

MINUTES OF THE HOUSE ETHICS AND ELECTIONS COMMITTEE.

The meeting was called to order by Chairperson Representative Don Myers at 3:30 p.m. on February 3, 2003 in Room 521-S of the Capitol.

All members were present except: Representative Ruby Gilbert, Excused

Committee staff present: Ken Wilke, Revisor
Dennis Hodgins, Research
Kathie Sparks, Research
Shirley Weideman, Secretary

Conferees appearing before the committee:

HB 2061 Proponents:

Jennifer Foster, Rossville
Randall Allen, Kansas Association of Counties
Jim Edwards, Kansas Association of School Boards
Don Moler, League of Kansas Municipalities
Robert Sharp, Harper County Commissioner

Opponent:

Mark Desetti, Kansas National Education Association

Neutral:

Brad Bryant, Deputy Assistant Secretary of State

Others attending: See attached list.

Chairman Myers opened the hearing on **HB 2061 - Elections: Grounds for recall.**

Jennifer Foster of Rossville, which is in Kaw Valley Unified School District No. 321 appeared before the committee as a proponent for **HB 2061.** She told the committee of the problems their board had in trying to reorganize their school district. Ms. Foster also said that the opponents of the reorganization sought and injunction against the board in the district court and then, when that failed, they circulated petitions seeking to recall three of the board members who had voted for the restructuring plan. (Attachment 1)

The second proponent for **HB 2061** was Randall Allen, Executive Director of the Kansas Association of Counties. He told the committee that the bill retains two grounds for recall (conviction of a felony, and failure to perform duties as prescribed by law). It also removes two other grounds for recall (misconduct in office, and incompetence) which are not defined in statute and therefore subject to interpretation. Mr. Allen said that these latter two grounds are difficult, if not impossible, to define with any degree of precision, and as such, inadvertently can serve as a vehicle to remove officials who are doing their jobs and giving attention to their positions, but at the same time making tough decisions in behalf of constituents. (Attachment 2)

Jim Edwards of the Kansas Association of School Boards appeared before the committee as a proponent of **HB 2061.** He said that the bill was prompted in part by a decision of District Judge Tracy Klingensmith. Mr. Edwards indicated that the judge's decision was handed down in a case where several school board members were threatened with recall after voting to convert a high school building to another use. The judge said the current law "needs clarity, either in the interpretation of current law, or by legislative amendment to existing statutes" as there is no legal definition of "misconduct" or "incompetence" in the recall statutes. (Attachment 3)

Don Moler, Executive Director of the Kansas League of Municipalities was also a proponent of **HB 2061.** He said the League believes that the two most abused portions of the recall act are misconduct in office and incompetence. Mr. Moler indicated that since neither of these terms is defined, they cover a very wide range of activities. As a result, it is very easy to come up with grounds under these very broad, poorly defined statutory terms to instigate a recall proceeding against an elected public officer. He also said that once an allegation has been made and sufficient signatures have been collected, it is no longer a search for truth and does not have to be proven to be true. (Attachment 4)

CONTINUATION SHEET

MINUTES OF THE HOUSE ETHICS AND ELECTIONS COMMITTEE at on February 3, 2003 in Room 521-S of the Capitol.

The last proponent for **HB 2061** was Robert Sharp, Harper County Commissioner. He told the committee how he had been subjected to a recall petition in Harper County. Mr. Sharp told the committee that it was a frivolous issue about not having an open meeting, since the meeting was recessed to another date because of bad weather and the public was not notified. He said that the only thing that saved him was that the statute allowing people outside of his district and county to sponsor a petition was not in effect until July of 2002 and this occurred in April and May of 2002. Mr. Sharp said the people sponsoring the petition were not all from his county .

The proponents responded to committee members questions after all of them had testified.

Mark Desetti, representing the Kansas National Education Association, appeared before the committee as an opponent to **HB 2061**. He gave two examples where the current law has worked in the state. In the first incident in Piper, the board was found to have violated the open meetings act and made a decision during an illegal closed meeting that the electorate found inappropriate. In the ensuing recall election, one of the board members was removed. Mr. Desetti cited another example where a school board failed to examine the financial transactions of the district and an 18-year-old, who took the time to look at some credit card purchases, found some rather dramatic misuse of funds. There was no recall attempt made, but he indicated that it might have been under the incompetence provision should the voters have so wished. (Attachment 5) Mr. Desetti answered questions asked by committee members.

