



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612-1597

ROBERT T. STEPHAN
ATTORNEY GENERAL

May 29, 1991

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
TELECOPIER: 296-6296

ATTORNEY GENERAL OPINION NO. 91- 59

The Honorable Ben E. Vidricksen
State Senator, Twenty-Fourth District
713 N. 11th Street
Salina, Kansas 67401-1814

Re: Elections--Recall of Elected Officials; Local
Officers--Grounds for Recall; County or District
Attorney to Determine Sufficiency of Grounds;
Constitutionality

Synopsis: The legislature is authorized pursuant to article 4, section 3 of the Kansas constitution to prescribe the grounds and procedures for recall of elected public officials. The procedure set forth by the legislature obligates the county or district attorney to determine the sufficiency of the grounds asserted in a petition seeking the recall of a local officer. The county or district attorney does not determine whether the local officer should be subject to recall. Rather, the county or district attorney determines whether the grounds are set forth with sufficient particularity so as to permit the local officer an opportunity to prepare a statement in justification of the officer's conduct in office. Cited herein: K.S.A. 25-4301; K.S.A. 1990 Supp. 25-4302; K.S.A. 25-4312; K.S.A. 1990 Supp. 25-4320; K.S.A. 25-4326; 25-4329; 25-4331; Kan. Const., art. 4, § 3.

*

*

*

Dear Senator Vidricksen:

As senator for the twenty-fourth district, you request our opinion regarding the constitutionality of certain provisions of K.S.A. 1990 Supp. 25-4302. The statute sets forth the grounds for recall of public officials and establishes a portion of the procedure to be followed in seeking recall of public officials.

The right to recall public officials has been recognized in the Kansas constitution since 1914. Originally, the constitutional provisions recognizing recall set forth part of the procedure for recall. See L. 1913, ch. 336, § 1. Recall of elected and appointed public officials was permitted. Id. However, no specific grounds for recall were stated in the constitutional provisions.

In 1974, the recall provisions of the constitution were eliminated, and article 4, section 3 of the Kansas constitution was amended to state:

"All elected public officials in the state, except judicial officers, shall be subject to recall by voters of the state or political subdivision from which elected. Procedures and grounds for recall shall be prescribed by law."

The amendment was proposed for the purpose of "making [recall] the responsibility of the legislature rather than the constitution." Senate Committee on Elections, Minutes, February 27, 1974. The amendment was adopted by the electors of the state on November 5, 1974.

In order to execute the authority conferred upon the legislature by the constitution, K.S.A. 25-4301 et seq. was enacted. K.S.A. 25-4302 established the grounds for recall and stated that no recall submitted to the voters would be held void because of the insufficiency of the grounds, application, or petition. L. 1976, ch. 178, § 16. Pursuant to K.S.A. 25-4312, the secretary of state was obligated to determine the sufficiency of each application and petition for recall of a state officer; under K.S.A. 25-4326, the county election officer was to do likewise regarding a petition seeking the recall of a local officer. At the request of the secretary of state's office, an amendment to K.S.A. 25-4302

was drafted and presented to the legislature in 1987 House Bill No. 2133. The proposed amendment read as follows:

"Grounds for recall are conviction of a felony, misconduct in office, incompetence or failure to perform duties prescribed by law. The county or district attorney of the county where petitions are required to be filed shall determine the sufficiency of the grounds stated in the petition for recall of a local officer. In the case of a recall of the county or district attorney, a judge of the district court of such county shall designate an attorney to determine the sufficiency of the grounds stated in the petition for recall. Such attorney shall perform the duties imposed on the county or district attorney in the recall of other local officers. 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." L. 1987, ch. 130, § 1. (Emphasis denotes new language.)

The amendment was proposed in the hope that it would help alleviate the number of lawsuits filed pursuant to K.S.A. 25-4331 by persons aggrieved by a determination made by the county election officer regarding the sufficiency of the recall petitions. Minutes, House Committee on Elections, (January 22, 1987); Minutes, House Committee on Elections (February 5, 1987); Minutes, Senate Committee on Elections, (January 28, 1987); Minutes, Senate Committee on Elections, (March 18, 1987). A number of the lawsuits were the result of a determination by the district court of Butler county that it was a responsibility of the county election officer to determine the sufficiency of the grounds asserted in a recall petition. Id. Because the secretary of state did not believe that county election officers should bear the liability for determining the sufficiency of the grounds asserted in a recall petition, the secretary of state requested that such responsibility be transferred to the district attorney or county attorney. Such was the effect of the adoption of the amendment set forth in 1987 House Bill No. 2133.

