

Testimony of Kris W. Kobach

Kansas Secretary of State

Regarding House Bill No. 2182

Before the House Judiciary Committee

February 12, 2013

Mr. Chairman and Members of the Committee, I offer this testimony in my capacity as a former Professor of American Legal History who has studied and taught about the historical origins of the grand jury. I support H.B. 2182 because it restores the grand jury's traditional and appropriate role in the American legal system as an *independent* and *robust* charging body. A short summary of that history follows.

The Early History of the Grand Jury

The grand jury is one of the oldest institutions in the Anglo-American legal system. It dates back to the year 997 A.D., in King Ethereald's laws of Wantage. It was more formally established in the Assize of Clarendon in 1164. It was a body of elders from the community who were expected to bring charges against any wrongdoers. In contrast, the petit jury—a body of citizens with the task of determining innocence or guilt—did not emerge until nearly 100 years after that, in the Thirteenth Century.

By the Thirteenth Century, a second function of the grand jury, in addition to assessing whether charges should be brought, emerged—the function of serving as a check upon county sheriffs and royal prosecutors who were abusing their authority. In order to serve this purpose, the grand jury had to be independent and free to act without the consent of the sheriff or a royal prosecutor. In 1681, the English grand jury acquired the power of secrecy, which was crucial in allowing it to be free from interference by the King's prosecutors.

Ironically, England would discontinue its use of grand juries in the Nineteenth Century. It was in America that the institution of the grand jury would flourish and continue to develop.

The Grand Jury in the American Republic

Grand juries became a pivotally important institution to Americans prior to independence, in order to protect Americans from unjust royal laws. The most famous case involving a grand jury during that period was the John Peter Zenger case. Zenger was a newspaper publisher who had published material critical of the Royal Governor of New York.

The Governor tried to prosecute Zenger of seditious libel in 1734. Three times the grand juries refused to indict Zenger. Instead, the grand juries stood by the principle that citizens should be able to speak freely. In 1765 a Boston grand jury refused to indict colonists who participated in riots against the Stamp Act. These cases impressed upon the colonists how much power they could hold in their own hands to protect themselves from prosecuting authorities who might abuse their authority.

The American colonists did not only use the grand jury as a defense against unjust prosecution. They also used it offensively, in order to investigate and charge royal officials who were breaking the law. Indeed, the early American grand jury used this power far more than it had ever been used in England. By the time of independence, the value of the grand jury as a means of bringing charges were prosecutors were unwilling to do so was well established.

When the Bill of Rights was drafted by James Madison and presented to Congress in 1789, it was widely agreed that the grand jury was an indispensable institution in America. The grand jury clause of the Fifth Amendment was one of the few clauses that encountered no opposition whatsoever in the Congress. It reads as follows: “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury....”

The grand jury was viewed as an important protection of the people against both overzealous prosecutors and against prosecutors who refused to bring charges. The Founding Fathers rightly predicted that these problems would persist, even after independence from Great Britain. The grand jury of the early American Republic was usually a body of 23 men, meeting in secret, empowered to act either on their own or with the advice of a prosecutor, and empowered to exclude the prosecutor from the room when necessary. This was particularly important when the grand jury was investigating any case involving government corruption.

An Independent Institution, Not a Tool of the Prosecutor

From its earliest origins, the grand jury was intended to be a powerful and independent check upon the prosecutor of the state. As Justice Hugo Black observed in *Costello v. United States* (1956) grand juries were important to the Founding Fathers because they were independent, could act on their own knowledge, and could set their own standards:

The basic purpose of the English grand jury was to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes. Grand jurors were selected from the body of the people and their work was not hampered by rigid procedural or evidential rules. In fact, grand jurors could act on their own knowledge and were free to make their presentments or indictments on such information as they deemed satisfactory.

The power to charge or not to charge is one of the most important powers in our judicial system. The Founding Fathers determined from their experience that without the grand jury, that power could be abused in ways both large and small. Consequently, they ensured that the grand jury would continue to be the citizens' check on prosecutorial power. They were to be an independent, self-directing body of inquisitors, free to accept or reject any advice or evidence offered by a prosecutor.

In many states, and in the federal system, this independence has been lost as prosecutors have successfully commandeered grand juries and made them into mere tools to assist the prosecutor. The grand jury in Kansas has not yet become the hollow institution that the grand jury has become in other states. But it has become weakened.

H.B. 2182

H.B. 2182 takes several small, but significant, steps to ensure that the Kansas grand jury remains consistent with its historical purpose. Section 3 empowers a majority of a grand jury to select a special counsel or investigator, freeing the grand jury from dependence upon a prosecutor who may for personal or political reasons be attempting to steer a grand jury improperly. Section 4 allows the person who filed the petition for the grand jury to be the first witness, thereby preventing a prosecutor from steering the grand jury away from its intended purpose. Section 4 also makes it more difficult for a prosecutor to keep a grand jury from hearing evidence. These are all important ways to keep the grand jury independent, and thereby to preserve its value and maintain its historical purpose.