Brad Bryant , Deputy Assistant Secretary of State, appeared before the committee as neutral to **HB 2061**. He questions whether the recall approach in HB 2061 will be effective. He said with the recent increase in the number of recall efforts, and also an unfortunate tendency for recall efforts to go to court usually delaying the resolution of the controversy, often means that the voting public never has the opportunity to exercise their constitutional right of recall at an election. Mr. Bryant questioned whether the number of spurious recall efforts based on questionable grounds would be reduced by removing two of the grounds for recall from the law. He indicated that there are instances where elected officials are incompetent, one example being that some people become incapacitated due to illnesses and misconduct can occur in the form of gender or age harassment. Mr. Bryant said their office is awaiting a hearing on **SB 103** which would establish a quasi-judicial recall board modeled after the objections board. (Attachment 6)

The conferees answered questions asked by committee members.

Chairman Myers closed the hearing on **HB 2061**.

Chairman Myers asked for introduction of committee bills.

Deputy Assistant Secretary of State Brad Bryant asked for the introduction of three committee bills requested by the Kansas County Election Officials Association:

The first bill would allow the election officer to appoint a special bi-partisan board to open the sealed sacks of ballots to look for write-in votes in cases where the original people counting ballots failed to produce the write-in total. Representative Sawyer moved and Representative Yonally seconded the motion that this bill be introduced. Motion passed.

The second bill would set a deadline for special elections to be requested of the election officer by local governing bodies. This would give election officials enough time to prepare ballots. Representative Miller moved and it was seconded by Representative Sharp that this be introduced as a bill. The motion passed.

The last bill would change the deadline in the current law from 30 days to 60 days for processing annexations by cities. This would give the county election officer time to process voters and ballots. Representative Sharp moved that such a bill be introduced. The motion was seconded by Representative McLeland. Motion passed.

The meeting was adjourned at 5:05 p.m. The next scheduled meeting is February 5th at 3:30 p.m.

HOUSE ETHICS AND ELECTIONS COMMITTEE

GUEST LIST

DATE Feb. 3, 2003

Your Name	Representing
MARK DESETTI	KNEA
Robert Sharp	Harper Co.
Sid Burkholder	Harper Co.
Brad Bryant	Sec. of State
Randall Allen	Ks. Assn. of Counties
Jim Edwards	KASB
Jim Haus	KASB
Jennifer Foster	Patron USD 321
Jesse Bourj...	SOS
Dan Moler	LKM
Ann Foster	Patron of USD 321

Testimony on **HB 2061**
before the
Committee on Ethics and Elections

by

Jennifer K. Foster
Patron from Kaw Valley USD 321

February 3, 2003

Mr. Chairman, and members of the Committee. My name is Jennifer Foster and I live on our farm near Rossville, Kansas which is a part of Kaw Valley Unified School District No. 321. Thank you for the opportunity to appear here today in support of House Bill No. 2061.

I am the Mother of 2 children, a taxpayer, and I served as a leader of one of the strategic planning teams which dealt with the reorganization of our school district, and contributed to the board's restructuring plan.

The opponents of the board's plan to restructure our district tried two approaches to overturn the board's decisions. First, they sought an injunction in the district court claiming that the board had acted illegally. Without much difficulty, the court found that the decision may have been unpopular with some people in the school district, but it decidedly was not illegal and denied the injunction.

Next, the opponents circulated petitions seeking to recall three of the board members who had voted for the restructuring plan. In these petitions the opponents alleged, among other things, that the board members were "incompetent", in accordance with the current law. The board members initiated, at their own considerable expense, legal proceedings to stop the recall election. Judge Klingensmith agreed with them, and stopped the election from proceeding. In his opinion, he asked for clarification in the statute, which is probably why we're here today.

I support removing the words "incompetence" and "misconduct in office" from the statute because they are impossible to define.

School boards are unpaid volunteers. School boards serve staggered terms, so that voters may change some of the seven board members every two years if they don't like the direction that the board is leading the district.

