverse engineering of any kind or

recompiling of any of the software components subject to review. No examination or procedure may occur that is not identified in the written examination plan unless otherwise agreed upon.

b. The software components subject to review shall at all times remain within the custody, control and oversight of the Commission and access will only be authorized for the duration of the review. All examinations, inspections, analysis, operation, testing or use shall occur solely in secure access-controlled rooms at a facility controlled by the Commission and agreed to by Vendor. The Commission shall select a secure location that will monitor access to and from the examination room. All authorized persons must sign a log-in sheet before entry to the examination room, and the log-in sheet shall be maintained by the Commission's designated representative with a copy provided to Vendor upon request. Vendor shall have the right to request additional reasonable security measures and/or procedures if reasonably necessary to ensure the security of the software components subject to review pursuant to the written examination plan submitted by the Recipient. Vendor shall be afforded a reasonable opportunity to inspect the room for compliance with this Agreement and other reasonable security measures prior to the review commencing. No other use or access is permitted in the examination room until the examination has been completed.

c. The software components subject to review may be encrypted and/or password-protected as considered reasonable by the Vendor. In such instances, the Commission shall keep track of all persons to who it provides corresponding encryption keys and pass codes. A list containing the names of these individuals shall be disclosed to Vendor upon request.

d. The software components subject to review will be loaded on one or more non-networked computer(s) preloaded with software tools agreed to in advance by the parties for use in viewing, searching, and analyzing the software components subject to review; such computer(s) shall be password protected and maintained in a secure, locked area. Use of any input/output device (e.g., USB memory stick, CD, compact flash, portable hard drive, etc.) is prohibited while accessing the computer containing the software components subject to review. After the software components subject to review and software tools for viewing are loaded on the computer, all ports shall be sealed with tamper evident seals. Absent the express written permission of Vendor, the Recipient shall not be permitted to output or record any proprietary information onto any portable, non-portable, or network media, by any means even if such means exist on the computer (including, but not limited to, compact flash, CD-R/RW drive, Ethernet, Internet, e-mail access or USB). No outside electronic devices, or other input/output devices or recording devices, including but not limited to, computers, cellular phones, tablets, cameras, sound recorders, personal digital assistants (PDAs), peripheral equipment, CDs, DVDs, drives of any kind (e.g. hard drives or thumb drives), or other hardware shall be permitted in the secure room. No devices may be connected to the computer(s) containing the software components subject to review or otherwise used to copy or record the software components subject to review from the computer. The computer(s) containing the software components subject to review

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will be made available for inspection during regular business hours, upon reasonable notice to Vendor.

e. No person shall reproduce, perform, distribute or prepare works derivative of the software components subject to review, other proprietary information or materials or permit anyone else to do so or to install any works derivative of the same on any computers outside of the confines of the examination room or inapposite the terms of this Agreement. Anyone reviewing the software components shall not tamper with the equipment or software components in any manner whatsoever.

f. The only persons in the examination room at the time of any examination pursuant to the examination plan and this Agreement shall be the Recipient or Recipients, designated members of the Commission staff or individuals designated by the Commission staff and any designated Vendor representatives. No person permitted access to the examination room for any reason shall remove any media, notes, or recordings containing the software components subject to review from the examination room, nor allow access to the room or to the software components subject to review for or by anyone else. The Commission will fully purge and delete the software components subject to review from each computer used at the conclusion of the Review.

g. Any notes taken during the Review may not be literal transcriptions of any of the software components subject to review nor may they be used to prepare literal transcriptions of any of the software components subject to review, but, among other things, may be sufficient to describe the function of any portion thereof.

h. Notes taken during the Review may be retained by Recipient after the Review, provided they do not contain proprietary information. For purposes of notes, upon request, Vendor shall have a reasonable opportunity to review such notes to verify that they do not contain any proprietary information.

i. When not being used, software components subject to review shall be stored in the respective secured, locked examination room pursuant to the terms of the parameters described herein.

j. Reasonable modifications to the parameters described herein may be suggested by the Recipient, Vendor or Commission to facilitate the orderly review of the software components designated, but any suggested modifications only become effective if all parties involve agree to such modifications.

Given the complexity of the issues involved, the Commission staff recommends delaying the effective date of any final decision made by the Commission by 30 days. This "stay" period will allow the Jill Stein for President campaign, ES&S and Dominion to examine the decision and prepare accordingly before any agreements are signed and software components are available for review.

Recommended Motion #1: The Wisconsin Elections Commission adopts this memorandum, the Confidentiality Non-Disclosure Agreement (Attachment 1) and the opinion and technical packages of code identified in the Pro V & V, Inc. report (Attachment 2) as its final decision related to the Jill Stein for President request for access to software components under Wis. Stat. § 5.905(4).

Recommended Motion #2: The final decision of the Wisconsin Elections Commission related to the Jill Stein for President request for access to software components under Wis. Stat. § 5.905(4) is effective March 2, 2018.

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Administrator Michael Haas

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Ann S. Jacobs
Jodi Jensen
Dean Knudson
Mark L. Thomsen, Chair

CONFIDENTIALITY AND NONDISCLOSURE AGREEMENT

1. THIS CONFIDENTIALITY AND NONDISCLOSURE AGREEMENT ("Agreement"), dated this ____ day of _____, 20__, by _____ ("Recipient"), obligates the Recipient to exercise the highest degree of reasonable care to maintain the confidentiality of all proprietary information to which the Recipient is granted access, as described in the Final Decision, pursuant to Wis. Stat. § 5.905 (4) and for no other purpose.

2. Recipient agrees to exercise the highest degree of reasonable care to maintain the confidentiality of all proprietary information to which access is provided and not disclose or reveal any proprietary information to any person, pursuant to Wis. Stat. § 5.905 (4).

3. After the Recipient's execution and delivery of this Agreement, and pursuant to the terms of the Final Decision, the Recipient shall be granted access to the software components used to record and tally the votes cast in the November 8, 2016 General Election conducted in the State of Wisconsin pursuant to Wis. Stat. § 5.905 (2).

4. Each Recipient designated under Wis. Stat. § 5.905 (4) shall execute and deliver this agreement to the Wisconsin Elections Commission ("WEC") prior to access being granted.

5. The review of the software components shall take place in accordance with the terms and conditions of the review as determined by the WEC as stated in the Final Decision.

