

Kansas' Grand Jury Law Comes Under Fire

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By Ron Sylvester

A Johnson County grand jury refused to indict an abortion clinic in Overland Park this week and called for the state to reconsider a law that allows citizens to call for such investigations.

That grand jury was empaneled in the same manner as one investigating abortion provider George Tiller in Wichita – through a petition of registered voters.

Grand juries are a part of the justice system few people understand. It's even more complicated in Kansas, because of a 120-year-old law that allows citizens to call grand juries through petitions.

Grand juries meet behind closed doors and act like police. They investigate crimes and decide if charges should be filed.

But Kansas is one of only six states that allow citizens to call for grand juries, as they did in Johnson County and Wichita through petition drives led by anti-abortion groups.

Nebraska, North Dakota, Oklahoma, New Mexico and Nevada have similar laws.

Tiller's lawyers say it should be illegal here, as it is in most other states.

They've asked the Kansas Supreme Court to strike down an 1887 law that anti-abortion groups used to order the empaneling of a grand jury by petition.

Such petitioning for grand juries, the lawyers argue, interferes with the duties given to prosecutors and law enforcement, who operate under the executive branch of government. It disrupts the balance of powers provided the government in the U.S. Constitution, they say.

On Feb. 15, Attorney General Stephen Six asked the state Supreme Court to review a subpoena for abortion records to his office from the Wichita grand jury investigating Tiller.

On Feb. 25, two Sedgwick County judges defended the grand jury process.

This week, the Johnson County panel said in a statement: "It is the feeling of this grand jury that the current statute that addresses the formation of a grand jury be evaluated as to evidence required to call the grand jury."

The Kansas Supreme Court scheduled oral arguments for April 8.

The grand jury's role

Grand juries usually aren't so controversial.

They were written into the Fifth Amendment of the U.S. Constitution and are required to indict people on federal charges for serious crimes.

All grand juries are picked from the same pool as those for criminal and civil trials, summoned from driver's license and voter registration records and sworn in by a judge.

Federal grand juries are run by prosecutors working for the U.S. government.

"Grand juries, whatever they were conceived of originally, they've very much become an investigative tool of the prosecutors, especially in the federal system," said Steve McAllister, professor of law at the University of Kansas.

Some argue prosecutors too often influence grand jurors.

The chief judge of New York state in 1985 suggested grand juries be abolished, claiming in a now-infamous quote that a skilled prosecutor could convince a grand jury to "indict a ham sandwich."

But in Kansas, citizen grand juries are in charge, although they have a prosecutor available as a legal adviser.

Kansans for Life reported that it spent \$20,000 in copying, mailing and other costs to collect about 7,000 signatures needed to convene the current grand jury in Wichita.

"Here, it's citizens who want to do something, and the local prosecutor may not want this at all," McAllister said. "So it's convened and it sort of takes on a life of its own."

The law in Kansas doesn't specify that a prosecutor has to pick up an indictment by a citizen grand jury. It simply says that the indictment must be filed with the court.

"At the end of the day, it's not clear who is accountable to the grand jury," McAllister said.

Past and present meet

The law empowering citizen grand juries has its roots in frontier justice, says an expert on Kansas history.

It was designed to give the public a voice in government decisions during the Populist movement of the 1880s, said Craig Minor, a professor of history at Wichita State University.

"They thought there were too many checks on the popular will of the people," Minor said.

Some 120 years later, social conservatives say citizens need that kind of control again because the government has ignored their cries to enforce Kansas' late-term abortion laws.

"There are serious improprieties and appearances of improprieties, and we're looking for the grand jury to take an independent look at these laws," said Troy Newman, leader of Operation Rescue.

Operation Rescue and other anti-abortion rights groups don't like that Sedgwick County District Attorney Nola Foulston blocked efforts in 2006 by then-Attorney General Phill Kline to file criminal charges against Tiller.

Foulston said Kline had no jurisdiction in her district. A judge agreed.

Dan Monnat, a Wichita lawyer representing Tiller, said the Wichita grand jury went too far in January when it subpoenaed five years' worth of clinic records for 2,000 women who had sought abortions after their 21st week of pregnancy.

Calling the subpoena an invasion of privacy, Tiller's attorneys asked a judge to stop the proceedings. Retired Judge Paul Buchanan ordered the records produced. Tiller's lawyers appealed to the Kansas Supreme Court, which has halted the subpoena while it reviews the case.

That includes asking the state's highest court to review the constitutional nature of citizen grand juries.

But Sedgwick County Chief Judge Michael Corrigan and Buchanan argued in papers filed last month with the Supreme Court that grand juries aren't required to return an indictment.

That is among the strengths of the grand jury system, the judges say. It removes the grand jury from influence by the special interests that may have petitioned for it.

That's what the Johnson County grand jury did with the Planned Parenthood case this month.

The Sedgwick County judges also noted that one function of a grand jury is to exonerate the innocent.

They point out that the grand jury asked for records from Tiller's Women's Health Care Services clinic, where some of the women did not ultimately obtain abortions.

"In other words, the subpoena sought records which would reveal that...Tiller and WHCS complied with the law," wrote David Cooper, a Topeka attorney representing the judges.

Six says he wants the Supreme Court to decide if the subpoena interferes with patients' right to privacy.

Chief Justice Kay McFarland put the attorney general's subpoena on hold—as she had with the order for Tiller—until the justices can sort out the case.

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