Approved: March 20, 2003
Date

MINUTES OF THE SENATE COMMITTEE ON ELECTIONS AND LOCAL GOVERNMENT.

The meeting was called to order by Chairperson Barbara P. Allen at 1:30 p.m. on February 12, 2003 in Room 245-N of the Capitol.

All members were present except:

Committee staff present: Ken Wilke, Revisor of Statutes
Mike Heim, Legislative Research
Dennis Hodgins, Legislative Research
Nancy Kirkwood, Committee Secretary

Conferees appearing before the committee: Brad Bryant, Deputy Assistant Secretary of State
Don Moler, League of Municipalities
Jim Edwards, Kansas Association of School Boards

Others attending: see attached list

SB 103 - Elections; recall procedures

Chairperson Allen brought the committee's attention to opening the hearing of **SB 103**. Brad Bryant testified in support of **SB 103**. This bill was proposed by the Secretary of State, to improve the overall recall process. **SB 103** is intended to do three things to improve the recall process at the State and Local levels. It is contained in Section 1, 2, 4, 6(a), 7. This is to clarify the requirements for a recall petition. Brad brought to committee two proposed amendments to **SB 103,** page 2, Section (a)(1) and page 4, Section (b)(1) (Attachment 1).

Don Moler appeared before the committee in support of **SB 103**, and presented written testimony showing that support (Attachment 2).

Conferee Jim Edwards testified in support of **SB 103**, furnishing testimony with amendments. The amendments Kansas Association of School Boards is suggesting would bring further clarification to the recall process (Attachment 3).

There being no other Conferees to testify on **SB 103**, the Chair closed the hearing.

Adjournment

The meeting adjourned at 2:27 p.m. The next meeting is scheduled for February 13, 2003

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

SENATE
ELECTIONS AND LOCAL GOVERNMENT
GUEST LIST

Date Wed Feb 12

RON THORNBURGH
Secretary of State

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STATE OF KANSAS

Senate Committee on Elections and Local Government

Testimony on SB 103

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

February ~~11~~ 12, 2003

Madam Chairman and Members of the Committee:

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

(1) clarify which election results are used to calculate recall petition requirements,
(2) provide for a temporary state or local recall board to review grounds for recall,
(3) require the grounds for recall and the statement in defense of the person being recalled to be filed in the county election office instead of being posted at each polling place.

1. Clarify which election results are used to calculate petition requirements— Sections 1, 2, 4, 6(a), 7

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.

We propose the language in the above-referenced sections of SB 103 to 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.

2. Provide for temporary recall boards to review grounds for recall— Sections 3, 6(b)

Recall efforts are inherently controversial and divisive. But the right to recall is also guaranteed in the Kansas Constitution. Constituents who want to remove an elected official from office will

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initiate recall efforts, sometimes using questionable grounds. The four grounds for recall are listed in K.S.A. 25-4302: "conviction of a felony, misconduct in office, incompetence or failure to perform duties prescribed by law."
We have noted in recent years an increase in the number of recall attempts and an increase in the number of court cases resulting from them. The effect is to delay resolution of the controversy and often deny the voters their opportunity to decide the issue in an election.
In order to provide a mechanism to keep the recall process moving forward and to reduce the number of court cases, we are proposing in SB 103 that the recall petition and the grounds stated in the petition be reviewed by a temporary recall board, either at the state or the county level. The recall board would be a quasi-judicial body consisting of the county election officer, county or district attorney and another elected county official, or, at the state level, consisting of the secretary of state, attorney general and lieutenant governor.
The recall board is modeled closely on the objection board, which is an entity already established in state law and which has worked well to resolve controversies arising from improper or questionable candidate filings and nominations.

We have had recent discussions with the Kansas Association of School Boards, who proposed a different approach to the problem of frivolous lawsuits in HB 2061. We have agreed with KASB on amendments to improve SB 103 as follows. We urge the committee to consider the following amendments.

PROPOSED AMENDMENTS TO SB 103

Page 2, Section (a)(1)
Page 4, Section (b)(1)
~~The facts do not support the grounds for recall as stated in the petition for recall;~~
The grounds for recall as stated in the petition do not meet the requirements for recall as given in K.S.A. 25-4302 and amendments thereto.