6. Recipient's obligation to exercise the highest degree of reasonable care to maintain the confidentiality of all proprietary information survives this agreement and shall continue permanently.

7. Recipient acknowledges that Recipient is responsible for any unauthorized disclosure and shall pay for any and all damages that relate or arise out of the review of the software components.

By executing this Agreement, I agree to abide by the terms set forth herein.

Recipient:

_____ (Printed Name, Title)

_____ (Address)

_____ (Phone Number)

_____ (Email Address)

_____ (Signature)

_____ (Date of Signing)

Upon Execution of this Agreement:

Send to:
Wisconsin Elections Commission
Attn: Legal Counsel
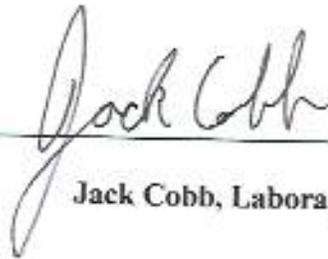212 E. Washington Ave., 3rd Floor
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Test Report

Software Component Review Report for the State of Wisconsin

Prepared by: _Jack Cobb_

Jack Cobb, Laboratory Director

January 17, 2018

v. TR-01-04-WIS-2017-01.01

1 Introduction

The purpose of this Test Report is to document the procedures that Pro V&V, Inc. followed to perform software component review on certified systems in the state of Wisconsin. Pro V&V performed this effort with the intent of providing professional and technical services for review of the software components of electronic voting systems used in the State of Wisconsin and determine which components are necessary to record and tally votes in an election.

1.1 References

The documents listed below were utilized in the development of this Test Report:

- Wisconsin Software Component Verification

- Wisconsin Elections Commission Contract for Software Component Review Services

1.2 Terms and Abbreviations

The terms and abbreviations applicable to the development of this Test Report are listed below:

EAC – Election Assistance Commission

TDP – Technical Data Package

USB – Universal Serial Bus

VSTL – Voting Systems Test Laboratory

WEC – Wisconsin Elections Commission

1.3 Background

Per Wisconsin Statute § 5.905(4), if a valid petition for a recount is filed under Wisconsin Statute § 9.01 *"in an election at which an electronic voting system was used to record and tally the votes cast, each party to the recount may designate one or more persons who are authorized to receive access to the software components that were used to record and tally the votes in the election."* A valid request from a party to the recount was received by the Wisconsin Elections Commission (WEC). WEC contracted Pro V&V to perform an analysis of the certified systems for use in Wisconsin to determine which components are necessary to record and tally votes in an election.

2 Review Overview

WEC submitted an encrypted USB drive with all voting systems in use in Wisconsin during the 2016 Presidential Election. Pro V&V was able to extract the individual source code repositories for the certified systems.

2.1 Review Materials

The encrypted USB drive contained the following directories:

Dominion Voting System

2006-11-03\WI 2006-10-31 Escrow Deposit – Recount.zip

2006-11-03\WI 2006-10-31 Escrow Deposit.zip

2014-06-04\GEMS 1-18-24D.exe

2015-09-16\Account-9974ML-SBLic01-UID-841-ID-7924\ADJ_2-4-1-3201_ObjectCode_UserDocs.zip

2015-09-16\Account-9974ML-SBLic01-UID-841-ID-7924\ADJ_2-4-1-3201_SourceCode_TechDocs.zip

2015-09-16\Account-9974ML-SBLic01-UID-841-ID-7924\ICC_4-14-17_ObjectCode_UserDocs.zip

2015-09-16\Account-9974ML-SBLic01-UID-841-ID-7924\ICC_4-14-17_SourceCode_TechDocs.zip

2015-09-16\Account-9974ML-SBLic01-UID-841-ID-7924\ICE-4-14-21_ObjectCode_UserDocs.zip

2015-09-16\Account-9974ML-SBLic01-UID-841-ID-7924\ICE-4-14-21_SourceCode_TechDocs.zip

2015-09-16\Account-9974ML-SBLic01-UID-841-ID-7924\ICL_2-1-1-5301_ObjectCode_UserDocs.zip

2015-09-16\Account-9974ML-SBLic01-UID-841-ID-7924\ICL_2-1-1-5301_SourceCode_TechDocs.zip

2015-09-16\Account-9974ML-SBLic01-UID-841-ID-7924\ICP_4-14-17_ObjectCode_UserDocs.zip

2015-09-16\EMS_4-14-37_ObjectCode_UserDocs.zip

Election Systems & Software

2006-11-03\Unity 3.0.1.0 for Wisconsin (Executables and Doc)

2006-11-03\Unity 3.0.1.0 for Wisconsin (Source)

2012-10-23\Unity 3.2.0.0 Revision 3 TDP.exe

2012-10-23\Unity 3.2.0.0 Revision 3 Trusted Build.exe

2013-04-04\Unity 3.4.0.0 TDP.exe

2013-04-04\Unity 3.4.0.0 TrustedBuild.exe

2013-04-04\Unity 3.4.0.0ProductVersionList.xlsx.exe

2013-09-09\TDP.exe

2013-09-09\Trusted Builds.exe

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2014-09-17\ A – Disk 1 of 4

2014-09-17\ A – Disk 2 of 4

2014-09-17\ A – Disk 3 of 4

2014-09-17\ A – Disk 4 of 4

2014-09-17\ B – Disk 1 of 4

2014-09-17\ B – Disk 2 of 4

2014-09-17\ B – Disk 3 of 4

2014-09-17\ B – Disk 4 of 4

2015-09-29\ProductInstalls.exe

2015-09-29\SourceOnlyStaging.exe

2015-09-29\TDP.exe

2015-09-29\Unity3.4.1.0WisconsinProductVersionList

2.2   Review Candidate

Per the contract, the electronic voting systems components that were subject to review were the following:

- Dominion (Sequoia) – Sequoia Insight
- Dominion (Premier) – Accuvote-OS
- Dominion(Premier) – Accuvote-TSX
- Dominion – Image Cast Evolution (ICE)
- Dominion (Sequoia) –Edge
- ES&S – iVotronic
- ES&S – M100
- ES&S - DS200

In addition to these components, the encrypted drive had additional components that may be fielded in Wisconsin. These components were added to err on the side of transparency. WEC will need to make a determination on including these components in the final package. The additional components are as listed below:

- ES&S - Optech 3PE
- ES&S - M150-550
- ES&S - M650
- ES&S - DS850

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2.3 Review Support Equipment/Materials

In addition to the component source code, the encrypted drive contained the TDP for each system. Pro V&V utilized the TDP when necessary to determine if a component was utilized to "record and tally" votes.

