

PROPONENT TESTIMONY OF PHILLIP COSBY SUPPORTING **HB 2151**

State Director, American Family Action of Kansas and Missouri

Kansas House Judiciary Committee February 2019

Pg. 3 Line 39-42 “ The person who filed the citizen-initiated petition and whose name, address and phone number appear on the face of each petition shall be immune from civil liability for any good faith conduct under this article.”

I rise in support of HB2151, offering an amendment to the **Constitutional** (*KS Supreme Court Nos. 99,951; 99,972; 100,042 GEORGE R. TILLER, M.D., and WOMEN'S HEALTH CARE SERVICES, INC.*) and **reaffirmed** Citizens-Initiated Grand Jury (CIGJ) by Petition process. (*No. 118,410 IN THE COURT OF APPEALS OF THE STATE OF KANSAS In the Matter of the PETITION TO SUMMON A GRAND JURY...*)

We the people are the rightful masters of both Congress and the courts... Lincoln

Kansas statute 22-3001 provides for three types of Grand Juries.

- (a) **Grand Jury ordered by district judges** – historical usage unknown
- (b) **Grand Jury by District or County Attorney** – Authority granted in 2014
- (c) **Grand Jury by Citizen-Initiated Petition**

Interestingly they correspond to the three **separate and equal** branches of government.

Of the three, the Citizen-Initiated Grand Jury (CGJ) by petition is the oldest and closest to the original intent chiseled in the U.S. Constitution as a restraining mechanism for possible abuse by institutional power. Its government limiting legacy can be traced back to the Magna Carta and its use in Ancient Greece.

Why is this amendment needed?

Judges enjoy , **Judicial immunity**- In the performance of their duties - Rules Adopted by the Kansas Supreme Court Rule 223 - Immunity

U.S. District Court, District of Kansas Rule 83.6.12 (f) **Judicial Immunity**. Complaints, reports, or testimony in the course of disciplinary proceedings under these rules are deemed to be made in the course of judicial proceedings. All participants are entitled to judicial immunity and all rights, privileges, and immunities afforded public officials and other participants in actions filed in the courts of Kansas.

Prosecutors enjoy **Absolute Immunity** – In the performance of their duty. Supreme Court of the State of Kansas *NO. 85,499 Dale E. McCormick v. Cynthia J. Long, Deputy District Attorney* – “2. **Prosecutors have absolute immunity** for activities intimately associated with the judicial phase of the criminal process...” and “acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial...are entitled to the **protections of absolute immunity.**” *Buckley v. Fitzsimmons, 509 U.S. 259, 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1993)* **Qualified Immunity** also protects government officials from lawsuits.

First Witness – In the performance of the statutory directive; K.S.A. 22-3001 (4) (B) The person filing the citizens' petition filed in this court must be the first witness you call for the purpose of presenting evidence and testimony as to the subject matter and allegations of the petition. **This amendment provides statutory plain language that extends immunity to the “first witness” who is charged with presenting evidence and allegations.**

“Kansas appellate courts have never examined the particulars of the citizen-initiated grand jury statute.” Pg. 19, No. 118,410 IN THE COURT OF APPEALS OF THE STATE OF KANSAS In the Matter of the PETITION TO SUMMON A GRAND JURY Filed by STEVEN DAVIS.

The courts might at some future date examine and rule on the particular point of immunity, more likely than not as a result of a civil suit against the citizen who filed the petition. The plain language of immunity to the first witness accuser would settle the question of legislative intent. It is preferable that the legislature writes law as opposed to a future judicial ruling dictating an immunity right, or not.

A natural tension is present with institutional power when citizens pursue a grand jury remedy. Resorting to a grand jury by petition implies that someone in authority is not doing their job, or worse. Corruption, indifference, collusion, bias, a wink and a nod...are of concern.

“...a citizen’s grand jury is convened to investigate criminal activity involving government or a perceived failure of the prosecutor or system to charge or investigate a particular person or entity...” KANSAS COUNTY AND DISTRICT ATTORNEYS ASSOCIATION MAGAZINE – *The Kansas Prosecutor* – “**Gimme A Grand Jury**”- Winter 2010 Jan Satterfield, Butler County Attorney

Thomas Jefferson. “I know no safe depository of the ultimate powers of the society but the people themselves ; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion by education...”

Who is the final arbiter of power? We the people... A Government of, by and for the people” ... ”All political power is inherent in the people” KS Constitution 1959 Who did the founders trust in the Bill of Rights? People or Power?

“The Constitution is not an instrument for the government to restrain the people, it is an instrument for the people to restrain the government – lest it come to dominate our lives and interests.” – Patrick Henry

*1st Amendment to the U.S. Constitution and Article 3 of the Kansas Bill of Rights...
The Right of Freedom Of Speech and the Peoples Right to Petition the Government for
a Redress of Grievances.*

Kansas is not inventing the Citizen-Initiated Grand Jury process, it is reestablishing its historical and constitutional mandate.

This sword cuts both ways. Please support HB 2151

Phillip Cosby 785-571-7214 , AFAction of Kansas and Missouri

Submitted with my testimony are two documents chronicling the usurpation of the citizens grand jury process and the abuse as a prosecutorial tool, rather than the original investigative purpose.

