

STATE OF WISCONSINBEFORE THE JOHN DOE JUDGE

IN THE MATTER OF A JOHN DOE PROCEEDING	COLUMBIA COUNTY CASE NO.	13JD000011
	DANE COUNTY CASE NO.	13JD000009
	DODGE COUNTY CASE NO.	13JD000006
	IOWA COUNTY CASE NO.	13JD000001
	MILWAUKEE COUNTY CASE NO.	12JD000023

**DECISION AND ORDER GRANTING MOTIONS TO QUASH SUBPOENAS AND RETURN OF
PROPERTY**

MOTIONS TO QUASH

Motions to quash subpoenas have been filed by: (1) Friends of Scott Walker (FOSW); (2) Wisconsin Manufacturers & Commerce, Inc. and its affiliate WMC-IMC.; (3) Wisconsin Club for Growth directors and accountant; and (4) Citizens for a Strong America, Inc. directors and officers. The motions have been fully briefed. The State's brief is a consolidated response, so I assume a consolidated decision will not adversely affect the secrecy order.

I am granting the motions to quash and ordering return of any property seized as a result of the subpoenas. I conclude the subpoenas do not show probable cause that the moving parties committed any violations of the campaign finance laws. I am persuaded the statutes only prohibit coordination by candidates and independent organizations for a political purpose, and political purpose, with one minor exception not relevant here (transfer of personalty, Wis. Stat. 11.01(7)(a)2.), requires express advocacy. There is no evidence of express advocacy.

The motions were filed over two months ago, before I was even assigned this case. They are overdue for a decision. This decision will be brief, enabling me to produce it more quickly. Any reviewing court owes no deference to my rationale, so giving the parties a result is more important than a delay to write a lengthy decision on election and constitutional law. For more detail, readers should consult the parties' briefs. In fact, in order to fully understand the factual and legal context of this decision, that will be necessary for anyone, such as an appellate court, not familiar with this case.

The subpoenas reach into the areas of First Amendment freedom of speech and freedom of association. As a result, I must apply a standard of exacting scrutiny and, in interpreting statutes, give the benefit of any doubt to protecting speech and association.

As a general statement, independent organizations can engage in issue advocacy without fear of government regulation. However, again as a general statement, when they coordinate spending with a candidate in order to influence an election, they are subject to regulation.

The State relies heavily on some rather broad language in *Wisconsin Coalition for Voter Participation, Inc. v. State Elections Board*, 231 Wis. 2d 670, 605 N.W.2d 654 (Wis. Ct. App. 1999). This case did give me some pause. However, I agree with the Wisconsin Club for Growth that the case is distinguishable. (Club's response brief at 10-14). But even more important, considerable First Amendment campaign financing law has developed in the fifteen years since that case was decided. (See, e.g., Wisconsin Manufacturers & Commerce initial brief at 5-6). It is unlikely that the broad language relied on by the State could withstand constitutional scrutiny today.

Wisconsin Club for Growth's analysis of the campaign financing statutory scheme is particularly helpful. As the Club explains in its reply brief, the legislature crafted definitions of four key terms: committee, disbursement, contribution and political purposes. All statutory regulations emanate from these four definitions. Before there is coordination there must be political purposes; without political purposes, coordination is not a crime.

To be a committee, an organization must have made or accepted contributions or disbursements for political purposes. Wis. Stat. 11.01(4). As relevant here, acts are for political purposes when they are made to influence the recall or retention of a person holding office. Wis. Stat. 11.01(16). If the statute stopped here, the definition of political purposes might well be unconstitutionally vague. *Buckley v. Valeo*, 424 U.S. 1, 77 (1976). But the definition continues: acts for political purposes include, but are not limited to, making a communication that expressly advocates the recall or retention of a clearly identified candidate. Wis. Stat. 11.01(16)(a). In GAB 1.28, the Government Accountability Board attempted to flesh out other acts that would constitute political purposes, but because of constitutional challenges it has stated it will not enforce that regulation. So the only clearly defined political purpose is one that requires express advocacy.

The State is not claiming that any of the independent organizations expressly advocated. Therefore, the subpoenas fail to show probable cause that a crime was committed.

Friends of Scott Walker is a campaign committee, not an independent organization. Election laws do not ban all coordination between a candidate and independent organizations. As the GAB has recognized, broad language to the contrary is constitutionally suspect. El.Bd. 00-2

(reaffirmed by GAB in 2008). Furthermore, I am persuaded by FOSW that the statutes do not regulate coordinated fundraising. (See FOSW reply at 10-18). Only coordination of expenditures may be regulated and the State does not argue coordination of expenditures occurred. Therefore, the subpoena issued to FOSW fails to show probable cause

The subpoenaed parties raise other issues in their briefs, some quite compellingly. However, given the above decision, it is not necessary to address those issues.

MOTIONS FOR RETURN OF PROPERTY

R.L. Johnson and Deborah Johnson have filed motions for the return of property seized pursuant to search warrants. The Johnsons claim the warrants were defective for several reasons, some of which are among the undecided issues in the above decision on the motions to quash. The Johnsons have not specifically raised the issues that are decided above. However, in the interests of fairness, the same legal conclusions should apply to all parties who have raised challenges in this case. Therefore, for the reasons stated above regarding the limitations on the scope of the campaign finance laws, I conclude that the Johnson warrants lack probable cause. Accordingly, their motions are granted.

ORDER

The subpoenas issued to Friends of Scott Walker, Wisconsin Manufacturers & Commerce, Inc. and its affiliate WMC-IMC, Wisconsin Club for Growth directors and accountant, and Citizens for a Strong America, Inc. directors and officers are quashed and any property seized pursuant to the subpoenas shall be returned.

Any property seized pursuant to search warrants served on R.L. Johnson and Deborah Johnson shall be returned.

Dated: January 10, 2014.

By the John Doe Judge:

Gregory A. Peterson
Reserve Judge