3 Review Process and Results

The following sections outline the process that was followed to evaluate the review candidate defined in Section 2.2.

3.1 General Information

The encrypted USB drive was copied to Pro V&V's network attached storage application. Each directory was extracted and decrypted to a level where no directory contained a compressed or encrypted file.

3.2 Review Procedures

Once Pro V&V had the raw source code files, a manual review of the submitted source code was performed to determine if a component did "record and tally" votes. If a component was determined to "record and tally" votes the entire source code package was moved into a deliverables directory. If a component was determined not to "record and tally" votes it was not copied to the deliverable directory. Pro V&V researched the component versions and structured the deliverables directory in a manner that the component could be traced to the voting system that it is certified with. The final results of this review are noted in Section 3.3.

3.3 Review Results

Below are the voting system name, the component name and version, the associated file name and the SHA256 value for the file:

Unity 3.4.1.0
  DS200 1.7.0.0n
      source.iso - a3ca2615a25edf7968844223e1cb80f86f48ae4e7df7044824da09c26fe44dc7

  M100 5.4.4.5.3
      source.tar - 463ef1d77790479bf6be92efafbc6a095b79687a81fc7f1e4d2ba32828f95b72
EVS 5.2.0.0
  DS200 2.12.0.0l
      source.iso - 4828e1b5159aa8efbbf4b75e5e2b945aa328a2013ebcb675638f8699cd6e5b6a

  DS850 2.10.0.0i
      source.iso - 8c08f7794c084ce90a12c05deb7a3463fcc52d1ce21415af4bf3b446e10c7a06

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Unity 3.4.0.1
  DS200 V1.6.0.0
    DS200 - 1.6.0.0t
        COTS.iso - a2630435fcfa67a88c891f122bb1e0fea814702976e15cf2e34bcac6f7441a2b
        Doc.iso - 0a8341346642962bc8c44185a17c8246f034a12b10f0607061638d331bb32205
        source.iso - e858d4be5f40dfc86c21bb1181f100f44c11344a9406b9c748312aaaf1d2c033

Unity 3.2.1.0
    CB_PEB_1.0.2.0a_Source.zip - 39177b2bf7461ae0fd9d6d9777320cb8144f6517b59c930dfa9e154800a16968
    CB_M100_1.4.1.0a_Source.zip - b46b017c0ceb6765f542e03deacabd108adbc3f70e6c4afb02b74ae3ddb4bd80
    CB_650_1.2.1.0a_Source.zip - 5bce9d7da618d3aefb904be79aeb8ccce68e042ee01048ab54fd513724041365
    CB_EAGL_1.3.2.0a_Source.zip - 84070e97289a92eb938ef6a04f4a7fdfaf05f1245c68ba9ca3e9cb9b2ad91b9b

Unity 3.4.0.0
  DS200 - 1.6.1.0l
      COTS.iso - d609c9735b08540714b86098154146486212350d391b0227a248844cf37b2015
      Doc.iso - 0b5f6e6dd84e43ebc523dbe375ce2f208c9ee9bed00dbb1c5f0c749906dd1367
      source.iso - 39599ddbab7a1fafb60b068e789fb98a118726c4ca97bac0947c4c776e09c2b6

Unity 3.2.0.0
    CB_M100_1.4.1.0a_Source.zip - b46b017c0ceb6765f542e03deacabd108adbc3f70e6c4afb02b74ae3ddb4bd80
    CB_650_1.2.1.0a_Source.zip - 5bce9d7da618d3aefb904be79aeb8ccce68e042ee01048ab54fd513724041365
    CB_EAGL_1.3.2.0a_Source.zip - 84070e97289a92eb938ef6a04f4a7fdfaf05f1245c68ba9ca3e9cb9b2ad91b9b

  M650 2.2.2.0.1
      M650_2.2.2.0.1_Source.tar - 8f3e1f4419594b84d6cb91931304ac6e8b5c6549130c10e0dc58e823371507ad

Unity 3.0.1.0
  Optech 3PE
      Eagle APS 1.50.zip53e46ce855143ae800c49a2f0271de4f243ea70edf1e54c5f00a576497c35c55
      Eagle CPS 1.02.zip - d22d81d8ebb77590744b831639629e9f00a2cc136cf3042e0a796e0c658fe59e
      Eagle HPS 1.28.zip -7002b732a784359d188789a0893772d41a7a3f6e5c662759ea09d9b542835884

  iVotronic 9.1.4.0
      V9140-source.zip - 5adb3039a105b5f1faaed20d755579aa0077abab9d8fac87e50ab3309692d133

  M100 5.2.0.0
      pbc5_2_0_0_15_src.tar.gz - 0bfdfad53e9c7b886e7cd934c5d8eb4d7fe9d04e4526282fe11d141b99f2c55b

  M150-550 2.1.2.0
    Source
        SER30M.ASM - ceb057779a8b198d46952bfdece265fb4983cad24b305151b1a79fd4e9acb83a

  M650 2.1.0.0
    M650 Display 2.1.0.0.zip - dda92146d6a464fe47af3eeb7c80a5fd89785cb9377406ebc0f7ff81fc7ab54a
    M650 Firmware 2.1.0.0.zip - 2b27f7dcb73bcdd216a5cd6698e964057f2bed81cc512f04efe9631f76e5c3e2
    M650   Support   Scripts   2.1.0.0.zip   -
63a367a0fbde68d09c3866bc1191e673e575477e27d23a46645de2abf9fc32ee

WinEDS 3.1.012
  AVC Edge Firmware Version 5.0.24 Source Code\
      CD - Source Code.zip - 7c3dbe9bd08a5d36805f9f28e70cc4265e2394e1bd841e9010a4e590de05688f
  Optech Insight\
      Source Code.zip - 756b94cb1d1bd006f0d909dd0b3d05d6bd9c6b8c936deef51b916be3ac8ab500