Grand Jury Under Attack – Law Review Journal from 1955 – An historical perspective from the Magna Carta , the 1st and 5th Amendments to the U.S. Constitution, the Citizen Grand Jury once used in the majority of states.

Pg. 225 Grand Jury Under Attack - Citizen panels have demonstrated repeatedly in the past that they could protest effectively in the name of the people against centralized authority. Today, grand juries remain potentially the strongest weapon against big government and the threat of "statism."

If it's Not a Runaway, It's Not a Real Grand Jury – A critical look at the grand jury system when subjugated by prosecutors. A 99.9% success rate of indictments.

Chronicling the early 1900's demise of the citizen's grand jury in America. Usurpers decried the citizen process as **"A movement that substituted a legal expert for an unwieldy body of laymen"**. The 1900's pro citizen grand jury arguments foretold of professional and judicial tyranny... uncannily prophetic.

The Kansas DA/CA Association lobbied successfully in 2014 for their own grand jury authority and now enjoy year-round DA/CA grand juries delivering speedy indictments that provide in their words "administrative relief" and "economy" of process, "saving money" by avoiding costly evidentiary hearings. Language describing a pursuit of a more just system seems dangerously missing in their reasoning's.

Pg. 28 Grand Jury Under Attack - ... The Supreme Court of Missouri upheld the jurors and declared that to hold otherwise "would strip them of their greatest utility and convert them into a mere engine to be acted upon by circuit attorneys or those who might choose to use them."

Pg. 35 Grand Jury Under Attack - opposed tampering with the institution and expressed a fear that, like many other modern reforms, the effect would be to "withdraw the people from the tribunals and replace them by officials."

Pg. 38 Grand Jury Under Attack - The Milwaukee News warned that killing the (Citizens) grand jury was "another step onward in the concentration of power,"

Pg. 40 Grand Jury Under Attack - Paced by the twin slogans of economy and efficiency, enemies of the grand jury had successfully ended its use in many states and curtailed it in others. ... Some judges were able to make serious inroads on grand jury powers to initiate and conduct investigations independently of the court

Pg. 42 Grand Jury Under Attack - their (*Citizen Grand Jury*) value shifted with the political tendencies of the age. At a time when excessive authority threatened, "then a grand jury, irresponsible as it is, and springing from the people, is an important safeguard of liberty."

The original purpose of the CGJ is a constitutional link in the chain that restrains tyranny. The Citizens Grand Jury's purpose was never to serve as the lapdog of power but a watchdog, tracing back 802 years to the birth of the Magna Carta in 1215 when the law became king. The CGJ chafes against such phrases as "prosecutorial discretion" and "administrative relief". It was crafted to challenge the Kings indifference to the law and is much more than a tool for administrative

efficiencies. The CGJ was purposed as a feared, independent investigative tool but is now wielded as an efficient prosecutorial instrument.

The Kansas legislature has been keen to this point of mischief, by institutional power dismissing and improperly influencing citizen- initiated grand juries. This body has enacted about a dozen statutory remedies in as many years. This amendment is in that same spirit.

"Since colonial times, the grand jury has served two functions: as a 'shield' between the government and the accused, and as a 'sword' probing into the evidence of a crime." *State v. Richards*, 464 N.W.2d 540, 541 (Minn. Ct. App. 1990). But "[w]here the king's grand juries had once colluded with the king's prosecutors, in pre-Revolutionary America, colonial grand juries resisted the king's representatives in America." *United States v. Navarro-Vargas*, 408 F.3d 1184, 1192 (9th Cir. 2005).

For the last fifteen years the Kansas legislature has rediscovered and insulated this instrument of the people from usurpation by power. For most states it is lost to history. The Citizen-Initiated Grand Jury by Petition renewal in Kansas is a unique pearl that a nation needs to rediscover. The CGJ improvements these past fifteen years are a reaction to institutional prosecutorial bias or judicial rulings that have short-stopped the process.

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"One can find no less than a dozen and a half published cases around the United States that repeat the maxim that a grand jury would indict a ham sandwich if asked to by a prosecutor." *McGill v. Superior Court*, 195 Cal. App. 4th 1454, 1498, 128 Cal. Rptr. 3d 120 (2011). It was apparently the opposite belief, that a prosecutor could just as easily thwart a grand jury process, that was the impetus for the changes that were made to the Kansas grand jury process in 2013... The wisdom of a statute is not the concern of the courts" ...See *INS v. Chadha*, 462 U.S. 919, 944, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983).

What is the cost of a Citizen-Initiated Grand Jury? The Salina Journal (circa 2003) reported that at the \$ 10 per day, per juror and a measured ten days of work in a typical Citizen Grand Jury, the total cost was \$1,500. With the current pace of less than one Citizen Grand Jury per year in the entire state of Kansas as compared to the hundreds, if not thousands of County and Municipal petit juries coupled with the newly minted County Attorney and District Attorneys year round Grand Juries, a Citizen-Initiated Grand Jury cost is negligible.