

TESTIMONY BEFORE THE COMMITTEE ON UTILITIES
REGARDING SENATE BILL NO. 172

Dear Committee Members:

I am a lifelong Kansan who has lived in Wichita since 1963. I graduated from Wichita State in 1977 and from the University of Kansas School of Law in 1979. I have been practicing law in Wichita for 41 years and remain actively licensed. I am submitting **neutral** testimony regarding this bill that seeks to define certain activity on the premises of a pipeline or other kinds of "critical infrastructure" as criminal trespassing or aggravated trespassing, and seeks to enhance penalties. I am concerned with the potential unintended consequences of Section 1.

Section 1(b) as proposed reads (eliminating unnecessary language) beginning on page 1, line 21:

"(b) Aggravated trespassing on a critical infrastructure facility is:

(1) Knowingly entering or remaining in:

(A) A critical infrastructure facility: or

(B) any property containing a critical infrastructure facility. . . . and

(2) with the intent to damage, destroy, vandalize, deface or tamper with a critical infrastructure facility or impede or inhibit operations of the facility."

Purely from the standpoint of clarity, I suggest that proposed subsections (1) and (2) be combined, and then followed by subsections (A) and (B). If this is done, then "and" at the end of subsection (B) could be dropped.

My concern is the "impede or inhibit operations of the facility" language (line 31), and the unintended consequences of an amendment that would change the word "on" in line 21 to "of", or changing "in" on line 23 to "at". If either of those words would be changed by typo error, by amendment or other reason to read "trespassing **of** a critical infrastructure facility" or "(k)nowingly entering or remaining **at**", then a combination of those changes would potentially criminalize conduct **off** the critical infrastructure facility. Hypothetically, imagine an oil refinery and a protest off the premises on public property such as a roadway that

might be the only access to the refinery. If law-abiding citizens exercising their First Amendment rights to assemble and protest set up on the sides of the road, then it might be argued that the protesters “impeded” the operation of the refinery because the drivers of the semi-tractor trailers transporting crude oil to the refinery slowed down out of concern for the safety of the protesters. This scenario could produce criminal liability for constitutionally protected activity.

Please also consider that Section 1(f)(1) on page 2 imposes civil damage liability on any (line 14 – 17) “person or entity that provides consideration or remuneration to a person to commit an act as described in this section may also be held liable for any damages . . .”. If the changes are made that I discussed earlier, then not only are peaceful protesters on public property at risk of being charged with these new crimes, but also threatened is the economic vitality of the organization that, perhaps, rented the buses to transport the peaceful protesters, or hired the port-a-potties to be delivered to the place of the peaceful protest. I understand that the drafters are perhaps appropriately concerned with terrorist activity, but I am sure neither the drafters nor this Committee wish to invade the sacred First Amendment rights of our citizens.

Another way to avoid these potential problems is to delete from proposed subsection (b)(2) the language “or impede or inhibit operation of the facility”. These words are vague, which is part of the reason I am concerned. It is also difficult to imagine activity that would not be damaging or destructive, or qualify as defacing or tampering, but would nevertheless inhibit or impede the operation of the facility. In other words, do those additional vague words add anything meaningful? Using unnecessary words in a criminal code statute can produce all kinds of unintended consequences.

Those are my concerns. Thank you for this opportunity to address you.

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