Approved: March 27, 2003
Date

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 March 17, 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:

SB 103 Proponents: Brad Bryant, Deputy Assistant Secretary of State
Jim Edwards, Kansas Association of School Boards
Mark Tomb, League of Kansas Municipalities
Opponent: Mark Desetti, Kansas National Education Association

Others attending: See attached list

Representative Wilson moved to approve the committee minutes for March 10 and 12. Representative Miller seconded the motion and the motion passed.

Chairman Myers opened the hearing on **SB 103 - Elections; recall procedures.**

The Chair requested the Revisor of Statutes, Ken Wilke to explain **SB 103.** Ken said that Section 1 changes the statutory grounds for recall by eliminating " incompetence" and explaining the term "misconduct in office" as a violation of law by the officer that impacts the officer's ability to perform the duties of that office. Sections 2 is a procedural portion of the process in recall, clarifying the language so that we're looking at 10% of all the votes cast for the candidates at the last general election. Section 3 has a similar change. Section 4 has been rewritten regarding the recall of state officials, adding that the Secretary of State reviews the application and certifies or notifies a committee of the grounds of refusal. It also adds (b) a mandamus proceeding. Section 5 makes a few changes in wording in the existing law. Section 6 covers local, county elections and Section 7 makes revisions for the recall of local officials similar to those for state officials, but the county or district attorney or other designated attorney will review the application. Section 8 adds more clarification of votes needed. Section 9 allows for a statement to be submitted and Section 10 changes the ouster statute to include "mental impairment".

Brad Bryant, Deputy Assistant Secretary of State appeared before the committee as a proponent of **SB 103.** He said that the bill will improve the process for recalling state and local elected officials by:

(1) amending the grounds for recall by defining "misconduct in office," removing "incompetence" and adding a definition of "mental impairment" into the ouster statute,
(2) clarifying which election results are used to calculate recall petition requirements,
(3) increasing the authority of the Secretary of State, at the state level, and the county or district attorney, at the local level, to substantively review the grounds for recall,
(4) maintaining a public access file of the grounds for recall and the statement in defense of the person being recalled in the county election office instead of posting them at each polling place.

(Attachment 1) Mr. Bryant responded to questions asked by committee members regarding the original bill with the recall board and the difference between a local-level recall and a state-level recall.

Jim Edwards, Kansas Association of School Boards, testified in support of **SB 103**. He indicated that the bill with the Senate amendments addresses the issue of frivolous recall. In current law, to be legally sufficient, a recall petition must state one of four grounds for the recall. They are 1) conviction of a felon, 2) misconduct in office, 3) incompetence, or 4) failure to perform duties prescribed by law. He said there were no definitions for two of the grounds for recall, and, as a result, these grounds can be alleged simply because a school board member makes an unpopular decision. This bill not only removes "incompetence" and defines "misconduct in office", but also provides a mechanism that would look at the "structural" aspects of the recall petition as well as the "merits" of the petition. (Attachment 2) Mr. Edwards answered questions asked by committee members.

MINUTES OF THE HOUSE ETHICS AND ELECTIONS COMMITTEE at on March 17, 2003 in Room 521-S of the Capitol.

Another proponent of **SB 103** was Mark Tomb, League of Kansas Municipalities. He said that the recall statutes have provided weapons for those wishing to attack public officials, without reasonable safeguards for elected public officials. He indicated that the two most abused portions have been misconduct in office and incompetence. Mr. Tomb also said that he supports this bill because it removes those terms which are subject to broad interpretation and can lead to an abuse of the statute. (Attachment 3) Mr. Tomb responded to questions asked by committee members.

Mark Desetti appeared before the committee as an opponent of **SB 103.** He said that the law has been working, although it may be inconvenient or messy to some. He has four major concerns with the bill as it has been amended. His first concern is with the percentage of votes for a state officer to be recalled , page 1, lines 41 through 43 and page 2, lines 6 through 8. His second concern is with the definition of "misconduct in office". He would expect that a violation of the open meetings act would be considered misconduct, but does it impact the board member's ability to perform the official duties of the office? His next concern is that it gives the Secretary of State, rather than the voters, the authority to determine whether the facts support the grounds for recall. Mr. Desetti's last concern with the bill is moving incompetence from the recall statute to the ouster statute. He indicated that defining incompetence as "mental impairment such that the person lacks the capacity to manage the office held" restricts the ability of the electorate to seek either recall or ouster. (Attachment 4) Mr. Desetti answered questions asked by committee members.

