

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
January 19, 2017

[LB26 LB47 LB57 LB93 LB102]

The Committee on Judiciary met at 1:30 p.m. on Thursday, January 19, 2017, in Room 1113 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB26, LB47, LB102, LB57, and LB93. Senators present: Laura Ebke, Chairperson; Roy Baker; Ernie Chambers; Steve Halloran; Matt Hansen; Bob Krist; and Adam Morfeld. Senators absent: Patty Pansing Brooks, Vice Chairperson.

SENATOR EBKE: Good afternoon, ladies and gentlemen, and welcome to the Judiciary Committee. We're going to get started here. We'll have senators coming and going today because we have a number of bills being introduced in other committees as well. My name is Laura Ebke. I am the senator from Crete, representing District 32. I'm the Chair of the Judiciary Committee. And I will start off by letting the other two members of the committee who are here introduce themselves.

SENATOR BAKER: Senator Roy Baker, District 30.

SENATOR HALLORAN: Senator Steve Halloran, District 33.

SENATOR EBKE: Okay. And assisting the committee today are Laurie Vollertsen, who is our committee clerk; and Brent Smoyer, who is our legal counsel. Our committee pages are Kaylee Hartman and Toni Caudillo. On the table in front, over there, you will find some yellow testifier sheets. If you are planning on testifying, please fill out one and hand it to the page when you come up to testify. This helps us keep an accurate record of the hearing. There's also a white sheet on that table if you do not wish to testify but would like to record your position on the bill. We'll begin the bill testimony with the introducer's opening statement. Following the opening, we'll hear from proponents, those who are in favor of the bill; then opponents, those who are against the bill; followed by those speaking in the neutral capacity. We'll finish with a closing statement by the introducer if he or she wishes to give one. We ask that you begin your testimony by giving your first and last name and spell them for the record. If you're going to testify, I would ask that we keep the on-deck chair, sitting right there next to Senator Watermeier, filled so that I know that somebody is in the process or getting ready to testify. So when the proponents of the bill come up, get started, please, if you're going to be testifying in favor of a bill, please just get up there so we know who the next person up is; same way with the opponents and the neutral. If that chair is empty, I won't give a lot of time before I say, okay, we're done with this section. So keep the chair filled if you plan on testifying. If you have any handouts, please bring up at least 12 copies and give them to the page. And if you do not have enough copies, the page can help you make more. We'll be using a five-minute light system today. When you begin your testimony, the light on the table will turn green. The yellow light is your one-minute warning.

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And when the red light comes on, we ask that you wrap up your final thought and stop. As a matter of committee policy, I'd like to remind everyone that the use of your cell phones is not allowed during public hearings, so, everybody, please shut them off or put them on silent. Senators may use their phones and computers to be taking notes or to be keeping in touch with their staff. So if you see somebody peeking at their phones or their computers up here, that's what's going on. I would remind folks that outbursts of applause are not welcome and such behavior may be cause for you to be asked to leave the hearing room. One more thing: As you can see, we now have three senators here. Senator Chambers, would you like to introduce yourself?

SENATOR CHAMBERS: That's who I am. (Laughter) Ernie Chambers.

SENATOR EBKE: And this has nothing to do with the importance of the bills that are being heard, but senators may have bills in other committees that they need to be at. So with that, we will begin today's hearing on LB26. [LB26]

DYLAN FREDERICK: Good afternoon, Chairman Ebke and members of the Judiciary Committee. My name is Dylan Frederick, D-y-l-a-n F-r-e-d-e-r-i-c-k. I serve as legislative aide to State Senator John Murante. Senator Murante couldn't be here today due to a scheduling conflict with other bills that he had to introduce. But LB26 was a bill that was brought to us on behalf of the Nebraska Attorney General. It was the product of a collaboration with various groups, including their office. And over the course of the last few days, it had come to our attention that the bill, in its current form, didn't accomplish getting us to where we need to be and the solution that we are creating. So Senator Murante will be withdrawing the bill, and we ask that you vote to IPP the bill. [LB26]

SENATOR EBKE: Okay. Any questions about that? [LB26]

SENATOR CHAMBERS: I want to send a message to Senator Murante. It gives me great pleasure to vote the way he requested on the first bill. (Laughter) [LB26]

DYLAN FREDERICK: Noted. [LB26]

SENATOR EBKE: Okay. Thank you, Dylan. Anybody want to testify in favor of the bill, since it's...? Anybody opposed to the bill, under the circumstances? Anybody in the neutral on the bill, under the circumstances? Is there anything for the record? Nothing for the record. Okay, well, that concludes the hearing on LB26. We will move to LB47, Senator Watermeier. Could I get a

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show of hands of how many might be testifying in either direction on this bill? Okay. If you're testifying in favor of it, somebody hit the on-deck chair. Senator Watermeier. [LB26 LB47]