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GEMS 1-18-24D

    AV-OS PC 1-96-6.zip - 2a82be00159ac7223cafefaf0407e7c67f760478941f17be3e7d88dc0f7fb6de

    AV-TSX.zip -0325ea1ee417fab61ba7cc6a9e2ab6a30f6b1791b6ca378912568b8ba8b1db9a

DVS 4.14

    ICP_4-14-17_ObjectCode_UserDocs.zip   -
f1f82dea3c01601b809ffc0d77a45c9e4bb6c09137e28693f46d6f632772ab45

    ICE_4-14-21_SourceCode_TechDocs.zip   -
871acbbcc28d9a535db188f8ef6c4acaaa0416162db49c92627c6aa0c97283a9

    ICC_4-14-17_SourceCode_TechDocs.zip   -
81e0313dc81f106a649e731250e69d4a61db04cce5ef68927b85550fd23af199

4 Conclusion

Based upon the review of the components, the final results identified in section 3.3 of this report were determined by Pro V&V as the necessary components of these systems for purposes of recording and tallying votes. The final results have been segregated into an encrypted deliverable and will be provided to WEC as requested so that when access to review software components under Wisconsin Statute § 5.905 (4) is requested, the State of Wisconsin will be confident they are providing what is allowable under the statute.

Memorandum
Date: January 23, 2018
To: Wisconsin Elections Commission members
From: Dean Knudson

I want to provide my fellow members with my thoughts and my proposal regarding the administrator position on the agenda for the meeting today.

Our top priority should be to insure continuity and stability with the agency so that the Commission can effectively administer and enforce Wisconsin election laws.

Wisconsin Statute 15.61 empowers the Commission members to:
   a) nominate an administrator to a four year term ending on July 1 of the odd numbered year
   b) appoint an interim administrator to serve until confirmation of administrator
   c) remove the administrator

The Senate yesterday voted to reject the nomination of Michael Haas as administrator. The Commission members clearly have the power to remove the administrator; however some members have held the position that only the Commission may remove the administrator. This position is unlikely to be upheld in court and I fear litigation would become a distraction leading to unnecessary disruption and uncertainty. I have provided members with a memo written by Deputy Director Jessica Karls-Ruplinger of Wisconsin Legislative Council stating "Although the statutes do not expressly address what happens if the Senate rejects confirmation of the administrators, it appears likely that a court would find that such action removes the administrators and results in vacancies in the administrator positions."

When a vacancy occurs in the administrator position, state law requires the Commission to appoint a new administrator, and submit the appointment for confirmation, within 45 days after the date of the vacancy. It is my belief that courts will be likely to deem the administrator position vacant as of today. The 45 day period would end on Friday, March 16ᵗʰ. **If the commission has not appointed a new administrator within 45 days, state law requires the legislature to name an interim administrator.**

I believe the administrator position is vacant today. I further believe that the mission of the Wisconsin Elections Commission will be seriously compromised by an effort to prove that the Commission could ignore the Senate vote and retain Michael Haas as Administrator. For example, in our annual Delegation Memo the Commission delegated authority to the Administrator to certify candidates, to implement determinations regarding sufficiency of nomination papers and qualifications of candidates, and to sign contracts. In each of these areas the Commission risks creating instability and uncertainty by attempting to retain Haas. No other staff is empowered to fulfill these functions. Candidates could challenge Commission decisions and actions taken by Haas during the period of litigation that would follow such action.

By attempting to retain Haas the Commission itself would immediately create the uncertainty and instability in our elections that Commission members and staff work so hard to avoid.

I propose a two-part process for consideration by the Commission. First, we should appoint a new interim administrator from within existing Commission staff. Second, we should conduct a nationwide search to recruit our new administrator. The interim administrator would serve on a temporary basis while the Commission evaluates candidates for the position and would be eligible to compete for the position. I propose the following motion for consideration at the meeting today.

Motion:

1. Appoint Deputy Administrator Meagan Wolfe to serve as Interim Administrator until the completion of a search process to be conducted over not more than 6 months. Wolfe shall immediately assume all the duties and authority of the Administrator and Chief Election Official pursuant to Wis. Stats 5.05 (3d) and (3g).

2. Direct the chairman to advertise the administrator position for 60 days, followed by a Commission meeting to narrow the field to three applicants. Schedule a Commission meeting to interview applicants not more than 90 days from today.

3. Direct the chairman to inform the Senate that Wolfe has been named Interim Administrator pending a nationwide search for the next Administrator. Her name will be submitted for confirmation as required by law, however the Commission's intention will be to replace her with the individual chosen during the search process. Ms. Wolfe will be eligible to compete for the administrator position along with other applicants.

Attachments:

Legislative Council Memo to Speaker Vos regarding Senate rejection of Administrator

2018 Delegation Memo regarding delegation of powers to the Administrator

WISCONSIN ELECTIONS COMMISSION

MEMORANDUM

DATE: For the January 9, 2018 Commission Meeting

TO: Members, Wisconsin Elections Commission

FROM: Michael Haas, Interim Administrator

SUBJECT: Delegation of Authority to Administrator

At its October 14, 2016 meeting, the Elections Commission approved a Delegation of Authority document to clarify actions and decisions that the Administrator could implement without prior Commission action. The Delegation of Authority was intended to maintain and improve the agency's administrative efficiencies for routine decisions and transactions, and also required the Administrator to report actions to the Commission after the fact and, in some cases, to consult with the Chair prior to taking action. This memorandum recommends that the Commission continue to delegate the same authority regarding various agency responsibilities.

By statute, the Wisconsin Elections Commission has general authority over the state's election laws. In various provisions of the election laws, the Commission is given a series of specific powers in addition to its general authority. Pursuant to Wis. Stat. § 5.05(3g), the Administrator of the Commission serves as the State's chief election officer, and pursuant to Wis. Stat. § 5.05(3d), the Administrator shall perform such duties as the Commission assigns to him or her in the administration of the election laws. Both the State Elections Board and the Government Accountability Board delegated certain authority to their administrative heads in order to facilitate the agency's day-to-day management and to clarify the scope of staff's authority to act without prior specific approval of the oversight body. Given the nature of the Commission's oversight of the agency and its meeting schedule, the Delegation of Authority aims to permit the Administrator to effectively manage the daily responsibilities of the agency while maintaining the Commission's role in making policy determinations, setting agency priorities, and directing significant staff initiatives.

