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FROM: Attorneys Lester A. Pines and Susan M. Crawford

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Wisconsin State Senate Lacks Authority to Hold Members in Contempt and Order Their Arrest

The Wisconsin Constitution absolutely prohibits members of the Wisconsin Senate from being arrested for a non-criminal offense. The failure or refusal of a senator to attend a session of the Senate is not a crime. Nor is it in contempt of the Senate. Moreover, the Senate's authority to cite any individual for contempt is limited to those offenses listed in Wis. Stat. §13.26(1), none of which have been committed by any of the absent Senators. The Wisconsin Senate's action today in citing fourteen of its members for contempt for their refusal to attend the Senate's sessions and to issue warrants for their arrest has no basis in the law of this state.

Each house of the Wisconsin Legislature may "compel the attendance of absent members in such manner and under such penalties as each house may provide." Wis. Const. Art. IV, §7. However, the Wisconsin Constitution confers on each legislator a broad privilege from arrest:

Members of the legislature shall in all cases, except treason, felony and breach of the peace, be privileged from arrest; nor shall they be subject to any civil process, during the session of the legislature, nor for fifteen days next before the commencement and after the termination of each session.

Wis. Const. Art. IV, §15.

Thus, while the Wisconsin Constitution authorizes each house to penalize its members in order to compel their attendance, this power must give way to the constitutional protection bestowed on each member privileging them from arrest or civil process.

This privilege protects members of the legislature from arrest or civil process, except in criminal cases. *State v. Burke*, 258 Wis.2d 832, 653 N.W.2d 922 (Ct. App. 2002).

None of the fourteen absent Senators has been charged with a crime. Nor has any crime occurred. The Wisconsin Senate has absolutely no authority to order any of its members arrested or taken into custody in order to compel their attendance.

Likewise, the Senate's authority to find a person in contempt is limited by statute. Section 13.26 of the Wisconsin Statutes provides that:

Each house may punish as a contempt, by imprisonment, a breach of its privileges or the privileges of its members; *but only for one or more of the following offenses:*

- (a) Arresting a member or officer of the house, or procuring such member or officer to be arrested in violation of the member's privilege from arrest.
 - (b) Disorderly conduct in the immediate view of either house or of any committee thereof and directly tending to interrupt its proceedings.
 - (c) Refusing to attend or be examined as a witness, either before the house or a committee, or before any person authorized to take testimony in legislative proceedings, or to produce any books, records, documents, papers or keys according to the exigency of any subpoena.
 - (d) Giving or offering a bribe to a member, or attempting by menace or other corrupt means or device to control or influence a member's vote or to prevent the member from voting.
- (2) The term of imprisonment a house may impose under this section shall not extend beyond the same session of the legislature.

Wis. Stat. §13.26 (1) (emphasis added).

None of those offenses has been committed by any of the absent senators. In fact, were one of the absent senators to be arrested on a warrant issued by Senator Fitzgerald, that

action would violate Wis. Stat. §13.26(a) and subject him to being held in contempt of the Senate.

Notably, §13.26 authorizes the order of contempt and imprisonment only of third parties. It does not authorized such an order against members of the legislature. It is consistent with, and implicitly acknowledges, the privilege from arrest bestowed on members of the legislature by the Wisconsin Constitution.

The Senate Rules proscribe the lawful procedure by which members may be compelled to be present. Senate Rule 8 authorizes the Sergeant at Arms to “proceed to find and bring in such absentees” upon the Senate’s call to the house. Neither the Senate Rules, the Wisconsin Constitution, nor the Wisconsin Statutes authorize the sergeant at arms to direct law enforcement to arrest a member, under threat or show of force, to compel the attendance of the member.

While the Senate may lawfully impose penalties on its absent members, and may direct the Sergeant at Arms to proceed to find and bring in such members, the Senate has no authority to issue a warrant for the arrest of its members.

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