SENATOR WATERMEIER: (Exhibit 1) All right. Thank you, Senator Ebke. Chairman Ebke and members of the Judiciary Committee, I'm Senator Dan Watermeier, spelled W-a-t-e-r-m-e-i-e-r. I represent District 1 in the southeast corner of the state and here to introduce LB47. Currently, counties are fiscally responsible for the costs of an autopsy, grand jury payments, and witness compensation when there is a death of an incarcerated person. LB47 seeks to transfer these costs from the county to the state if the inmate died while serving a sentence in a state correctional institution. I introduced a similar bill, LB105, two years ago. It was advanced from the Government, Military and Veterans Affairs Committee with committee amendments, which have been incorporated into LB47. Since it was not prioritized, LB105 remained on General File at the end of last year's session. In 2014 Senator Sue Crawford introduced LR582. This was an interim study aimed at reviewing the work of a 1996 Task Force on Unfunded Mandates and studying the impact of unfunded and underfunded mandates on the counties' and cities' government. As a result of the conference calls and public hearings held regarding LR582, a list of possible state action items related to unfunded and underfunded mandates and fees were identified. One of the items identified was to require the state of Nebraska, rather than the county, to pay for costs associated with an autopsy and grand jury if a prisoner dies in state custody. There are state correctional facilities in Lincoln, Omaha, York, McCook, and Tecumseh. I agreed to offer this legislation because I represent Johnson County, where the Tecumseh State Correctional Institution is located. Since this facility was fairly new, it was relatively easy to calculate the cost to the county associated with TSCI. From 2002-2014, such costs amounted to more than \$150,000 for Johnson County. This included grand jury fees, witness fees, coroner tests, as well as district and county court filing fees and mileage for paper service. There are approximately 1,000 prisoners at TSCI. Johnson County population is approximately 5,200 with the inmates included in it. It's only 4,200 in the county. If LB47 would have been in effect when TSCI opened, the state would have helped Johnson County with approximately half of the \$150,000 in expenses. Data shows that coroner fees, witnesses' fees, and grand jury fees amounted to approximately \$78,000 through the end of 2015. These expenses do not include any costs associated with the Mother's Day riot. Due to the staff time required of the county clerk, who also serves as the clerk of the district court, Johnson County hired a part-time office person to handle the increased number of court filings to district court made by the inmates. The added expense is about \$60,000 annually, which doesn't sound like much for a larger county but it is significant for a smaller county like Johnson County. The annual expense is in addition to the more than \$150,000 in costs associated with TSCI since the prison had opened. It takes approximately 1.5 cents of the county's levy just to support the costs of this state prison. If an inmate dies in state custody, state law requires that an autopsy must be conducted and a grand jury must be convened. Therefore, Johnson County must cover these costs even though the prisoners are state prisoners and are not from an arrest at...nor arrested in Johnson County. I

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think it is logical to require the county to pay the expenses if an inmate dies while in the sheriff's custody, but I don't think it is fair to require the county to pay for autopsies and grand jury hearings and state prisoners that happen to die in the county. Although my comments have focused primarily on Johnson County, other counties, including Douglas, Lancaster, York, and Red Willow, would benefit from the legislation as well. The legislation does not cover all the counties' costs associated with a state correctional institution, but it would assist the affected counties and would resolve the problem of one more unfunded mandate. Since it's a state facility, I believe that it should be the responsibility of the state to cover these costs. When I first introduced this concept, it was prior to the riot at TSCI. Director Frakes has worked with the county on expenses incurred due to the riot and most of the costs have been covered by the state. However, the expense of court-appointed counsel for defendants is a big concern for the county. They will utilize the Commission of Public Advocacy and the public defender's office as much as possible, but if there are more than two co-defendants, the county will be responsible. Rick Smith, the Johnson County Attorney, will be able to give you more specifics on the expenses stemmed from the Mother's Day riot. The Department of Corrections informed me that they would submit testimony in a neutral capacity on LB47. They indicated that they would need an additional county clerk to handle the recordkeeping and increase in payments to individual witnesses and jurors. However, they stated that if the initial payment is made by the county, in part to keep juror and witness information confidential, and the state reimburses the county upon request, no additional staff would be needed to process the payments. I have drafted an amendment to make these changes the department suggested, and I have given you a copy of AM20, which simply strikes "paid" or "made" and inserts "reimbursed" in the two sections dealing with the payment of the juror and witness compensation. I thank you for consideration of LB47. I guess I just would appreciate you looking at it. It's something that does hit these small counties in a big way and it's kind of incredible to me to think that 1.5 cents of the...they're not up to their maximum levy. They do a good job, but it is at significant expense. So thank you, Ms. Chairman, Chairman. [LB47]