The Commission previously indicated that it wished to review the Delegation of Authority on an annual basis. The recommended Delegation of Authority below is identical to that approved by the Commission in October 2016, except for the last bullet point under Section 2, which was not previously included simply due to an oversight.

Recommendation

Consistent with the Delegation of Authority previously adopted by the Wisconsin Elections Commission, I recommend the Commission delegate the authority described below to the

Administrator, pursuant to the Administrator's role as agency head and chief state election official. In exercising all delegated authority, the Administrator should be required to report, at the Commission meeting immediately following the delegated action, the specifics of the action taken, the basis for taking the action, and the outcome of that action.

1. The following authority should be delegated to the Administrator subject to the requirement that before it is exercised, the Administrator consult with the Commission Chair to determine whether Commission members should be polled or a special meeting conducted before action is taken:

   • To issue compliance review orders under the provisions of Wis. Stat. § 5.06;

   • To certify and sign election related documents including candidate certifications, certificates of election, and certifications of election results on behalf of the Commission;

   • To accept, review, and exercise discretion to approve applications for voting system modifications characterized as engineering change orders (ECOs) for systems previously approved for use in Wisconsin;

   • To implement the Commission's determinations regarding sufficiency of nomination papers or qualifications of candidates;

   • To communicate with litigation counsel representing the Commission in order to make timely necessary decisions regarding Commission litigation;

   • To make a finding pursuant to Executive Order #50, Sec. IV(8), that a proposed administrative rule does not have an economic impact.

   • To execute and sign contracts on behalf of the Commission, except related to special investigators as provided in Wis. Stat. § 5.05(2m), subject to the further provisions of this paragraph. The Administrator is required to request approval from the Commission for contracts involving a sum exceeding $100,000, or for purchases from a statewide contract over $100,000. The Administrator is required to request approval from the Commission prior to posting a Request for Proposal or Request for Bid. In addition, the Administrator may enter into a sole source contract only after obtaining approval from Commission Chair and providing five days' prior notice to the Commission regardless of the dollar amount.

2. The following authority should be delegated to the Administrator without the requirement for prior consultation with the Commission Chair before action is taken:

   • To exempt municipalities from polling place accessibility requirements pursuant to the provisions of Wis. Stat. § 5.25(4)(a);

   • To exempt municipalities from the requirements for the use of voting machines or electronic voting systems pursuant to the provisions of Wis. Stat. § 5.40(5m);

- To authorize the non-appointment of an individual who is nominated to serve as an election official under the provisions of Wis. Stat. § 7.30(4)(e);

- To execute and sign contracts on behalf of the Commission, except related to special investigators as provided in Wis. Stat. § 5.05(2m), for contracts involving a sum not exceeding $100,000, or for purchases from a statewide contract involving sums not exceeding $100,000.

- To issue written informal advisory opinions pursuant to Wis. Stat. §5.05(6a) related to recurring issues or issues of first impression for which no formal advisory opinion has been issued.

In making the above recommendations, I would note the following. Applications for exemption from accessibility requirements are rare and generally involve last minute construction issues. Permitting a municipality to use paper ballots instead of electronic voting equipment is a fairly routine decision that is predicated on unique circumstances such as the cost of programming electronic voting equipment when there is only one race on the ballot. Post-election certifications are generally administrative in nature, time sensitive and necessary to ensure an orderly transition of leadership following an election. These election-related certifications cannot be completed while a recount or litigation challenging a recount is pending. Wis. Stat. § 7.70 (5)(a). Regarding contract authority, agency purchases are governed by state procurement requirements, and very few contracts involve an amount exceeding $100,000.

Finally, Wis. Stat. §5.05(6a) specifically permits the Commission to authorize the Administrator to issue informal written advisory opinions subject to any limitations the Commission deems appropriate. Every informal advisory opinion shall be consistent with applicable formal advisory opinions issued by the Commission or applicable statutes or case law. Requests for such informal advisory opinions are rare and the Administrator is required to review any such opinions issued at the next meeting of the Commission. The Commission may choose to issue a formal advisory opinion adopting or modifying the informal advisory opinion. If the Commission disagrees with an opinion issued by the Administrator, it may withdraw the opinion or request an opinion of the Attorney General.

A proposed motion is set out below.

Recommended Motion:

Pursuant to the Commission Administrator's role as agency head and the State's chief election official, the Wisconsin Elections Commission delegates the authority described below to its Administrator. In exercising all delegated authority, the Administrator is required to report, at the Commission meeting immediately following the delegated action, the specifics of the action taken, the basis for taking the action, and the outcome of that action.

1. The following authority is delegated to the Administrator subject to the requirement that before it is exercised, the Administrator consult with the Commission Chair to determine

whether Commission members should be polled or a special meeting conducted before action is taken:

- To issue compliance review orders under the provisions of Wis. Stat. § 5.06;

- To certify and sign election related documents including candidate certifications, certificates of election, and certifications of election results on behalf of the Commission;

- To accept, review, and exercise discretion to approve applications for voting system modifications characterized as engineering change orders (ECOs) for systems previously approved for use in Wisconsin;

- To implement the Commission's determinations regarding sufficiency of nomination papers or qualifications of candidates;

- To communicate with litigation counsel representing the Commission in order to make timely necessary decisions regarding Commission litigation;

- To make a finding pursuant to Executive Order #50, Sec. IV(8), that a proposed administrative rule does not have an economic impact.

- To execute and sign contracts on behalf of the Commission, except related to special investigators as provided in Wis. Stat. § 5.05(2m), subject to the further provisions of this paragraph. The Administrator is required to request approval from the Commission for contracts involving a sum exceeding $100,000, or for purchases from a statewide contract over $100,000. The Administrator is required to request approval from the Commission prior to posting a Request for Proposal or Request for Bid. In addition, the Administrator may enter into a sole source contract only after obtaining approval from Commission Chair and providing five days' prior notice to the Commission regardless of the dollar amount.