Our system of universal public education, governed by locally elected lay volunteers is a cornerstone of American Democracy. School boards face complex responsibilities, as demanding as any elected office in Kansas; policy decisions about curriculum, rising expectations for public education, financial management of a large and complex organization, operating within the framework of a substantial body of law requiring knowledge of legal ramifications of board action, analysis of large amounts of complex data affecting all decisions.

I believe that recall should be a more clearly defined process, such as it would be under the amendments proposed in House Bill No. 2061. The rights of the voters to remove office holders in Kansas are supplemented by an "ouster" process whereby office holders can be removed through due process in the judicial branch.

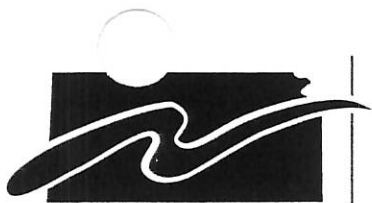
Grounds for recall in the current statute and in court interpretations of it are vague, at best. No legal standard whereby a petitioner, a signatory or an elected official can determine exactly what "incompetence" or "misconduct" actually is.

The current vagueness results in recall petitions being circulated solely on the basis of disagreement with the decisions of an elected school board. Indeed, school board members who are willing to make these extremely tough decisions are likely to be some of the most competent people in the community. The three board members who were the subject of accusations of "incompetence" include a professional engineer, a professional educator who holds a doctorate in educational administration, and a lifelong champion of children in our community who has served on our school board twice in her life, who sent six children through our district's schools and who invested 31 years as a 4-H leader in our community, among many other things.

In our community, the recent experience with recall had (and the petitioners could not truthfully disagree with this statement) absolutely nothing to do with the "competence", or the "misconduct" of the elected school board members. It was ONLY about disagreement with their decisions.

A chronic problem with school board elections statewide is the lack of available candidates willing to serve. It is a thankless job, under the best of circumstances. I do not believe that anyone thinks that the future of Kansas public education will require LESS controversial decision making by school boards, that there will be fewer tough decisions for boards to make. If board members are subject to recall, and the personal expense to them of the process, just for making unpopular decisions, then why would anyone want to serve on a board?

Thank you for the opportunity to appear here today. I would be happy to respond to any questions.



KANSAS
ASSOCIATION OF
COUNTIES

TESTIMONY
concerning House Bill No. 2061
re. the Grounds for Recall
House Ethics and Elections Committee

Presented by Randall Allen, Executive Director
Kansas Association of Counties
February 3, 2003

Chairman Myers and members of the committee, my name is Randall Allen, Executive Director of the Kansas Association of Counties. I am here today to support passage of House Bill No. 2061.

The bill retains two grounds for recall (conviction of a felony, and failure to perform duties as prescribed by law) currently in statute while removing two other grounds for recall (misconduct in office, and incompetence). The latter two grounds are not defined in statute, and therefore subject to interpretation. It seems to us that they are difficult if not impossible to define with any degree of precision, and as such, inadvertently can serve as a vehicle to remove officials who are doing their jobs and giving attention to their positions but at the same time making tough decisions in behalf of constituents.

In our representative system of government at the county level, as few as two county commissioners (a majority of three members) make policy decisions which affect the lives of many people. They were elected to make such decisions. Sometimes, the decisions weigh heavily because the implications are lasting and long-term. They are sobering decisions, and often made in the face of considerable political pressure. No elected official, in the decisions he or she makes, can avoid (nor should they) public accountability or political impact (positive or negative) from the decisions made as a member of a governing body. However, removal by the recall process prescribed in K.S.A. 25-4302 punishes those who would dare to only do their job but occasionally make a controversial decision with which 51% of the public disagrees. This seems fundamentally wrong. Making a difficult policy decision with which many disagree is often courageous, usually difficult, yet always necessary.

Please give consideration HB 2061 and report it favorably for passage.
Thank you.

The Kansas Association of Counties, an instrumentality of member counties under K.S.A. 19-2690, provides legislative representation, educational and technical services and a wide range of informational services to its member counties. Inquiries concerning this testimony should be directed to Randall Allen or Judy Moler by calling (785) 272-2585.