"Recall can be, and has been, viewed from a number of different perspectives. At one end of the spectrum is the view that recall is 'special extraordinary, and unusual,' and produces the 'harsh' result of removing an official prior to the expiration of the fixed term to which he was elected. State ex rel. Palmer v. Hart, 665 P.2d 965 (Mont. 1982). From this perspective, one emphasizes the legal as opposed to the political character of the recall process. The statutory grounds for recall are construed narrowly, in favor of the officeholder. All doubts are resolved against forcing the officer to face the voters in a recall election. Likewise, procedural statutes are strictly construed. There is no doctrine that 'substantial compliance' with the procedures is sufficient and that technical errors will be overlooked after-the-fact. Any violation of the prescribed procedures is sufficient to invalidate the recall effort.

"At the other end of the spectrum, recall can be seen as an essentially political process in which the role of judicial or administrative review is minimal and all doubts are resolved in favor of placing the recall question before the voters. Influenced by this philosophy, some states have no statutory grounds for recall; disagreement with an officeholder's position on questions of policy is sufficient." Meiners v. Bering Strait School District, 687 P.2d 287, 294 (Alaska 1984).

Pursuant to the adoption by the electors of Kansas of the 1974 amendment to article 4, section 3 of the constitution, the legislature clearly acquired the authority to prescribe the specific grounds necessary for recall of a public official and designate a procedure to be followed. At the same time, the Kansas supreme court has recognized that recall is a fundamental right which the people have reserved for themselves; statutes governing the exercise of the power are to be liberally construed in favor of the ability to exercise

it and any limitations on that power must be strictly construed. Unger v. Horn, 240 Kan. 740, 741 (1987).

Therefore, the history of recall in Kansas appears to place the state's perspective of recall somewhere in the middle of the spectrum set forth in Meiners, supra.

As stated previously, the legislature clearly has the authority to establish the grounds and procedure for recall. The legislature, through enactment of K.S.A. 25-4301 et seq. has made the constitutional provisions for recall meaningful and prevented undue harassment of elected officials. Unger, supra, 240 Kan. at 746. Requiring that petitions seeking the recall of local officers be subjected to review by the county or district attorney for a determination of the sufficiency of the grounds asserted does not unconstitutionally impede the right of the people to recall elected public officials.

While the county or district attorney is obligated to determine the sufficiency of the grounds asserted in a petition seeking the recall of a local officer, the county or district attorney does not determine whether the grounds asserted should subject the local officer to recall. The electors are as qualified to determine the capability and efficiency of their elected officials, after giving those officials an opportunity to perform the duties of their offices, as they were when they first selected the officials to fill the positions. Unger, supra, 240 Kan. at 741. The truth or falsity of the grounds must be determined by the electors. Id. at 742. Rather, the county or district attorney determines only whether the petition includes "the grounds for recall described in particular in not more than 200 words." K.S.A. 1990 Supp. 25-4320(a)(2). The county or district attorney determines only whether the petition sets forth the grounds with sufficient particularity so as to permit the local officer an opportunity to prepare a statement pursuant to K.S.A. 25-4329 in justification of the officer's conduct in office. Id. at 747.

"K.S.A. [1990 Supp.] 25-4302 provides, inter alia, that a conviction of a felony is required to subject a public officer to recall. A public official charged with a felony would not be subject to recall until convicted, unless the criminal act was also misconduct in office. . . . A public officer charged

with misconduct in office, incompetence, or failure to perform duties prescribed by law is tried by the public in the recall election." Unger, supra, 240 Kan. at 743.

A petition seeking the recall of a local officer must be submitted to the county or district attorney so that the county or district attorney may determine the sufficiency of the grounds set forth in the petition. The grounds must be set forth with sufficient particularity so as to permit the public officer to make a meaningful public response to the merits of each charge asserted in the petition. Unger, supra, 240 Kan. at 745. The initial review of recall petitions is intended to save the public and local officers the time and expense of circulating and responding to a petition which is fatally defective. Id. at 744.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Richard D. Smith
Assistant Attorney General

RTS:JLM:RDS:jm