DAVID CRAIG

STATE REPRESENTATIVE

CHAIRMAN, ASSEMBLY COMMITTEE ON FINANCIAL INSTITUTIONS

Senate Committee on Judiciary and Public Safety
Public Hearing, 11 March 2015
Senate Bill 43
Representative David Craig, 83rd Assembly District

Chairman Wanggaard and Committee Members,

Thank you for hearing testimony on Senate Bill 43.

Senate Bill 43 is a much-needed reform of the John Doe statute in Wisconsin law. As state legislators, it is incumbent upon us to ensure that our laws provide an adequate and necessary balance between the constitutional rights of individuals and the appropriate prosecutorial power needed to carry out criminal investigations. Wisconsin is unique in that it allows for the normal criminal proceeding, a grand jury investigative proceeding as well as a John Doe investigative proceeding.

The John Doe proceeding has been the law in Wisconsin since the time it was a territory. The purpose of the John Doe proceeding is to give prosecutors and judges certain powers in criminal investigations to determine whether an alleged crime has been committed. It gives an incredible amount of discretionary power to a presiding judge and to the prosecutor.

The John Doe proceeding under current law is open ended with next to no due process protections, which is why we are proposing the following reforms: increase judicial oversight of the process, protect the constitutional rights of individuals, and ensure accountability to the people of the state of Wisconsin. On the practical level, this involves procedural and substantive reform: increasing the judicial oversight and public accountability of the John Doe process, and determining the scope of crimes which can by investigated through a John Doe proceeding.

In regards to judicial oversight, our bill establishes a process by which a majority of the ten judicial administrative district chief judges can approve requests to extend the scope and length of a John Doe proceeding. The length of a proceeding is limited to six months, unless the majority of chief judges approve extensions in six month increments. We do not limit the number of extensions. If a prosecutor is using a John Doe to investigate a case of battery and uncovers evidence of a homicide, the prosecutor can go to the chief judges to expand the scope of the investigation to homicide. We believe this is a reasonable balance between giving prosecutors the tools they need to investigate serious crimes while also providing oversight for the presiding judge and prosecutor within the existing structure of our judicial system in Wisconsin.

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As I mentioned earlier, our bill provides a level of public accountability that is currently entirely missing from the John Doe law. I think there is no question that a presiding judge of a John Doe proceeding should be a full time judge who is accountable to the electorate, not a reserve judge. In addition, this bill says that a basic summary of the cost of a John Doe must be available to the public under Wisconsin's Open Records law. Further, the votes of the ten chief judges—the vote only—must also be available to the public. This does not include details of the John Doe proceeding on which they voted.

One of the most important procedural changes we make, in my opinion, is to restore free speech rights to witnesses and targets of a John Doe proceeding. Recently, Judge Frank Easterbrook of the 7th Circuit U.S. Court of Appeals referred to a secrecy order issued under Wisconsin's John Doe law as "screamingly unconstitutional." A quick look at the secrecy rules under a federal grand jury investigation reveals that secrecy order cannot extend to witnesses and targets—this is an issue the U.S. Supreme Court has been very clear on. Our bill mirrors the federal grand jury secrecy orders and clears up the potential of our John Doe law being found unconstitutional.

When looking at the scope of crimes that may be investigated through a John Doe proceeding, we spoke at length with a number of individuals who have used John Doe proceedings, in addition to many other experts on the law. What we found is that a John Doe proceeding is used by prosecutors to compel testimony when witness testimony is the only way to investigate an alleged crime and when witnesses are not forthcoming with testimony. With that in mind, we believe it is important to retain this powerful prosecutorial tool for those crimes which the legislature has decided are the most egregious and most serious, namely, the crimes in the criminal code which are classified as A through D. The penalty for a Class A Felony is up to life imprisonment. The maximum penalty for a Class D Felony is a $100,000 fine and up to 25 years in prison. In addition, we have added crimes which are classified as Class E through Class I felonies which are of a particularly sensitive nature which might, therefore, require compelled testimony, such as battery or threat to a witness, abuse of individuals at risk, or crimes against children.

In closing, we believe this bill strikes that important balance between prosecutorial necessity and constitutional rights and I ask for your support of SB 43.

Thank you and I would be happy to answer any questions you may have our bill.