6206 SW 9th Terrace
Topeka, KS 66615
785•272•2585
Fax 785•272•3585
email kac@ink.org

House Ethics and Elections
2-3-03
Attachment 2

**KANSAS
ASSOCIATION**



**OF
SCHOOL
BOARDS**



**1420 SW Arrowhead Road • Topeka, Kansas 66604-4024
785-273-3600**

**Testimony on HB 2061
before the
House Ethics and Elections Committee**

by

**Jim Edwards, Governmental Relations Specialist
Kansas Association of School Boards**

February 3, 2003

Chairman Myers and members of the Committee:

I appreciate the opportunity to appear in front of you today to support HB 2061, a measure that was prompted in part by a decision of District Judge Tracy Klinginsmith. His decision was handed down in a case where several school board members were threatened with recall after voting to convert a high school building to another use. The Judge said the current law “needs clarity, either in the interpretation of current law, or by legislative amendment to existing statutes” as there is no legal definition of “misconduct” or “incompetence” in the recall statutes.

All elected officials today are faced with some of the toughest challenges ever. These challenges stem from the slump in the economy, shifts in population, demographic changes and sometimes more focus on single issues by the electorate. Combine these with the fact that we now also live in a “thirty minute or second” society and the divisiveness can sometimes grow to staggering proportions.

To be legally sufficient a recall petition must state one of four grounds (conviction of a felony, misconduct in office, incompetence or failure to perform duties prescribed by law) listed in K.S.A. 25-4302 with particularity in no more than 200 words. As a result, these grounds can be alleged simply because a board member makes an unpopular decision. HB 2061 would make clear that board members could only be recalled for an actual violation of the law or failure to perform a specific duty. The Legislature should not ask elected officials to make difficult and possibly unpopular decisions, and then allow them to be threatened with removal from office for making those decisions.

The following is a brief, completed by our legal staff, of the recent recall issue involving the school district mentioned in the opening paragraph.

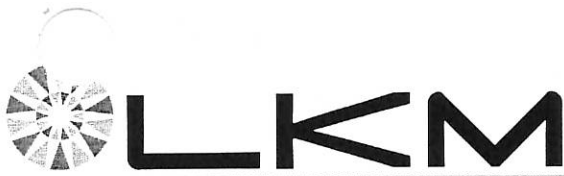
House Ethics and Elections
2-3-03
Attachment 3

DEBACKER v. REESE

In Debacker v. Reese (2002), constituents became unsatisfied when the Board of Education of USD 321 voted to consolidate schools in Rossville and St. Marys. Based on this decision, several of the constituents filed a petition for the recall of three of the school board members. The petitions alleged that the members were incompetent to serve in office and that the members had committed misconduct in office. After reviewing the petitions, the district court concluded that the petitions were specific enough to be upheld according to the standards set forth in Cline.

However, the court found the petitions failed to adequately show a “nexus between the conduct alleged and the elected officials’ duties as prescribed by law,” as required in Baker, with enough specificity “to tell those subject to the recall efforts what board policies they violated” as required by Reynolds. Based on these findings, the district court ruled the recall petitions were legally insufficient and dismissed the case.

I thank you once again for the opportunity to present our testimony and would ask you to strongly consider this measure for passage.



League of Kansas Municipalities

300 SW 8th .
Topeka, Kansas 66603-3912
Phone: (785) 354-9565
Fax: (785) 354-4186

To: House Ethics and Election Committee
From: Don Moler, Executive Director
Re: Support for HB 2061
Date: February 3, 2003

Thank you for allowing the League to appear today in support of HB 2061. The League has for many years believed that the recall statutes, as they are currently constituted, provide weapons for those wishing to attack public officials, without reasonable safeguards for elected public officials. We believe the two most abused portions of the recall act are misconduct in office, and incompetence. Since neither of these terms are defined, they cover a very wide range of activities. As a result, it is very easy to come up with grounds under these very broad, and poorly defined, statutory terms to instigate a recall proceeding against an elected public officer.