Brad Bryant of the Secretary of State's Office proposed an **amendment to SB 103** to clarify which election is used to calculate the number of signatures required on recall petitions. In sections 2, 3, 5, 7 and 8 it would read after the number or %..... "*of the votes cast for all candidates for the office of the state (local) officer sought to be recalled, such percentage to be based upon the last general election for the current term of office of the state (local) officer sought to be recalled*". (Attachment 5)

Chairman Myers closed the hearing on **SB 103.**

Chair Myers told the committee he plans to work **SB 103** and **SB 166** on Wednesday.

The meeting was adjourned at 4:55 p.m. The next scheduled meeting is March 19 at 3:30 p.m.

HOUSE ETHICS AND ELECTIONS COMMITTEE

GUEST LIST **DATE:** March 17, 2003

Your Name	Representing
Jim Edwards	KASB
Mark Desetti	KNEA
Mark Tomb	LKM
Brad Bryant	Sec. of State
Twila Drybread	Div. of Budget

RON THORNBURGH
Secretary of State

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STATE OF KANSAS

House Committee on Ethics and Elections

Testimony on SB 103

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

March 17, 2003

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to testify in support of Senate Bill 103 as amended by the Senate. This is a recall bill proposed by the Secretary of State to improve the process for recalling state and local elected officials. It will:

(1) amend the grounds for recall by defining "misconduct in office," removing "incompetence" and adding a definition of "mental impairment" into the ouster statute,
(2) clarify which election results are used to calculate recall petition requirements,
(3) increase the authority of the Secretary of State (at the state level) and the county or district attorney (at the local level) to substantively review the grounds for recall,
(4) maintain a public access file of the grounds for recall and the statement in defense of the person being recalled in the county election office instead of posting them at each polling place.

1. Clarify the grounds for recall and amend the ouster statutes to reduce frivolous recalls—Sections 1, 10

We share the concern others have expressed that too many frivolous recalls are filed, and too many of them go to court, which delays resolution of the conflict and often ultimately denies the voters their right to vote on the issue. In order to reduce the number of frivolous recall petitions filed, the Senate amended SB 103 by adding Sections 1 and 10.

The Kansas Association of School Boards had proposed a different approach to the problem of frivolous lawsuits in HB 2061 by striking "incompetence" and "misconduct in office" from the statute specifying the grounds for recall. Compromise language agreed upon by the KASB, League of Municipalities and the Secretary of State was amended into SB 103.

Senate amendments to SB 103--

Section 1 was added by the Senate to provide a definition of the term "misconduct in office" in K.S.A. 25-4302, which specifies the grounds for recall. It also strikes the word "incompetence" from the statute. The definition provided is a codification of three elements of misconduct as

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House Ethics and Elections
3-17-03
Attachment 1

expressed in various court cases: an action must be willful, it must be a violation of the law, and it must affect the person's official duties.

Section 10 adds a definition of "mental impairment" to the statute governing ouster of elected officials. Ouster is different from recall in that it is a court proceeding instigated by the county/district attorney or the attorney general.
This amendment to K.S.A. 60-1205 is a codification of mental impairment taken from the Kansas Guardianship Act. It effectively removes "incompetence" from the recall statutes and adds mental impairment to the ouster statutes because discussion of impairment and incompetence are more appropriate in court than in a public political debate.

2. Clarify which election results are used to calculate petition requirements—
Sections 2, 3, 5, 7(a), 8

A recall election is required if a petition is filed containing signatures of registered voters equal to 40% of the total votes cast for all candidates at the last general election when a person was elected to the office held by the person being recalled. (For recalls of state officers, an additional *application* with signatures of 10% is filed before the recall petition.) Sometimes situations arise which the current language of the law does not cover, such as when an intervening election has occurred between the time the subject of the recall was elected and the time the recall petition is filed. The intervening election can change the number of signatures required and nullify a petition that has been circulated in good faith according to the requirements at the time the effort was begun. This occurred in a 2002 case in Johnson County, *Richards vs. Schmidt*, that was ultimately decided by the Kansas Supreme Court.
SB 103 will clarify that the number of signatures required on the recall petition is calculated using the last general election at which a person was elected to the *current term of office* of the officer sought to be recalled.

