March 11, 2015

Statement of E. Michael McCann on Senate Bill 43

Senators:

My name is E. Michael McCann. I appear before you wearing two hats.

The first hat is as a board member of Common Cause of Wisconsin.

Common Cause is a non-partisan, non-profit citizen’s lobby affiliated with national Common Cause. As noted on our web site: “We focus on campaign finance, ethics and lobby reform, open meetings law and other issues concerning the promotion and maintenance of ‘clean,’ open, responsible and accountable government.” When I am speaking to the issue of amending the laws to end the use of the John Doe statute for the investigation and prosecution of public officials for crimes against government and its administration, I am wearing that first hat.

Senate bill 43 reaches substantially beyond that and ends the use of the John Doe for serious crimes including class E, F, G, H, and I felonies involving (1) the manufacture, sale and delivery of heroin, cocaine, and other drugs, (2) identity theft, (3) mortgage fraud, (4) arson with intent to defraud (5) thefts reaching even into millions of dollars and (6) numerous other similarly classed serious felonies. When I speak to these issues, I have taken off my first hat but am still wearing the second, that of the retired prosecutor who served for 38 years as the elected district attorney of Milwaukee County.

In the Milwaukee Journal of February 28, 2015, Assembly Speaker Robin Vos is quoted as directing criticism at two John Doe proceedings conducted in recent years in
Milwaukee and stating that he wants a bill to rewrite the John Doe statute. The first Doe probe resulted in convictions of six individuals (one for misconduct in public office and one for theft from a veterans’ group) who were aides, associates or appointees of Scott Walker when he served as Milwaukee County Executive. The second John Doe has been reported in the newspapers as starting in 2012 and probing alleged coordination argued to be unlawful between conservative political organizations and recall election efforts of Governor Walker and other candidates. All have denied wrongdoing. That second probe has been subject to intense litigation and appears to be basically at a halt while the legal issues are being presented to the Wisconsin Supreme Court. I assume Senate Bill 43 is the rewrite which Mr. Vos anticipated.

Representative David Craig, a co-sponsor of the bill, was reported in the Milwaukee Journal Sentinel criticizing the secrecy of John Doe proceedings and calling for freedom of speech. As there is so much confusion over the John Doe secrecy law, I will address that issue first. Governor Scott Walker, Eric O'Keefe, R.J. Johnson, Deb Jordahl, and any persons associated with the Wisconsin Club for Growth and Gogebic Taconite are free to legally comment as much as they wish on all aspects of their involvement with any related political campaigns, any related fund raising, communications between legislators and other information appearing to be related to the topics raised in the newspaper. The caucus scandal confirmed the powerful role played by leaders in the legislature in raising funds to support political efforts of others in their caucus. Assembly Leader Robin Vos is completely free to discuss everything he knows about the $700,000 the Milwaukee Journal Sentinel of February 28, 2015, reported Gogebic
donated to a political group at a time when Gogebic was interested in moving a mining bill through the legislature. Representative Craig can advise any and all that he knows on issues such as how much support, if any, he has received from the Wisconsin Club for Growth, what support he got if any from the $700,000 given by Gogebic to the political group and other campaign financing information he wishes to provide about himself or others.

The very narrow area that the John Doe secrecy reaches is that one cannot advise that he has been subpoenaed to the John Doe, questions he was asked in the John Doe and responses he made and any information he learned in the John Doe. He is totally free to repeat that same information he gave to the John Doe anywhere and to anyone he wishes but he cannot say that this is the information that I provided to the John Doe. The basic reason for such rule is to prevent wrongdoers from learning that a Doe is in progress and what the Doe may be targeting so that a wrongdoer is not alerted to destroy incriminating evidence or undertake to lie himself when called before the Doe or to orchestrate perjury before the Doe. The secrecy also exists to protect the reputation of persons who might never be charged. Reporting outside the Doe that a witness was asked, “What do you know about Senator x taking bribes” may destroy a reputation of a person who is never charged. During my 38 years as District Attorney, we looked at the activities of two persons who had prominence as public officials and did not charge either person. Witnesses called to the probe apparently abided by the secrecy order and no report of such John Doe inquiries appeared in the press. It is true that federal rules permit a witness before the grand jury to publicly report what he has been asked
and what he said. But it is exceedingly rare to see the subject of an inquiry or someone under suspicion make a public statement about what was said in the grand jury. Any competent lawyer will advise such witness that his interests are better served by silence. The accusing witness who speaks may be ruining the reputation of a person never to be charged. Make no mistake: free speech in the investigation and prosecution of crimes of public officials isn’t the problem - silence is.