New Section. **K.S.A. 25-4302. Grounds for recall.** *(a)* Grounds for recall are conviction of a felony, misconduct in office~~, incompetence~~ or failure to perform duties prescribed by law. No recall submitted to the voters shall be held void because of the insufficiency of the grounds, application, or petition by which the submission was procured.
(b) As used in this section, the term "misconduct in office" means a willful violation of law by the officer that impacts the officer's ability to perform the official duties of the office.

New Section. **K.S.A. 60-1205. Grounds for forfeiture of public office**. Every person holding any office of trust or profit, under and by virtue of any of the laws of the state of Kansas, either state, district, county, township or city office, except those subject to removal from office only by impeachment, who shall (1) willfully misconduct himself or herself in office, (2) willfully neglect to perform any duty enjoined upon him or her by law, *(3) demonstrate mental impairment such that the person lacks the capacity to manage the office held* or ~~(3)~~*(4)* who shall commit any act constituting a violation of any penal statute involving moral turpitude, shall forfeit his or her office and shall be ousted from such office in the manner hereinafter provided.

The first part of the amendment changes the nature of the recall boards' review of the grounds for recall.
The second part of the amendment, which amends K.S.A. 25-4302, provides a definition for the term "misconduct in office," which is not defined in current recall statutes. The definition provided is a codification of three elements of misconduct as 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.
The third part of the amendment, which amends the ouster statutes in 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.

3. 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 5, 8

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 recall committee and the subject of the recall 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 and to report the bill favorably for passage. Thank you for your consideration.

League of Kansas Municipalities

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To: Senate Elections and Local Government

From: Don Moler, Executive Director

Re: Support for SB 103 with Amendments

Date: February 12, 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 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.

As a result of the concerns I have just enumerated in this testimony, the League has three proposed amendments which we believe will strengthen the bill and bring some sanity to the statutes which are involved in this case.

First of all we would suggest that misconduct in office and incompetence be removed from K.S.A. 25-4302 as grounds for a recall petition and election.

Secondly we would suggest that incompetence be inserted into the ouster statutes which are found at K.S.A. 60-1205 *et seq.* Misconduct in office is already a part of the ouster statutes and we would simply be inserting incompetence into this provision. We believe it would significantly improve the statutes as it would still allow for removal from office for incompetence, but would not subject an individual who was clearly ill or had some mental breakdown, to potential ridicule, stress and the difficulty of a recall petition and vote on their mental state.

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Our third proposed amendment to SB 103 would be to reconstitute the county recall board by designating it to be the county attorney, a city attorney from a city within the county, and a third attorney designated by the first two. This is because the statute will require legal interpretation by the recall board and these officers we believe would be better suited to that purpose.

Finally we would like to point out that in the current bill there is no provision for removal of the county election officer or the county or district attorney should they be the subject of the recall petition. We would suggest that whatever officers are designated to be on county recall board would at least be subject to replacement in some logical fashion should they be the subject of the recall petition.

Thank you very much for allowing the League to testify here today.

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.

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KANSAS ASSOCIATION OF SCHOOL BOARDS

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Testimony on **SB 103**
Before the
Senate Elections and Local Government Committee

by

Jim Edwards, Governmental Relations Specialist
Kansas Association of School Boards

February 12, 2003

Madam Chair and Members of the Committee:

Thank you for allowing me to appear before you today to express KASB's support for SB 103, with suggested amendments. 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 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.

While we feel SB 103 takes some steps necessary to address the issue of frivolous recall, we feel that it might not go far enough. 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. Our amendments would bring further clarification to the recall process.

SB 103, with our amendments would do the following.

1. Make clear that board members could only be recalled for:
   - conviction of a felony;
   - failure to perform a specific duty prescribed by law;
   - conviction of misconduct as described by the Secretary of State as a violation of law. (traffic or tobacco infractions would not be included)
2. Provide a mechanism that would look at not only the "structural" aspects of the recall petition but also the "merits" of the petition. This "review team" would be comprised of the county/district attorney, a city attorney (from one of the cities in the county where the recall is filed on local recall petitions) and one other appointed attorney.

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

In conclusion, we believe that our proposed amendments to the Secretary of State's bill will make the provisions fair to all parties. I would once again reiterate 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.