

FILM

Subject

*Elections  
Initiatory Petition*

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STATE OF KANSAS

*Office of the Attorney General*

State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

VERN MILLER  
Attorney General

June 19, 1974

Opinion No. 74- 198

Don C. Staab  
Assistant County Attorney  
P.O. Box 725  
Hays, Kansas 67601

Dear Mr. Staab:

You advise that a petition has been filed with the county election officer of Ellis County requesting that an election be held to recall from office the mayor and three members of the council of the City of Ellis. The petition apparently contains the number of signatures required by Article 4, § 3 of the Kansas Constitution. You inquire whether there is any lawful authority for the conduct of recall election pursuant to this petition.

Article 4, § 3 of the constitution states thus, in pertinent part:

"Every public officer holding either by election or appointment is subject to recall from office by a majority of the electors of the state or lesser electoral division for which elected or appointed, voting on the subject at any general or special election . . . ."

Requirements which must be satisfied by a petition for recall are set forth in section 4, which states regarding an election thereon:

"The petition shall be filed with the authority for calling elections in the state or other electoral division, at least ninety days before the date of election, and the election held thereon shall be called within thirty days after filing petition, and be proclaimed at least sixty days before the date of holding." [Emphasis supplied.]

In State ex rel. Burnett v. Deck, 106 Kan. 518 (1920), the petitioner sought a writ of mandamus directing the defendant board of county commissioners to call an election upon a petition seeking to recall from office one member of the board. The court found no specific statute authorizing a board of county commissioners to call a special election for the recall of a county officer, adding that "[w]here such authority is not expressly conferred it would not exist." The court stated thus:

"There seems to be a hiatus in our statutes -- a want of a clear, unquestioned authority to call special elections, except in such instances as we have outlined above, none of which is pertinent here. This is a matter which the legislature can easily remedy. It can designate the governor, as it has done in the case of vacancies in the state legislature; it can designate the county clerk, seeing that he has so much to do with the election machinery; it can designate the board of county commissioners, as it has done in so many specific instances above cited. It may provide an election commissioner and vest such authority in him. But the legislature must do the designating; it must name 'the authority for calling elections' for the recall of public officials. In that detail the constitutional amendment is not self-executory, and must await supplementary legislation to give it potency so far as the recall of a county commissioner is concerned." 106 Kan. at 524.

Certainly, some constitutional provisions are self-executing. The general rule is stated thus in Higgins v. Cardinal Manufacturing Co., 188 Kan. 11, 360 P.2d 456 (1961):

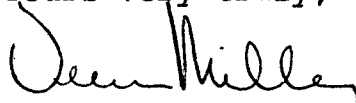
"It is a settled rule of constitutional construction that prohibitive and restrictive constitutional provisions are self-executing and may be enforced by the courts independent of any legislative action, unless it appears from the language of the provision that the enactment of legislation is contemplated as a requisite to give it effect." 188 Kan. at 18.

Over a half century ago, the Kansas Supreme Court pointed out that enactment of legislation is necessary to identify the authority empowered to call an election upon a petition for recall. No such legislation has been forthcoming. Pursuant to K.S.A. 25-2110, all city elections are to be conducted by the county election officer. He is not, however, authorized

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to call city elections, but only to conduct those duly and lawfully called or prescribed by statute. No public officer is authorized by law to call an election for the purpose of recalling from office a city official. In the absence of legislative action on the manner, as pointed out by the court in 1970, we cannot but conclude that no official is authorized by law to call an election upon the petition for recall of the mayor and members of the council of the City of Erie.

Yours very truly,



VERN MILLER  
Attorney General

VM:JRM:jsm