2. The following authority is delegated to the Administrator without the requirement for prior consultation with the Commission Chair before action is taken:

- To exempt municipalities from polling place accessibility requirements pursuant to the provisions of Wis. Stat. § 5.25(4)(a);

- To exempt municipalities from the requirements for the use of voting machines or electronic voting systems pursuant to the provisions of Wis. Stat. § 5.40(5m);

- To authorize the non-appointment of an individual who is nominated to serve as an election official under the provisions of Wis. Stat. § 7.30(4)(e);

- To execute and sign contracts on behalf of the Commission, except related to special investigators as provided in Wis. Stat. § 5.05(2m), for contracts involving a sum not

exceeding $100,000, or for purchases from a statewide contract involving sums not exceeding $100,000.

- To issue written informal advisory opinions pursuant to Wis. Stat. §5.05(6a) related to recurring issues or issues of first impression for which no formal advisory opinion has been issued.

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WISCONSIN LEGISLATIVE COUNCIL

Terry C. Anderson, Director   Jessica Karls-Ruplinger, Deputy Director

TO: SPEAKER ROBIN VOS

FROM: Jessica Karls-Ruplinger, Deputy Director

RE: Senate Action on the Appointments of the Elections Commission Administrator
          and Ethics Commission Administrator

DATE: January 18, 2018

This memorandum responds to your question about whether the interim administrators of the Elections Commission and the Ethics Commission are removed from their positions if the Senate votes "no" on confirmation of the administrators. Although the statutes do not expressly address what happens if the Senate rejects confirmation of the administrators, it appears likely that a court would find that such action removes the administrators and results in vacancies in the administrator positions.

BACKGROUND

The Elections Commission and the Ethics Commission are each under the direction and supervision of an administrator who serves for a four-year term expiring on July 1 of the odd-numbered year. The administrator of the Elections Commission is "appointed by a majority of the members of the [Elections Commission], **with the advice and consent of the [S]enate**." Similarly, the administrator of the Ethics Commission is "appointed by a majority of the members of the [Ethics Commission], **with the advice and consent of the [S]enate**." "Until the [S]enate has confirmed an appointment ..., [each] commission shall be under the direction and supervision of an interim administrator selected by a majority of the members of the commission." [ss. 15.61 (1) (b) 1. and 15.62 (1) (b) 1., Stats. (emphasis added).]

DISCUSSION

The statutes do not expressly address whether an interim administrator of the Elections Commission or the Ethics Commission is removed if the Senate votes "no" on confirmation of the administrator. If a court were asked to determine whether an interim administrator is removed if the Senate rejects his or her confirmation, it would likely apply rules of statutory

construction to "ascertain the intent of the legislature." Rules of statutory construction include harmonizing the parts of the statute, considering the legislative history of the statute, and giving effect to each word, clause, and sentence.[1] [*In re Estate of Walker*, 75 Wis. 2d 93 (1977).]

The statute requires the "advice and consent" of the Senate for the appointment of an administrator for the Elections Commission and the Ethics Commission, but allows an interim administrator to direct the commission until the Senate confirms the appointment of an administrator. To give meaningful effect to Senate "advice and consent," a court is likely to find that the Legislature intended to allow an interim administrator to serve temporarily until the Senate acts on confirmation rather than to allow an interim administrator to continue to serve indefinitely as administrator after Senate rejection of that administrator's confirmation. If the Legislature intended to allow an administrator to continue to serve in the position regardless of the Senate rejection, it would be unnecessary to include Senate confirmation as an element of the appointment process.

Further, a court may look to another statute relating to interim appointments for guidance. Under s. 17.20 (2), Stats., if an interim appointment nominated by the Governor is later rejected by the Senate, the effect of the Senate rejection is a vacancy in the position. Specifically, the statute provides:

> Vacancies occurring in the office of any officer normally nominated by the governor, and with the advice and consent of the senate appointed, may be filled by a provisional appointment by the governor for the residue of the unexpired term, if any, subject to confirmation by the senate. Any such appointment shall be in full force until acted upon by the senate, and when confirmed by the senate shall continue for the residue of the unexpired term, if any, or until a successor is chosen and qualifies. ... **Any appointment made under this paragraph which is withdrawn or rejected by the senate shall lapse. When a provisional appointment lapses, a vacancy occurs.** ... [Emphasis added.][2]

This statute gives effect to a principle that Senate rejection of the confirmation of a Governor's appointee terminates the lawful status of the appointee. Similarly, if a court is asked to determine the effect of Senate rejection on the status of the administrators of the Elections Commission and the Ethics Commission, it would likely apply this same principle by

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[1] Generally, all words and phrases in the statutes must be construed according to common and approved usage. [s. 990.01 (1), Stats.]

[2] In the absence of this specific language about Senate rejection, the Wisconsin Supreme Court recognized that Senate rejection of the confirmation of an interim appointee terminates the lawful status of the appointee. [*State ex rel. Reynolds v. Smith*, 22 Wis. 2d 516 (1964) and *State ex rel. Thompson v. Gibson*, 22 Wis. 2d 275 (1964), which were decided before s. 17.20 (2), Stats., included specific language about Senate rejection. The statute instead stated: "Any such appointment subject to confirmation by the [S]enate shall be in full force until acted upon by the [S]enate, and when confirmed by the [S]enate shall continue for the residue of the unexpired term."]

concluding that rejection results in a vacancy, in order to give meaningful effect to the role of Senate confirmation.

In contrast, it could be argued that removal of the administrator of the Elections Commission requires action by the Elections Commission, and that removal of the administrator of the Ethics Commission requires action by the Ethics Commission, because the statutes: (1) allow each commission to be under the direction and supervision of an interim administrator "[u]ntil the [S]enate has confirmed an appointment" of an administrator; and (2) provide that removal of an administrator is by "affirmative vote of a majority of all members of the commission" and does not specifically allow the Senate to remove an administrator. [ss. 15.61 (1) (b) and 15.62 (1) (b), Stats.] However, this reading makes the requirement for "advice and consent" of the Senate superfluous and is likely not consistent with legislative intent.

First, the statutes provide that the Elections Commission and the Ethics Commission are each under the direction and supervision of an interim administrator "[u]ntil the [S]enate has confirmed an appointment" of an administrator. [ss. 15.61 (1) (b) 1. and 15.62 (1) (b) 1., Stats.] Arguably, if the Senate rejects the confirmation of an administrator, it has not "confirmed an appointment" and thus the interim administrator whose confirmation was rejected may continue to serve as the interim administrator. However, this reading of the statutes ignores the presumed temporary nature of an "interim" administrator. It appears more likely that the ability of a commission to appoint an interim administrator is similar to the ability of the Governor to make an interim appointment, as described above, in that it exists to ensure that an administrator can be in place prior to Senate action on confirmation.

