Legislation to Cripple State “John Doe” Law Would Exempt Political Corruption From Effective Investigation and Prosecution

By E. Michael McCann

Every Wisconsin citizen, regardless of political party preference, wants clean government and elected officials with integrity. Enactment of legislation that would dramatically alter the state’s longstanding “John Doe” law, Senate Bill 43/Assembly Bill 68 -- poised for action before the Wisconsin Legislature in the next few days -- would be a serious step backward from that commonly held aspiration for honest, accountable government.

Even before Wisconsin became a state, the territorial legislature enacted a John Doe law, which permitted a judge, upon receiving a complaint, to compel a person to appear before the judge and give testimony. That law continues to be in place to this day and permits the investigation of every type of felony or misdemeanor crime. Under Wisconsin law, neither the police nor the district attorney can subpoena anyone to appear in a police station or a district attorney’s office. While victims and witnesses usually cooperate in reporting crimes and willingly provide statements of what they know of the offense, in some important cases few or no persons will cooperate with investigators and the public interest requires that witnesses be subpoenaed before a John Doe, compelled to give testimony, if necessary under a grant of immunity, and required to produce documents relating to the crime. For over 165 years, the John Doe statute has served our state well and has been particularly effective in recent decades in bringing to justice legislators and other public officials who have committed crimes in public office.

Senate Bill 43/Assembly Bill 68 would leave the John Doe law in effect for many serious felonies, but would exempt from the reach of the law those very crimes that are often committed by legislators, others holding public office, and the wealthy special interests unlawfully attempting to influence elected officials. Among those crimes to be exempted from John Doe coverage are misconduct in public office, bribery of public officials, theft, all violations of campaign finance laws, all election law offenses, corrupt means to influence legislators, extortion, private interest in public contract, lobby law violations, criminal violations of state
ethics rules, false swearing and those additional crimes that may occur when a John Doe investigation is underway, such as perjury, bribery of a witness and tampering with public records.

Legislators supporting SB 43/Assembly Bill 68 respond that a district attorney may use a grand jury to investigate rather than a John Doe proceeding. In the last twenty years, both Republican and Democratic district attorneys across the state of Wisconsin have used the John Doe law hundreds of times. I am not aware of the grand jury law being used even once during that time. Unequivocally and resoundingly, district attorneys prefer the John Doe procedure because it is more effective, more efficient, and is less onerous a burden on citizens and less costly to county budgets. To initiate a John Doe proceeding, the district attorney schedules an appointment with the assigned judge and presents certain papers to the judge with the complaining witness and the court reporter being the only persons needed to be present. If the judge authorizes the probe, the only persons that need to be present are the district attorney, the judge, the court reporter, together with the complaining witness replaced by other witnesses as they sequentially appear, and usually present as well, is a key investigating officer.

In contrast, when a judge orders a grand jury, the clerk of courts must convene between 75 and 150 citizens from which 17 are selected to serve as grand jurors. All 17 are required to attend every scheduled session of the grand jury or be excused, and at least 14 must be present for the jury to hear a witness or otherwise act. The district attorney will generally attend all sessions as well as a reporter to record proceedings and an investigator and a witness when desired. For a serious and complex investigation, the grand jury may meet many times with the judge extending the service time of the grand jurors beyond an initial 31-day period. For the initial 75 or more citizens initially summoned in by the clerk and for each meeting the 17 chosen members of the grand jury must be paid generally a minimum of $16 a day plus mileage or a higher rate if the county so provides, all from county funds. It’s obvious why district attorneys prefer the John Doe as a more efficient and effective investigating procedure and one less burdensome on taxpayers.
The State Capitol “Legislative Caucus Scandal” investigation, started in 2001, demonstrates how effective a John Doe can be. Next to the governor, the two most powerful political positions in the state are the Speaker of the Assembly and the Majority Leader of the State Senate. The Legislative Caucus Scandal arose with allegations that state taxpayer paid employees, working for the Democratic and Republican legislative caucuses, were in fact doing political election campaign work while on the state payroll. The John Doe apparently started with that focus, but was expanded to investigate various other political type crimes. The Democratic State Senate Majority Leader was charged with 20 felony counts, nine of which focused on unlawful campaign coordination. He did not contest the charges with a trial, and all but two felonies were dismissed when he was found guilty. Three felony counts of misconduct in public office and a misdemeanor violation of public trust were brought against the Republican Assembly Speaker and he was convicted on all counts by a Dane County jury. A felony and a misdemeanor were charged against the Assembly Republican Majority leader, with the felony being dismissed reportedly for cooperation and conviction of the misdemeanor followed. Two felony charges against a second Democratic state senator and a misdemeanor against an additional Republican state representative resulted in convictions. The Assembly Speaker appealed and the three felony misconduct in office convictions were vacated on grounds of judicial error. The case was transferred to Waukesha County under a new statute (that created the Government Accountability Board) granting legislators the right to be tried in their locale of election for misconduct in office. The Waukesha County district attorney, noting the burden that retrial would pose on his limited staff, the travail that the conviction had brought on the defendant and his family, and the fact that the defendant could not again hold public office under the state constitution because of the violation of public trust misdemeanor conviction in Dane County that was not reversed, dismissed the three pending misconduct in public office felonies upon the defendant’s stipulation to repay the state $67,000 in legal fees and pay an additional $5,000 maximum fee on a forfeiture then brought in Waukesha County. District Attorney Brad Schimel, now the Wisconsin Attorney General, issued a statement on the case:

“... 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 County and Milwaukee County District Attorney 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 been dissolved.”