The most upsetting part of the act is simply the fact that once an allegation has been made, and sufficient signatures have been collected, it is no longer a search for truth but merely hard-ball politics. Once the allegation is made, it does not have to be proven, merely alleged. This then subjects an elected public officer to an up or down vote as to whether they retain their office. For your information, I have attached to my testimony a copy of a column I authored back in 1998, which appeared in the *Kansas Government Journal*, and is entitled "Recall as a Weapon." My thoughts on this subject are more fully explained in this column, but essentially they boil down to the recall statute, as currently constituted, is more about getting one's political opponents than it is about good government. As a result, we fully support the initiative contained in HB 2061 to more precisely focus the grounds for recall and to remove those terms which are subject to broad interpretation and can lead to an abuse of the statute. Thank you very much for allowing the League to testify here today.

House Ethics and Elections
2-3-03
Attachment 4



Recall as a Weapon

One of the things that has been bothering me recently are the seemingly endless number of recall petitions and elections that have been springing up around the state like noxious weeds. It seems like every time I pick up the phone, I'm being told about a new recall some place in Kansas where county or city officials are being subjected to the recall process. This bugs me and let me tell you why.

The idea of recall, where a petition of the public stating at appropriate reason for recall under statute subjects a public official to a recall election, is meant to be used as a "good government" tool. It is in the statutes precisely for the reason that it allows the public to remove elected public officials who have somehow violated their public trust. Unfortunately, I believe recall, at least in its current state in Kansas, is more to be likened to the Sword of Damocles than a tool of "good government." It is being used to strike down thine enemies. Specifically, in most communities around this state, it takes only a handful of electors, people who are registered to vote, to sign a petition and force a recall election.

The current law requires 40% of those voting for that position at the last regular city or county election to sign the recall petition. Thus, in a town of 1,000, where perhaps 200 voted, 80 signatures of electors on a petition would force a recall election. But let's look at that again in a town of 500. If we have the same percentage vote, that being 20%, we would have 100 ballots cast and 40% of 100 is 40. Thus, the signatures could be collected at a barbeque or standing out in front of the post office on a Monday

morning for 30 or 40 minutes. That is only part of the problem. While the threshold seems high, 40% of those voting for that position at the prior city or county election, it really isn't when you realize that only a fraction of the actual electors of the city actually will go to the polls in most local elections. The second problem is with the criteria which must be stated in the recall petition.

Right now state statute provides for specific criteria which must be stated in order for a recall petition to be submitted and successful. So far, so good. Unfortunately, the criteria are at best vague and at worst ridiculous. They include: failure to perform duties prescribed by law, incompetence, conviction of a felony, or misconduct in office.

Let's look at incompetence first. I've told at least two dozen seminars that I have participated in that "incompetence" is simply the folks you didn't vote for in the first place. Right? So stating the fact that an elected public official is incompetent provides nothing but an allegation of their inability to properly do their job. For misconduct in office, the easiest to allege and hardest to disprove is a violation of the Open Meetings Act. You want to remove an elected governing body member from office? Simply allege that they have violated the Open Meetings Act. It is virtually impossible to prove or disprove and provides an ironclad way to get your recall petition before the electorate.

I have had a number of city officials who have been threatened with or actually subjected to recall call me and ask "Well when do I get to refute the charges? They aren't true." My response is, you don't. The recall law works in a fashion that only allows for allegations to be made and

nothing more. The truth or falsity of the charges is never proven or disproven. They are simply used as a canard to place an elected public official before the voters and in jeopardy of losing their reputation and position.

This entire direction was solidified three years ago by the Kansas Court of Appeals in a ruling on a recall case. The issue had to do with the fact that the county attorney had determined that the petition was insufficient because he believed the recall petitions which were submitted failed to state sufficient grounds for a recall. The Court of Appeals in *Cline v. Tittel*, 20 K.A. 2d 695 (1995) ruled that the county attorney should not make a determination as to the truth or falsity of the allegations. Rather, the court determined that the county attorney should only determine if the allegations were made under one of the criteria enumerated in statute and that the petition was 200 words or less. So there you have it. If you allege misconduct or incompetence in under 200 words and you get a few of your friends and relatives to sign a petition with you, you can force a recall election on any governing body member you happen not to like. Something is wrong here and I think we need to address it.

It strikes me that more thought must go into this process than we currently have. While it appears to be a good government exercise, it is being used now to strike down political enemies and subject them to the most severe form of hardball politics. The public official who is the focus of a recall has virtually no defense against this except to wage a political struggle to retain their job. It leaves people who do not like them free to allege all types of wrongdoing or incompetence in public office without ever having to prove any of it. This cannot be the way that this process was envisioned to work.