Second, the statutes provide that the administrator of the Elections Commission may be removed by the affirmative vote of a majority of all members of the Elections Commission. Similarly, the administrator of the Ethics Commission may be removed by the affirmative vote of a majority of all members of the Ethics Commission. [ss. 15.61 (1) (b) 2. and 15.62 (1) (b) 2., Stats.] However, the ability of each commission to remove an administrator appears to be compatible with a vacancy resulting from Senate rejection of the confirmation of an administrator. This is consistent with interim appointments nominated by the Governor; for such appointments, the Governor can remove the appointee or a vacancy could result from Senate rejection of the confirmation of the appointee. [ss. 17.07 (3), (4), and (5) and 17.20 (2) (a), Stats.]

CONCLUSION

It appears likely that a court would find that a Senate "no" vote on confirmation of the interim administrators of the Elections Commission and the Ethics Commission results in the removal of the administrators and vacancies[3] in the administrator positions because such a

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[3] If a vacancy in the administrator position for the Elections Commission or the Ethics Commission occurs, the commission must appoint a new administrator, and submit the appointment for Senate confirmation, within 45 days after the date of the vacancy. If the commission does not appoint a new administrator within 45 days, the Joint Committee on Legislative Organization must appoint an interim administrator to serve until a new

reading of the statutes is likely consistent with legislative intent and gives effect to the requirement for Senate confirmation.

If you have any questions, please feel free to contact me directly at the Legislative Council staff offices.

JKR:jal

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administrator is confirmed by the Senate but for a term of no longer than one year. [ss. 15.61 (1) (b) 1. and 15.62 (1) (b) 1., Stats.]

MEMO

Date: January 24, 2018

From: Ann S. Jacobs

Re: Analysis of Effect of Senate Confirmation Vote

Question Presented: What happens under §15.61 (1) if the senate does not "advise and consent" to the appointment of the interim administrator to the position of permanent administrator?

> **Answer: "Advice and Consent" of the senate does not cause the termination of the interim administrator. Only a vote of the majority of the commissioners can effect the termination of the interim administrator. The interim administrator *remains* interim *until* the senate confirms his/her appointment.**

Analysis:

Generally: The Wisconsin Elections Commission is organized as an "Independent Agency" under Ch. 15 of the Wisconsin Statutes.

§15.61(1)(b)1. Provides that the administrator is the appointee of the commission. He/she is not appointed by the legislature or the governor.

§15.61(1)(b)2. Provides that only the vote of a majority of the commissioners can remove the administrator.

The only other statute which could possibly govern removal of the administrator would be Ch. 17, "Resignations, Vacancies, Removals." This statute governs how persons in various positions throughout state government can be removed and/or how vacancies are filled after a resignation occurs.

§17.03 states that a vacancy is created when the person holding the position dies, resigns, is removed, ceases to be a resident of the applicable location in the state, commits treason, is adjudicated incompetent, neglects to take their oath, refuses to execute a bond, declines the office or dies, term expires, failure to elect a school board, creating of a new county and town, or any other legal provision which creates a vacancy.

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None of §17.03 potentially applies to the question presented except removal pursuant to §17.03(3).[1]

Thus, the analysis must turn to the question of how an interim administrator is removed.

Removals are governed by §17.07: Removals: legislative and appointive state officers. (1) does not apply because the administrator is not elected by the Legislature. (2) does not apply because the administrator is not appointed by the Legislature or the Governor. (3) does not apply because the administrator is not appointed by the Governor. (3m) applies only to the parole commission. (4) does not apply because the administrator is not appointed by the governor with the advice and consent of the senate. (5) does not apply because the administrator is not appointed by the governor.

§17.07(6) is the only applicable section. It reads:
> Other state officers serving in an office that is filled by appointment of any officer or body without the concurrence of the governor, **by the officer or body having the authority to make appointments to that office, at pleasure**, except that officers appointed according to merit and fitness under and subject to ch. 230 or officers whose removal is governed by ch. 230 may be removed only in conformity with that chapter. (emphasis added)

In other words, the only way the interim administrator can be removed is through the "body having the authority to make appointments to that office." That is the commission itself.

Of note, §17.07 is expressly consistent with §15.61(1)(b)2., as referred to above. This is an axiomatic part of statutory construction. (Conflict in statutes should not be found if statutes can otherwise be reasonably construed. State v. Zawistowski, 95 Wis. 2d 250, 263, 290 N.W.2d 303, 310 (1980).)

Thus, only the Commission can remove the administrator.

So what is the effect of the Senate's vote to not confirm?

Consider the express language of the statute. It states that the interim administrator remains interim *"**Until**"* approved by the senate to become permanent.

In reviewing statutory language, courts "must give words their ordinary and accepted meanings and try to give effect to every word so as to not render any part of the statute superfluous." State v. Petty, 201 Wis. 2d 337, 355, 548 N.W.2d 817, 823-24

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[1] Although §17.03(13) refers to other provisions, there are no other legal provisions applicable to the Elections Commission administrator which could create a vacancy. In comparison, see §17.15, which lists other specific removals for differing commissions.

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(1996) quoting <u>Benjamin Plumbing, Inc. v. Barnes</u>, 162 Wis. 2d 837, 856, 470 N.W.2d 888 (1991). The difference between "Until" and "Unless" is straightforward. The legislature chose "Until."

"If the language of a statute is clear on its face, we need not look any further than the statutory text to determine the statute's meaning." *See* <u>Bruno v. Milwaukee County</u>, 2003 WI 28, ¶¶ 18-22, 260 Wis.2d 633, 660 N.W.2d 656.

Additionally, a review of Ch. 15 with regard to the appointment of various other persons to various positions, does not reveal similar language indicating interim status "until" senate approval.

The statute uses the word "until" and provides no other statutory mechanism to remove the interim administrator other than those analyzed above. This does not nullify the vote of the senate. The vote of the senate has the effect of maintaining the interim status of the administrator. However, that vote does not usurp the right of the commission to make its own decision on whether or not to fire the administrator, or to maintain the administrator in an interim position.