SB 43

JOHN DOE INVESTIGATIONS

Testimony of Dean A. Strang
March 11, 2015

- John Doe investigations can serve useful and legitimate law enforcement purposes for crimes that are difficult to prove by normal police methods
  - Cold-case homicides, in which leads may be few and stale
  - Gang criminal activity in which witnesses act in unison to be uncooperative
  - Organized crimes in which innocent third parties and witnesses may be intimidated (by motorcycle or street gangs or rogue law enforcement, for example)
  - Crimes within the family, where strong pressures may exist to protect family members or to hide shameful facts
  - Old crimes in which some potential suspects very well may be completely innocent, or in which it is possible that there was no crime at all (for example, a suspicious death that may prove to be a suicide, not a homicide—but the police truly are unsure)
- This bill preserves the John Doe probe for such crimes. In fact, it goes beyond that, and allows law enforcement officials to continue to use John Doe powers for some crimes on which those powers are unnecessary. ***But it is a reasonable compromise in an imperfect world***
- The compromise is with the dangers to innocent citizens and the threats to limited government—with checks and balances—that the current John Doe statute presents
  - Judges acting as quasi-prosecutors, with all of the powers of the judicial office but hearing only one side of the story and in secret

- Police, prosecutors, and judges imposing unlimited gag orders on witnesses, targets, and their lawyers, so they can carry on unchecked in secret

- Broad subpoena and search powers when no crime is charged and no crime even may have occurred

- Potentially endless secret investigations, growing unpredictably in scope, limited only by a statute of limitations (if there is one)

- This bill eliminates the worst of the actual and potential abuses

  - Prevents the open-ended investigation that continues indefinitely, sometimes for years, and that spreads cancerously to any new snooping that prosecutors and police officers happen to want to conduct when they hit a dead end on the original purpose of the investigation. Stops investigations that continue until they find *something, anything*

  - Witnesses, suspects, and their lawyers never can be gagged and prevented from disclosing the truth they know and the conduct by police, prosecutors, and judges that they have seen

    - cuts back secrecy to exactly the same secrecy rule that applies in federal grand jury investigations, which underlie almost all federal felony charges and have served this country well since the beginning of the republic

    - ends the overbroad Wisconsin John Doe secrecy rule that federal Judge Frank H. Easterbrook, of the U.S. Court of Appeals in Chicago that covers Wisconsin, suggested strongly is a clear violation of the First Amendment during oral arguments in September 2014

  - Prevents the use of the powerful, secretive, and judicial tools on crimes that are readily solved and charged with ordinary, honest police work

- In other words, the bill prevents the following abuses of ordinary citizens that I personally have seen:

  - The innocent businessman who was suspected wrongly of murdering a business partner, and whose wife, employees, and close friends all were subpoenaed into a secret investigation, bullied there, and ordered not to tell the innocent target—their employer, their friend, their husband—what they were asked and what they knew, at pain of prosecution themselves for contempt of court

  - The 20-year old college student who was suspected of being a vegan anarchist (which is no crime at all, obviously) and was badgered about her political beliefs, her reasons for not eating animal and fish products, and the political beliefs of her friends in a pointless secret investigation that resulted in no charges against anyone. Then, both she and her lawyer were ordered that they could say nothing to anyone about what they saw and heard and said in that secret hearing

  - The district attorney who wanted to delay a trial but the judge refused, so the prosecutor started a baseless John Doe investigation against the dedicated public defender who represented the defendant—just to force him off the case and therefore get the trial delay that the judge had denied. No one ever was charged with any crime because there was no crime. But the district attorney got her delay. The indigent defendant had to be assigned a new lawyer, at considerable waste of public resources, disruption to him, and delay of justice for the alleged victim

  - And of course, the current John Doe investigation in five counties about which you all have read, and in which I represent a private citizen whose life has been turned upside down for 18 months and who now fears merely speaking on the most important political issues facing our state today

- In those four examples, I have encountered one Democratic district attorney, one Republican district attorney, a Republican special prosecutor working predominantly with a Democratic district attorney (and, to a lesser degree, with other district attorneys of both parties), and perhaps most disturbing

but common: a young, ambitious, and power-thirsty prosecutor of no obvious political beliefs at all—just a strong drive to make a name for himself and to win assignments to bigger crimes with more publicity

- Five things this bill will *not* do:
  - prevent anyone from being prosecuted for any crime he or she actually may have committed
  - make currently illegal conduct legal or decriminalize anything
  - reduce any punishment
  - restrict ordinary police powers and ordinary prosecutorial powers in any way
  - limit any power of judges when they are in their traditional judicial role in the adversary system
- This bill does not protect the guilty. It protects the innocent.