Mark Desetti, testimony
House Ethics and Elections
HB 2061
February 3, 2003

KANSAS NATIONAL EDUCATION ASSOCIATION / 715 SW 10TH AVENUE / TOPEKA, KANSAS 66612-1686

Mr. Chairman, members of the committee, thank you for allowing me the opportunity to come before you today and address **House Bill 2061**. My name is Mark Desetti and I represent Kansas NEA.

I come before you today to register our opposition to the proposal contained in this bill. Currently, statute allows as grounds for a recall election: conviction of a felony, misconduct in office, incompetence, or failure to perform duties prescribed by law. This bill is very simple. You are simply being asked to remove “misconduct in office” and “incompetence” from the list.

We are concerned that this proposal, as applied to some elected officials recently, would deny the electorate the opportunity to remove from office those office holders whose actions show them to be at odds with standards set by the people.

I can cite for you two recent examples from the world of local school boards. First, the incident in Piper where the board was found to have violated the open meetings act and made a decision during that illegal closed meeting that the electorate found inappropriate. In that case there was a recall and one of those board members was removed from office. This was a case of misconduct – not a felony, not a failure to do what was prescribed by law, just plain old misconduct.

In another case, a school board simply failed to examine the financial transactions of the district and an 18-year-old, who took the time to look at some credit card purchases, found some rather dramatic misuse of funds. In that case the superintendent lost employment and the 18-year-old was elected to the board. There was no recall attempt made but it might have been under the incompetence provision should the voters have so wished.

We don't wish to stand here and argue that our elected officials should be recalled willy-nilly. And under the law as it stands now, they can't be. And there certainly has not been a rash of recall attempts that would justify changing the law. But frankly, voters don't want their officials guilty of misconduct and they want competent people overseeing the expenditure of their tax resources.

In short, the system is not broken. Why are we fixing it?

House Ethics and Elections
2-3-03
Attachment 5

RON THORNBURGH
Secretary of State



Memorial Hall, 1st Floor
120 S.W. 10th Avenue
Topeka, KS 66612-1594
(785)296-4564

STATE OF KANSAS
House Committee on Ethics and Elections

Testimony on HB 2061

Brad Bryant, Deputy Assistant Secretary of State
Elections and Legislative Matters

February 3, 2003

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to testify on HB 2061. We are testifying neither in favor of nor against HB 2061; we wish to provide information for the committee's consideration.

We have noted an increase in the number of recall efforts in recent years, and also an unfortunate tendency for recall efforts to go to court, which usually delays resolution of the controversy and often means the voting public never has the opportunity to exercise the constitutional right of recall at an election.

We have discussed this trend with the Kansas Association of School Boards and have offered the Legislature a different approach to addressing the problem. We question whether the approach in HB 2061 will be effective. Current law lists four grounds for recall: conviction of a felony, misconduct in office, incompetence and failure to perform duties prescribed by law. If there are already too many spurious recall efforts based on questionable grounds, we question whether they will be reduced by removing two of the grounds from the law.

As we see it, the constitutional right of recall allows public debate on controversial issues and provides an orderly process for resolving the conflict. Constituents who wish to remove an official will still attempt to recall them.

There are instances when elected officials are incompetent and where misconduct does occur. People sometimes become incapacitated due to illnesses that were not apparent at the time they were elected. Misconduct can occur in the form of gender or age harassment that does not always result in a felony conviction. HB 2061 will remove two important grounds for recall when it might be necessary to remove someone from office. It might have the unintended consequence of stifling public debate about elected officials.

The Secretary of State has proposed a different approach in SB 103, which awaits a hearing in the Senate Committee on Elections and Local Government. SB 103 would establish a quasi-judicial recall board modeled on the objections board to review the grounds for recall and the format of the petition. We believe the recall board would allow constituents to raise their concerns about their elected officials, provide a meaningful review of the grounds, and keep the process moving on a set schedule, avoiding delays caused by lawsuits.

Thank you for the opportunity to provide the committee with our thoughts on HB 2061. In HB 2061 and SB 103, the Legislature has two options to improve the recall process. If needed, we will work with the committee and the other conferees to weigh the options and decide the best course.

Thank you.