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Testimony in Support of House Bill 2042

**Presented to the House Committee on Corrections and Juvenile Justice
By Kansas Attorney General Derek Schmidt**

January 28, 2019

Chairman Jennings, members of the Committee:

Thank you for the opportunity to testify today in support of House Bill 2042. This bill would remove the statutory authority of the Secretary of State to prosecute certain election crimes and would make related changes to the system for handling these cases. The substantive provisions of this bill are as follows:

- Removes the Secretary of State's criminal prosecution authority for election crimes, leaving authority with the county and district attorneys and with the Attorney General;
- Imposes a duty on the Secretary of State to report evidence of election crimes to the Attorney General or appropriate county or district attorney and to cooperate with and assist county and district attorneys and the Attorney General to investigate and, if appropriate, prosecute cases of suspected election crimes. This is similar to the obligation imposed by statute on the Commissioner of Insurance and the Securities Commissioner to assist the prosecuting authorities on criminal cases within their respective jurisdictions. *See K.S.A. 75-767.*
- Eliminate unusual statutory language regarding which county or district attorney has jurisdiction in order to avoid potential future disputes that could arise from the current law's somewhat unusual language. It is cleaner merely to reference the "appropriate" county or district attorney and allow general statutes governing jurisdiction and venue to control;
- Eliminate unusual statutory language that effectively sets up a "race to the courthouse" among different prosecuting authorities to determine which has jurisdiction. With the Secretary of State no longer prosecuting these cases, the Attorney General and county or district attorneys can handle these criminal matters as they do many other crimes for which they share jurisdiction, so there is no need for special statutory procedures; and
- Clarify that conspiracy to commit the covered crimes is covered by the authority to prosecute. For reasons not obvious, current law covers attempts to commit the covered crimes but not conspiracies to commit them. The omission of conspiracy in current law is puzzling and should be rectified to avoid potential future disputes over the scope of the authority.

As you know, in 2015 the Legislature enacted Senate Bill 34, which created the authority of the Secretary of State to prosecute certain election crimes. That proposal was first introduced in 2011 as part of House Bill 2067, Kansas Secure and Fair Elections Act (SAFE Act). At that time, I submitted testimony in support of the provision of that bill that granted the Attorney General original jurisdiction to prosecute election crimes, and had no objection to the provision granting that authority to the Secretary of State. I noted that in 2011, there was precedent for granting authority to bring prosecutions to state officials other

than the Attorney General – namely, the Securities Commissioner for criminal prosecutions of securities laws. When the proposal was reintroduced in 2015, I did not testify on the bill, but my position on its proposals had not changed. Since the law was enacted in 2015, at least four things have changed that lead me now to advocate for H.B. 2042, which would remove the Secretary of State’s prosecution authority but leave the Attorney General’s authority intact:

First, the current Secretary of State has made clear that he does not wish to have, and does not intend to exercise, the statutory authority to prosecute election crimes. Rather, he prefers to return to a more traditional relationship in which professional criminal prosecutors in the Office of Attorney General or in county or district attorneys’ offices would handle prosecution of these matters as they may arise.

Second, the current staffing of the Secretary of State’s office does not include any attorneys with criminal prosecution experience. That is a more traditional approach to staffing the office than was true in the previous Secretary of State administration.

Third, in 2016, I established the Fraud and Abuse Litigation Division within the Attorney General’s office. This criminal-prosecution division, which did not exist when the Secretary of State was granted prosecution authority in 2015, handles general criminal fraud, elder abuse, financial crimes and similar matters. Its existence is important because now, unlike in 2015, the Attorney General’s office has standing capacity that can handle and absorb referrals of any election crimes cases from the Secretary of State. It no longer is the situation, as it was in 2015, that any election fraud cases referred to our office would be competing for prosecution resources with the demands of major person felonies such as homicides or sex crimes against children.

Fourth, in 2017, the Legislature declared it to be the public policy of the state of Kansas “that the prosecuting attorneys who bring criminal actions in the name of the state of Kansas, other than county and district attorneys, and the funding therefor should, to the extent practicable, be located in the attorney general’s office under the jurisdiction of the attorney general.” *See* K.S.A. 75-766(a). This policy is intended “[t]o promote efficiency in staffing and operations and consistency in enforcement of the criminal law.” *Id.* That public policy had not been codified in statute when the Secretary of State’s prosecution authority was enacted in 2015, but consistent with that policy the Legislature has consolidated with the Attorney General, rather than the Securities Commissioner, authority to prosecute criminal violations of the securities laws, thus removing the precedent I pointed out in my 2011 testimony as a justification for the Secretary of State’s prosecution authority. For those reasons, it seems sensible at this time to further that declared policy by consolidating prosecution authority for election crimes with the Attorney General and with county and district attorneys rather than leaving it with the Secretary of State.

Mr. Chairman, for these reasons, I recommend adoption of H.B. 2042. Thank you for your consideration. I would stand for questions.