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 Jpurnal 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 $700,00 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 some one 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

946.72 Tampering with public record

19,45(13), 19.58.and 19.59 Standards of conduct for state and local officials

Chapter 11 All violations of campaign finance laws

Chapter 12 Prohibited election practices

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 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 Generla 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 wire tap 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 hundred 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.

I will now take off my Common Cause hat and speak as a retired district attorney.

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Kelli S. Thompson
State Public Defender

Michael Tobin
Deputy State
Public Defender

Wednesday, March 11, 2015

State Public Defender testimony on Senate Bill 43

Dear Chairman Wanggaard and members,

Thank you for having this hearing on Senate Bill 43. My name is Adam Plotkin, Legislative Liaison for the Office of the Public Defender (SPD). Joining me is Devon Lee, our Legal Counsel. While we are of course aware of the bigger context surrounding the issues this legislation affects, there are a specific subset of reasons for which the State Public Defender supports efforts to change the current John Doe process.

From the standpoint of our agency, the current John Doe investigatory process contains both positive and negative elements. One of the benefits of the current John Doe process is to allow for inmate complaints to be investigated without significant impacts on those accused of wrongdoing in the complaint prior to an investigation and, potentially, formal allegations being brought. In addition, we recognize the John Doe process can be a useful tool for prosecutors. These are valuable tools offered in the current John Doe statute and one that is preserved in Senate Bill 43.

From another standpoint, the current John Doe process has had negative impacts on SPD staff who have occasionally been themselves a target of a John Doe investigation. Current secrecy provisions in s. 968.26 does not allow us or those subjects to elaborate further on specific instances, but Devon will offer some generic examples of the impact of these investigations.

There are specific examples of items in Senate Bill 43 which SPD feels will make beneficial changes in the narrow context of impact on SPD staff. First, placing time limits which are extendable upon judicial review will encourage expeditious investigations. This will help to limit the timeframe a staff members may be the subject of an investigation.

This issue also supports the change regarding secrecy provisions. Under the current law, an attorney who finds themselves the subject of a John Doe investigation may not be aware of either the scope of the investigation or even if the investigation has concluded without the filing of formal charges. The open ended investigation impacts the ability of that attorney to provide ongoing representation to a client or, in a worst case scenario, the ability to continue representing clients at all. This in turn has a fiscal impact on the state by needing to appoint cases handled by that attorney to private bar attorneys thus paying both the staff attorney's salary and the private bar attorney.

Every day the SPD sees the collateral impacts of criminal investigations and charges on our clients future ability to obtain employment, housing, and higher education even if the charge is subsequently dropped or the client is found not guilty. There is value in preserving aspects of the current John Doe law, but there are also experiental reasons to place some practical limitations on the scope and impact of these investigations.

I would like to make sure to thank the authors, Senator Tiffany and Representative Craig, for seeking the State Public Defender's input on this legislation. Devon can offer some general background on the impact of John Doe investigations on SPD staff.

March 11, 2015

Senator Van Wanggaard, Chairman
Senate Committee on Judiciary and Public Safety
Room 319 South, State Capitol
Madison, WI 53707

Dear Senator Wanggaard & Committee Members:

I submit this testimony in support of Senate Bill 43, a measure that reforms existing statutes that pertain to so-called John Doe investigations.

SB 43 responds in part to abuses associated with supposedly "secret" John Doe investigations conducted in the last five years by District Attorney John Chisholm. These investigations have infringed unduly on the rights of many individuals. (Owing in part to gag orders, it is possible that few of them will offer public comment on this bill.)

While I have no involvement in the John Doe proceedings, I have experience that is relevant. This experience highlights the onerous impact that can arise when one is drawn into an investigation that operates under few conventional ground rules of evidence or due process. The John Doe investigations directed by District Attorney Chisholm have been carried out in such an environment.