Proposed amendment to SB 103—

Since SB 103 was introduced, further discussions with the parties involved in the litigation have convinced us that further amendments need to be made in the bill. The original language of the bill could be misconstrued to require the recall petition to contain signatures of 40% of the votes cast *for all offices in the entire election* at which the person was elected, rather than the total votes cast in the *single race*. This is not the intent of the current law or of SB 103. Therefore, we propose amendatory language in an attached balloon that should be amended into five sections of SB 103 (Sections 2, 3, 5, 7(a) and 8).

3. Increase the authority of the Secretary of State or county/district attorney to review grounds for recall—
Sections 4, 7(b)

The Secretary of State originally proposed in SB 103 the establishment of temporary, ad hoc recall boards to review the grounds for recall and to make a substantive determination of their validity before the recall petition could be circulated. The recall board would have been a quasi-judicial body modeled on the objections board, a useful mechanism already established in law to deal with questions of candidates' qualifications for office.

Senate amendments to SB 103—

The Senate removed the provisions for state and county recall boards and returned the duty of reviewing the grounds for recall to the Secretary of State at the state level and the county or district attorney at the local level. The amendments include language to make the review of the grounds more substantive (see page 2, lines 27 and 28 and page 5, lines 15 and 16).

Under current law, the courts have limited the review of the grounds for recall to the format and completeness of the petition rather than allowing a substantive review and possible denial of frivolous recall efforts. The Senate amendment will strengthen the authority of the officers reviewing the grounds for recall.

4. Provide for the maintenance in the county election office of a public access file of statements of the grounds for recall and statements in defense of the person being recalled—

Sections 6, 9

At a recall election, current law requires that two statements be posted at each polling place: a statement of the grounds for recall as specified in the recall petition and a 200-word statement by the officer being recalled in defense of his/her conduct in office. SB 103 proposes to maintain these statements on file in the county election office for public inspection instead of posting them at the polling places. The statements are often biased and politically one-sided because they are drafted by the opposing sides in the recall controversy. There is no control over their content. Thus, as political campaign statements they have no place at the polling site and should not be posted there. The recall committee and the person being recalled are free to disseminate this information to the voters through a political campaign, which is more appropriate than posting campaign statements at the polling place. Also, posting statements at the polling places does not treat all voters equally because advance voters do not see them.

We have surveyed other states regarding their recall procedures and have found no other states that require the posting of statements at the polling place.

We propose this change in the way recall statements are handled as a way to ensure that all voters receive the same information at the time of voting and to keep political statements out of the polling place.

We urge the committee to amend SB 103 as recommended in sections 2, 3, 5, 7(a) and 8 and to report the bill favorably for passage. Thank you for your consideration.

KANSAS ASSOCIATION OF SCHOOL BOARDS

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Testimony on SB 103
Before the
House Ethics and Elections Committee

by

Jim Edwards, Governmental Relations Director
Kansas Association of School Boards

March 17, 2003

Chairman Myers and members of the Committee:

I appreciate the opportunity to appear before you on behalf of the member boards of education of the Kansas Association of School Boards in support of SB 103.

KASB's interest in this issue came in part from a decision of District Judge Tracy Klinginsmith that was handed down in a case where several school board members were threatened with recall after voting to merge two high schools in that district. 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.

We feel SB 103, with the Senate amendments, takes the steps necessary to address the issue of frivolous recall. Presently, 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 as grounds for the recall. Because of this, you can have a recall petition be ruled as sufficient even though two of the grounds that could be used as a reason for the recall have no legal definition. As a result, these grounds can be alleged simply because a board member makes an unpopular decision. The Senate amendments to SB 103 would bring further clarification to the recall process.

SB 103, as amended, would:

1. Make clear that office holders could only be recalled for:
   - conviction of a felony;
   - failure to perform a specific duty prescribed by law; or
   - misconduct in office (defined as "a violation of the law by the officer that impacts the officer's official duties of the office.")
2. Provide a mechanism that would look at not only the "structural" aspects of the recall petition but also the "merits" of the petition.

House Ethics and Elections
3-17-03
Attachment 2

3. Move the incompetence provision in the recall statute over to the ouster statute. This would provide a more fair and discreet method of dealing with this.

In conclusion, we believe that SB 103 will still provide for the recall of public officials when warranted yet will ensure that the process isn't used frivolously. I would remind you that 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.