Review of Wisconsin Legislative Council Memo of 1/18/18:

The memo rests in large part on the claim that §17.20, which governs rejection of governor's appointees, would address this matter. Such a claim flies in direct contradiction to proper statutory analysis.

When the legislature enacts a new statute, it is presumed to know the new statute's relationship with existing and contemporaneously created statutory provisions, especially those directly affecting the statute. See <u>City of Milwaukee v. Kilgore</u>, 193 Wis.2d 168, 183-84, 532 N.W.2d 690 (1995). ("When determining legislative intent, we must assume that lawmakers knew the law in effect at the time they acted.")

In this case, §17.20 existed prior to the creation of §15.61, thus the legislature is presumed to have knowledge of it. It expressly chose **not** to include that clause in §15.61. It is improper to read into §15.61 clauses from §17.20 when the tenets of statutory construction require the opposite.

One can also question why the clause found in §17.20 is necessary, if the failure of the senate to consent effectuated a vacancy. It would be superfluous. Its express delineation of what occurs under that situation makes clear that absent that clause, there would **not** be a vacancy. This is consistent with §17.03(13) - §17.20 is a statute that expressly creates a vacancy. "Any other event occurs which is declared by any special provision of law to create a vacancy." If, in fact, the failure of the senate to approve an appointed person created a vacancy, §17.20's clause would not be necessary. It is necessary precisely because §17.03 does NOT hold that the senate's failure to approve creates a vacancy.

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Additionally, one cannot read into §17.03 a new, un-listed clause: that the failure of the senate to approve an interim administrator creates a vacancy. To do so literally re-writes the statute to create this new exception.

Further, it belies the rules of statutory analysis, *"expresio unius est exclusio alterius"* (the expression of one is the exclusion of another). *See* State ex rel. Harris v. Larson, 64 Wis. 2d 521, 527 (1974) ("The enumeration of the specific alternatives is evidence of legislative intent that any alternative not specifically authorized is to be excluded.").

Case Law Analysis:

Moses v. Board of Veterans Affairs, 80 Wis.2d 411, 259 N.W.2d 102 (1977).

This case addressed the removal of petitioner Moses as the Secretary of Veterans Affairs (an agency also formed under Ch. 15 of the statutes).

The Wisconsin Supreme Court held:

> Most of the issues raised on this appeal deal with the manner of removal of the petitioner by the board of veterans affairs. But, before we can get to the HOW of the removal, we must first determine WHO had the right to remove him from the secretaryship. Certainly, in this case, although not in the dictionary, WHO comes before HOW. The threshold question is who had the statutory right and authority to remove the petitioner as secretary of veterans affairs.
>
> **In this state the right to remove legislative or appointive state officers is given by statute to the person or body that made the appointment of such officer. This is codified in a removal statute creating certain categories of officers.** These categories relate the right to remove an officer with the person or body that made the appointment. One such category is "state officers appointed by the governor by and with the advice and consent of the senate, or appointed by any other officer or body, subject to the concurrence of the governor." State officers in this category can be removed from office only "by the governor at any time, for cause." Another category is "(o)ther state officers appointed by any officer or body without the concurrence of the governor." State officers in this category can be removed from office "by the officer or body that appointed them, at pleasure." If the petitioner is in the first category, he can be removed only by the governor for cause. But if the second applies, he is removable by the board, at its pleasure.
>
> Id. 414-415 (emphasis added / citations removed)

The Supreme Court went on to explain that "It is not the nature of the duties performed that determines who can remove. Rather, the determinative question is who made the appointment." Id. at 418.

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Governing Statutes:

§15.61(1):
(b) 1. The elections commission shall be under the direction and supervision of an administrator, who shall be appointed by a majority of the members of the commission, with the advice and consent of the senate, to serve for a 4-year term expiring on July 1 of the odd-numbered year.

Until the senate has confirmed an appointment made under this subdivision, the elections commission shall be under the direction and supervision of an interim administrator selected by a majority of the members of the commission.

If a vacancy occurs in the administrator position, the commission shall appoint a new administrator, and submit the appointment for senate confirmation, no later than 45 days after
the date of the vacancy. If the commission has not appointed a new administrator at the end of the 45-day period, the joint committee on legislative organization shall appoint an interim administrator to serve until a new administrator has been confirmed by the senate but for a term of no longer than one year. If the administrator position remains vacant at the end of the one-year period, the process for filling the vacancy described in this subdivision is repeated until the vacancy is filled.

2. The administrator may be removed by the affirmative vote of a majority of all members of the commission voting at a meeting of the commission called for that purpose

17.07   Removals; legislative and appointive state officers.

Removals from office of legislative and appointive state officers may be made as follows:
> (1) Officers elected by either house of the legislature, by the house that elected them, at pleasure.

> (2) State officers appointed by the legislature, by that body, at pleasure; or by the governor during the recess of the legislature, for cause.

> (3) State officers serving in an office that is filled by appointment of the governor for a fixed term by and with the advice and consent of the senate, or serving in an office that is filled by appointment of any other officer or body for a fixed term subject to the concurrence of the governor, by the governor at any time, for cause.

> (3m) Notwithstanding sub. (3), the parole commission chairperson may be removed by the governor, at pleasure.

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(4) State officers serving in an office that is filled by appointment of the governor with the advice and consent of the senate to serve at the pleasure of the governor, or serving in an office that is filled by appointment of any other officer or body for an indefinite term subject to the concurrence of the governor, by the governor at any time.

(5) State officers serving in an office that is filled by appointment of the governor alone for a fixed or indefinite term or to supply a vacancy in any office, elective or appointive, except justices of the supreme court and judges and the adjutant general, by the governor at pleasure; the adjutant general, by the governor, at any time, for cause or for withdrawal of federal recognition of his or her commission under 32 USC 323; and all officers appointed by the governor during the recess of the legislature whose appointments are required to be later confirmed by the senate shall be deemed to be appointed by the governor alone until so confirmed.

17.07(6) (6) Other state officers serving in an office that is filled by appointment of any officer or body without the concurrence of the governor, by the officer or body having the authority to make appointments to that office, at pleasure, except that officers appointed according to merit and fitness under and subject to ch. 230 or officers whose removal is governed by ch. 230 may be removed only in conformity with that chapter.

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