In the late 1990s, and again in 2006, I was the target of investigations initiated under the auspices of the Wisconsin Elections Board. Both examples illustrate the need for the Legislature to better protect citizens from unwarranted allegations initiated for political purposes. While neither were John Doe proceedings, their impact on me was strikingly similar to that experienced by those involved in the current John Doe. It is for that reason that I believe this information is pertinent to SB 43.

In the first of these instances, an unsuccessful candidate for the Wisconsin Supreme Court caused the Elections Board to suspect that I might have been involved in an unlawful campaign practice. Somewhat amazingly, to pursue this allegation the Board enlisted help from **criminal** agents of the Wisconsin Department of Justice.

On January 12, 2000, two DOJ agents arrived at my home — unannounced — and asked if they could discuss the campaign with me. Within about 15 minutes I was informed that I, and more likely my wife, might be **indicted.** They asked me to "come clean." One agent said, referring to unspecified but supposedly unlawful activity, "You have some involvement, somehow, George, you know you do." The other agent asked, "If there's nothing to hide, why don't you put your cards on the table?"

Shortly thereafter I excused the agents from my home, after which I called Kevin Kennedy at the Elections Board. He offered a rambling explanation that included no tangible evidence whatsoever as to any wrongdoing on my part. In essence, I was a target due to guilt by association.

In short order, my wife and I needed to retain separate lawyers. The organization for which she worked had to retain a third lawyer.

The subsequent investigation conducted by and for the Elections Board concluded more than a year later. It found **no violations** on my part, or on the part of my wife, or the organization that employed he. Legal expenses incurred on my behalf exceeded $50,000. I had to provide sworn statements. My phone records were subpoenaed. Yet to my recollection, my name was not even mentioned in the final investigative report. Legal expenses incurred on my wife's behalf and by her employer were in the six-figure category. All of this because a losing candidate in a Supreme Court race convinced the Elections Board that we were complicit.

Six years later, in 2006 I was the registered agent for a group that financed issue advocacy communications. One such communication included language that could be construed as express advocacy. Such a communication triggered registration and disclosure requirements under Wisconsin law. When I became aware of the communication I recommended that the group file the required disclosure forms and inform the Elections Board. We did so, acknowledging to the Elections Board that our filing was late (though it did occur in time for pre-election disclosure). We told the Elections Board that the possible express advocacy language was unintentional but we accepted responsibility for the circumstances. The Board's general counsel at the time had advised us that the language in question was ambiguous; we erred on the side of admitting an error and filing the required registration and disclosure forms.

In response, individuals and organizations who opposed the policy goals of our organization filed a series of error-ridden sworn complaints. The absence of even a shred of due process made it necessary for me and the organization to retain legal counsel. Expenses exceeded $100,000. We filed an array of material over many months in refutation of the erroneous and legally flawed complaints. Once again, the organization directed by my wife was swept in and it, too, required legal counsel.

The Elections Board ended its operations without resolving this matter. The Government Accountability Board inherited the case and named an independent investigator. After further months of filings and interviews, the investigator concluded that no violation of law had occurred (other than the late registration that resulted when we brought the matter to the Elections Board).

The GAB finding was made on May 5, 2009. The original and completely bogus complaint was filed on October 12, 2006. Thus, after more than 2.5 years and a six-figure legal bill, the GAB determined that there was nothing to the complaint.

In the end, both of these cases amounted to nothing more than witch hunts. Neither complaint initiated against me reflected a shred of legal evidence. They should have been dismissed out of hand. Even though I was completely exonerated, those with whom I had policy disagreements had succeeded in forcing a six-figure expenditure for legal expenses on my behalf and on behalf of groups with which I was associated.

As the Legislature considers legislation to address abuses in the John Doe investigations, and as it considers reforms to the structure of the Government Accountability Board, circumstances such as mine need to be taken into account. Wisconsin's election laws should not be subject to willful and deceitful misuse of the kind that I experienced.

Thank you for considering these views.

Sincerely,

George A. Mitchell
5250 N. Kimbark Place
Whitefish Bay WI 53217

cc: Senator Tiffany
Representative Craig

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Testimony
Of
Nancy Rottier
Legislative Liaison

For Information Only on
2015 Senate Bill 43
Relating to John Doe Proceedings

Committee on Judiciary and Public Safety
Senator Van Wanggaard, Chair
March 11, 2015

Thank you, Chairperson Wanggaard and members of the Committee. I am Nancy Rottier, the Legislative Liaison for the Director of State Courts. On behalf of the Legislative Committee of the Judicial Conference, I would like to offer some observations about Senate Bill 43, relating to John Doe proceedings.