Absolutely critical to that effort was the John Doe law.

The John Doe is often used in those situations where wrongdoing of a particular type appears but the specifics and numbers of related offense are not known. Indeed that is one of the reasons the statute is used. Expansion of the investigation is at the discretion of the John Doe judge. Under Section 7 (b) of proposed Senate Bill 43/Assembly Bill 68, a John Doe proceeding “may not investigate a crime that was not part of the original request . . . unless a majority {6 of 10} of judicial administrative district chief judges find good cause to add specified crimes.” No similar rule exists in Wisconsin criminal law or procedure. In the Caucus Scandal investigation, it was only slowly, and after much effort, that the various crimes involved came to the surface. In other John Does where a large number of defendants and crimes are involved, the proposed rule would be utterly destructive to effective prosecution. The 1998 federal indictment of members of the Milwaukee Latin Kings street gang originated with a state John Doe proceeding into the gang’s activities that resulted in state and federal charges against 75 members of the gang. To require clearance of 6 of 10 judges from different parts of the state to add each new crime investigated 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 or dishonest politicians and to the distinct disadvantage of their victims and the public at large.

Senate Bill 43/Senate Bill 68 limits use of the John Doe to only certain felony crimes in the Criminal Code. As a result, in addition to the political type crimes listed above that could not be investigated by a John Doe, many crimes outside the Criminal Code, such as all tax offenses, securities law violations, public assistance crimes such as food stamp and Medicaid frauds and other crimes would require impaneling a grand jury to secure testimony from an uncooperative witness or to subpoena records.

This bill arises from Republican legislative leadership unhappiness over the John Doe II investigation into whether there was so called “illegal coordination” between the Wisconsin Club
for Growth, a self identified issue-advocacy group which is not required to report the contributions it receives or the expenditure it makes, and Governor Walker’s campaign committee which is required to report contributions received and expenditures made. In the 1999 case of Wis. Coal. for Voter Participation, Inc. v. State (WCVP), the Wisconsin Court of Appeals addressed that very issue involving a campaign committee and an issue-advocacy group and ruled that intense and extensive cooperation between a campaign committee and an issues-advocacy group was illegal and a violation of Wisconsin election law. Under such circumstances of illegal cooperation, the campaign committee should report the issue-advocacy group expenditures as contributions to the campaign committee but does not. The WCVP case was viewed as the governing law by the Wisconsin Government Accountability Board, the agency charged enforcement of the Wisconsin election laws, over the next 16 years. No doubt the WCVP case was seen as the governing law by the Republican special prosecutor and three Democratic and two Republican district attorneys who joined in the John Doe II effort. For 16 years, from 1999 to the present, the Wisconsin Legislature never passed a law setting aside the ruling in WCVP. In O’Keefe v. Chisholm, a 2014 attempt to derail the John Doe II, the Seventh Circuit Federal Court of Appeals stated, “No opinion issued by the {U.S.} Supreme Court or by any court of appeals establishes (‘clearly’ or otherwise) that the First Amendment {U.S. Constitution} forbids regulation of coordination between campaign committees and issue-advocacy groups . . .” and reached a ruling consistent with the WVCP decision. The Wisconsin Supreme Court this Summer, in a split court ruling in State ex rel Two Unnamed Petitioners v. Peterson, overruled the WVCP decision and stated the First Amendment precludes prosecution in the context of Wisconsin law of any type of coordination between a campaign committee and an issues-advocacy group and ordered an end to the John Doe II proceeding. It appears that this decision may be appealed on several grounds, one reportedly being that two of the four Wisconsin Supreme Court justices voting for the ruling, Justice Michael Gableman, who wrote the majority opinion, and Justice David Prosser, had received substantial support in their elections to the Wisconsin Supreme Court from two entities who later came under review in the John Doe II proceeding.

Citizens who followed the John Doe II reports may favor tighter rules on the nighttime execution of search warrants at homes and may support guidelines to shorten the length of a John Doe
when that can be done consistent with the public interest. For constitutional reasons, a witness in the John Doe should no longer be bound by the secrecy order that binds the judge, prosecutor, court reporter and investigator.

There is no broad public clamor for change of the John Doe law. Indeed, most citizens, Democratic, Republican and Independent believe there should be much stronger watchdog efforts over the conduct of public officials and election fundraising than there presently is. Such limited, but very powerful support for Senate Bill 43/Assembly Bill 68 as there is, comes from legislators and most likely from special interest groups who oppose use of the John Doe to enforce current election campaign finance laws.

Enactment of Senate Bill 43/Assembly Bill 68 would be an immense disservice to the cause of clean, honest and transparent government. The John Doe law has served our state well for 165 years and should not be so radically reduced in reach as Senate Bill 43/Assembly Bill 68 provides.

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