Contents of Senate Bill 43

The John Doe statute has served Wisconsin well in bringing wrongdoing public officials to justice. Among those convicted after John Doe inquiries were State Senator James Devitt, State Senate Majority Leader Charles Chavla, State Senator Brian Burke, Assembly Speaker Scott Jensen, Milwaukee Alderman Mark Ryan, and Milwaukee Alderman Michael Mcgee. Senate Bill 43 guts the strength of the John Doe by removing numerous crimes for which public officials have been convicted in the past. The key public crimes the bill removes from investigation by a John Doe are:

- 946.10 Bribery of public officers and employees
- 946.12 Misconduct in Public Office
- 946.13 Private interest in public contract prohibited
- 946.17 Corrupt means to influence legislation; disclosure of interest
- 946.31 Perjury
- 948.32 False swearing
- 946.61 Bribery of witness
Senate Bill 43 removes from the reach of the John Doe all the statutes under which Senate Majority leader Chvala and Assembly Speaker Jensen were charged in the caucus John Doe. Nine of the 20 charges against Chvala involved unlawful campaign coordination. Chavla did not contest the charges by trial and a number were dismissed on motion of the district attorney when he was found guilty. Jensen contested the three counts of misconduct in office and a charge under the public official conduct code and was found guilty by a Dane County jury of all counts. The misconduct charge convictions were overturned on appeal because of an erroneous jury instruction by the judge. The case was transferred to Waukesha County under a new statute granting legislators the right to be tried in their locale of election. Waukesha County District Attorney Brad Schimel, noting the burden that retrial would pose on his limited staff, the travail that the conviction had brought on the defendant and his family, the fact that the defendant could not again hold public office under the state constitution because of the violation of public trust conviction in Dane County, dismissed the misconduct counts upon the defendant’s stipulation to repay the state over $67,000 in legal fees and pay an additional $5000 maximum fee on a forfeiture then brought in Waukesha County. District Attorney Schimel, now Wisconsin Attorney General Schimel, issued a statement at that time as follows:
“. . . I note that the investigation and prosecution into the caucus scandals brought about systemic change. The Department of Justice and my colleagues in the Dane and Milwaukee County District Attorney’s Offices performed their duties with a resolve to expose pervasive abuse of the public trust. It is a credit to their diligent work that the entire caucus system has since been dissolved.”

Common Cause and I personally believe that the John Doe statute as it is was critically important in bringing an end to the misconduct in office seen in the caucus scandal. We strongly believe that statute, as it is, is vital to the interests of clean and accountable government and thus are deeply opposed to Senate Bill 43 which would gut the current statute.

The John Doe is used in those cases where wrongdoing of some type appears but the specifics and numbers and types of offense are not known. Indeed, that is one of the reasons that the statute is used. The provision under Section 7 (b) of the bill requiring that a John Doe “may not investigate a crime that was not part of the original request . . . unless a majority of judicial administrative district chief judges find good cause to add specified crimes” is unique. In over 50 years of practice of the law mostly with respect to crimes, I have never seen such a rule in Wisconsin or federal law. Indeed, I have never seen such a rule in any state law. In the caucus investigation it was only slowly, after much effort that the crimes involved came to surface. In other John Does where a huge number of defendants and crimes are involved the proposed rule is utterly destructive of effective prosecution. In the Samuel Caraballo drug trafficking
organization John Doe, the Milwaukee County District Attorney working with a state wiretap brought charges against Carabillo and 31 co-conspirators.

The 1998 federal indictment of 33 members of the Milwaukee Latin Kings street gang originated with a state John Doe investigation into the gang’s activities that resulted in state and federal charges against over 75 members of the gang. To require clearance by ten judges to add each new charge to the John Doe in such cases would be a stupefying task that would clearly be of perverse advantage to some very hard core offenders. Some of the ten judges might act on paper and some, possibly those hundreds of miles away, might require the attendance of an assistant district attorney. Some judges might act rapidly at first but after being inundated with requests demanding their time to the disadvantage of local litigants, might understandably require the district attorney to schedule onto the calendar weeks after the request. There is good reason why no precedent is found for such a statute. It would only be adopted by a legislature either intent on crippling the effect of the John Doe statute or simply unaware of the havoc it would bring to effective prosecution.

The above Sam Caraballo John Doe investigation took over a year. The Latin Kings effort took three years. The imposition of a six month time limit on the John Doe is not necessary. Getting the approval of ten judges to continue an investigation is disruptive and unprecedented. Most judges are already very busy and are desirous of moving the John Doe as rapidly as the interests of justice permit. Obviously, in cases where intense
concurrent state and federal litigation by subjects with an interest in the Doe is carried on, the John Doe will be slowed.

The current John Doe statute as it is has served our state very well. In the interest of clean and just government, Common Cause opposes Senate Bill 43.