The Judicial Conference is made up of all the appellate, circuit and reserve judges in the state. Under the bylaws of the conference, the elected members of the Legislative Committee examine pending legislation for its impact on the judiciary and the court system. The committee has not taken a position in favor of or in opposition to this legislation but hopes you will consider its observations, questions and concerns.

I would also note that our Committee of Chief Judges, the ten circuit court judges appointed by the Supreme Court to oversee administrative matters affecting the circuit courts, will be discussing this bill at its regularly-scheduled meeting this Friday. That committee may have additional comments relating to this legislation, particularly since it is referenced in Section 7 of the bill.

The Legislative Committee urges this committee and the Legislature to keep in mind where most John Doe proceedings arise. The total number of cases filed as John Doe cases in

Wisconsin is not great, averaging just under 200 cases per year over the last five years. While the number of cases is small, the process can be time-consuming for the courts, requiring a good deal of the judge's time to review the submission and determine whether a hearing should be held. The cases also tend to be concentrated in counties where state prisons are located, so the workload is not spread evenly across the state.

The majority of John Doe cases are filed by prisoners who are making a claim that a crime of some sort has been committed. In the table below, I have shown the cases filed in six counties that are home to correctional institutions – Brown, Columbia, Dodge, Grant, Racine and Winnebago. As you can see, these six counties account for nearly half of all the John Doe cases filed each year in the circuit courts.

John Doe Cases Filed in Wisconsin Circuit Courts					
County	**2010**	**2011**	**2012**	**2013**	**2014**
Brown	13	31	24	30	45
Columbia	20	17	26	18	13
Dodge	8	5	8	11	12
Grant	44	65	16	22	10
Racine	7	6	7	10	7
Winnebago	9	9	12	5	12
Rest of state	74	105	100	94	96
Total Filed	**175**	**238**	**193**	**190**	**195**

My purpose in bringing forward these numbers is to emphasize that any legislative changes to the John Doe statute must be evaluated based on how they will impact the cases brought by inmates to prevent unintended consequences in this significant portion of John Doe cases.

The Legislative Committee also has questions about two other provisions.

First, in Section 4, there is a prohibition on the use of reserve judges to hear John Doe cases. In our experience, reserve judges are used in these cases for two primary reasons: (1) if there is a conflict of interest for the county's circuit court judge or judges; and (2) as an administrative convenience to maintain case flow of the ordinary business of the courts. An example of the first type of case is one where the allegation is against a county official, for instance, a county board supervisor. Because the county board has budget authority over parts of the court budget, it would be a conflict of interest for judge or judges from that county to hear a

case. Typically a reserve judge from another county would be assigned to handle the John Doe. The second type of case is particularly important in smaller counties with only one or two judges. If the John Doe case is going to be a lengthy one, use of a reserve judge allows the county judge or judges to continue processing their normal caseload. We are puzzled why the authors would remove this important administrative tool.

The second provision we have questions about are the procedures established in Section 7 of the bill that deal with extensions of time beyond six months and investigations of crimes that were not part of the original request. The bill requires an affirmative vote by a majority of the Committee of Chief Judges for either an extension of time or an expansion of the investigation.

How does this administrative committee of judges have jurisdiction to act in a pending case? The duties and powers of a Chief Judge involve the day-to-day administrative functions that allow for effective management of the court's case flow. The duties and powers do not include entering substantive orders in pending cases.

In addition, Section 7 says the Committee of Chief Judge must find "good cause" to make the decisions relating to an extension of time or an expansion of the investigation. This language has specific legal meaning and usually requires a hearing of some sort and a finding of fact in order to support "good cause." Again, this committee is an administrative group and not a sitting court. Is this what is intended? If not, on what is this committee supposed to base its decision? If a secrecy order is in place for a particular John Doe case, how is this committee going to legally obtain the information needed to make a decision? Will it require lifting a secrecy order that was lawfully granted?

These are some practical concerns that seem to exist with the language of Senate Bill 43 as introduced. We hope the committee will study the bill's provisions closely in order that they do not lead to unintended consequences affecting the majority of John Doe cases filed and that they are compatible with existing Wisconsin law and practice.

Thank you.