Thank you and I would be happy to stand for questions.

LKM
League of Kansas Municipalities

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To: House Ethics and Elections

From: Mark Tomb, Intergovernmental Relations Associate

Re: Support for SB 103

Date: March 17, 2003

Thank you for allowing the League to appear today in support of SB 103. 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 currently 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.

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 language contained in SB 103 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.

Again, thank you for allowing LKM to comment on this proposed legislation. I would be happy to stand for questions.

House Ethics and Elections
3-17-03
Attachment 3


Don Moler

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.

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

Mark Desetti, testi. .y
House Ethics and Elections
March 17, 2003
Senate Bill 103

Mr. Chairman, members of the committee, I come before you today to register our concerns about **Senate Bill 103.** 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. The proponents of this bill suggest that incompetence and misconduct in office are not adequately defined and for this reason, the recall law needs to be overhauled. Our concern is that, in overhauling the current statute, roadblocks should not be placed on the rights of the electorate. **SB 103**, as it is before you today, may be putting those roadblocks in place.

In the case of recall petitions, the changes to lines 41 through 43 of page one and lines 6 through 8 of page two, while not clear, appear to increase the number of signatures necessary for the recall petition to be considered. If this is the case, and the language is confusing enough to make it unclear, then this is a roadblock to recall initiated by the electorate.

Our second concern has to do with the definition of "misconduct in office." If such misconduct must impact "the officer's ability to perform the official duties of the office," as is stated in section 1, subsection (b), would violations of the open meetings act be considered misconduct? Such violations led to the successful recall of a school board member in Piper, but would that violation impact the board member's ability to perform the official duties of the office? The answer from the officeholder might be "I'm sorry it happened, I've paid my fine and I'm still able to fulfill my duties." I would submit that we have an open meetings act for a reason and if this change removes the ability of the electorate to recall elected officials for ignoring the act then we have a problem.

The change to the reasons for which the Secretary of State may deny certification is the addition of a ruling on the facts. This change simply removes from the electorate the right to determine the facts for themselves. Why would we want to restrict the voters from determining whether the facts support the recall?

On the issue of moving incompetence from the recall statute to the ouster statute, while we have no problem with adding it to the ouster statute, the motivation for removing it from recall is unclear. To then further define incompetence as "mental impairment such that the person lacks the capacity to manage the office held," certainly restricts the ability of the electorate to seek either recall or ouster. How would this impact another real case in which a school board simply failed to examine the district and an 18-year-old, who took the time to look at some credit card purc

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dramatic misuse of funds. In that case the superintendent lost employment and the 18-year-old was elec[illegible] to the board. There was no recall attempt made, but it might have been under the incompetence provision should the voters have so wished. Would one argue that not bothering to examine financial transactions is not incompetence? It isn't a mental impairment but it certainly might be a competency issue in the eyes of voters who want elected officials to oversee the expenditure of their tax dollars.

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. Some will argue that some recall attempts are not justified and that the recall law therefore is messy. But frankly, democracy by its nature is messy. We pride ourselves on being a government "of the people, by the people and for the people." The recall statute is the people's law. In a democracy, we let the people decide even when it's inconvenient or messy.

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

4-2

RON THORNBURGH
Secretary of State

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STATE OF KANSAS

Proposed Amendment to SB 103

We propose amending SB 103 as follows to further clarify which election is used to calculate the number of signatures required on recall petitions.

Section 2, page 1, line 41, after "all candidates"
Strike "at" and insert "for the office of the state officer sought to be recalled, such percentage to be based upon" after the word "candidates"

Section 3, page 2, line 6, after "all candidates"
Strike "at" and insert "for the office of the state officer sought to be recalled, such percentage to be based upon" after the word "candidates"

Section 5, page 3, line 32, after "all candidates"
Strike "at" and insert "for the office of the state officer sought to be recalled, such percentage to be based upon" after the word "candidates"

Section 7, page 4, line 20, after "all candidates"
Strike "at" and insert "for the office of the local officer sought to be recalled, such percentage to be based upon" after the word "candidates"

Section 8, page 6, line 19, after "all candidates"
Strike "at" and insert "for the office of the local officer sought to be recalled, such percentage to be based upon" after the word "candidates"

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House Ethics and Elections
3-17-03
Attachment 5