SENATOR EBKE: Thank you. Any questions? Senator Chambers. [LB47]

SENATOR CHAMBERS: Are you aware that the county sought the placement of that prison there? [LB47]

SENATOR WATERMEIER: I remember it. [LB47]

SENATOR CHAMBERS: Are you aware that there are considerable jobs, considerable number of jobs made available to the residents of Johnson County? [LB47]

SENATOR WATERMEIER: Yes. [LB47]

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SENATOR CHAMBERS: That's all I want to ask you. Thank you. [LB47]

SENATOR EBKE: Any other questions? Okay. Going to hang around to close? [LB47]

SENATOR WATERMEIER: I've got Appropriations going on, we're "execing." I might stick around for a little bit but I probably will waive closing. [LB47]

SENATOR EBKE: Thank you. [LB47]

SENATOR WATERMEIER: Thank you, Chairman. [LB47]

SENATOR EBKE: Next proponent. [LB47]

RICHARD SMITH: (Exhibits 2 and 3) Chairman Ebke, members of the Judiciary Committee, my name is Richard Smith, R-i-c-h-a-r-d S-m-i-t-h. I'm the Johnson County Attorney. I'm here to speak in favor of LB47. To add to what Senator Watermeier said, I have an exhibit that's being passed around that shows some of the specific costs and updated costs of inmate autopsies and grand jury investigations and witness fees associated with those. I think the total number now is north of \$85,000 since the building of the Tecumseh Prison. I agree with Senator Watermeier that this bill would help to shift the costs of these mandatory autopsies and grand juries for inmates to the agency who's responsible for the inmate's care, which is the state Department of Corrections. The grand jury investigations, obviously that procedure would not change based on this bill. This would only change the manner of payment for these mandatory medical examinations and the court proceedings that follow. By way of example of how this has impacted Johnson County, we had within the last couple of years an inmate who was housed at NSP in Lincoln who was a terminal cancer patient and who was placed on hospice. After he was placed on hospice, he was transported from the Nebraska State Penitentiary to the Tecumseh State Correctional Institution, where he died within days. Johnson County paid for his autopsy. Johnson County conducted that grand jury investigation and the cost of that was all on Johnson County, even though this inmate wasn't committed from Johnson County and his only nexus to our county was that the Department of Corrections had seen fit to bring him to Tecumseh to die, essentially. If you look at the numbers that I passed out there, the average cost per inmate, including the grand jury and witness reports, has come out over the last approximately 15 years to just shy of \$2,800 per inmate, and Johnson County has bore all those costs. It's impossible to break that out inmate by inmate, because whenever possible we try to convene multiple grand juries in a day to try to save the costs. And of course, that procedure wouldn't change either. The only thing that would be changing is that the state would be paying for state inmates' deaths. I think that Senator Watermeier's bill is a logical one and I think it would clearly be beneficial, primarily to the five counties that have correctional facilities in them. But for the record, if I were not from one of

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those five counties, I would still be in support of this bill. I think it makes a lot of sense about who pays the bills for inmates in their own care. Thank you. [LB47]

SENATOR EBKE: Questions? [LB47]

SENATOR CHAMBERS: How long have you been county attorney? [LB47]

RICHARD SMITH: Approximately a year and a half, and I was the deputy county attorney before that, since 2007. [LB47]

SENATOR CHAMBERS: How much money does that prison contribute to the economy of Johnson County? [LB47]

RICHARD SMITH: I don't think there's any way that I can quantify that. [LB47]

SENATOR CHAMBERS: Okay. But it's a good amount of money, isn't it? [LB47]

RICHARD SMITH: I'm not sure. I mean there's no direct payment to the county from the prison being there, of course, so the effects on the economy are a little harder to quantify because they would all be indirect. [LB47]

SENATOR CHAMBERS: Do people have jobs who live in Johnson County... [LB47]

RICHARD SMITH: Yes. [LB47]

SENATOR CHAMBERS: ...at the prison? [LB47]

RICHARD SMITH: Yes. The prison employs a number of residents of Johnson County. [LB47]

SENATOR CHAMBERS: You said if you were not from one of those five counties, you'd be in favor of this bill. But you would not have tried to have it sponsored, would you? [LB47]

RICHARD SMITH: I suppose you could say that, yeah. I don't know that I would be directly involved in it, but I think... [LB47]

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SENATOR CHAMBERS: Okay. The only reason I mentioned that, because you brought it up so I thought I'd... [LB47]

RICHARD SMITH: Certainly. [LB47]

SENATOR CHAMBERS: ...make it clear that you do have a specific interest that brings you here today and not an altruistic philosophical position on this matter. [LB47]

RICHARD SMITH: If I weren't Johnson County Attorney, I likely wouldn't be here testifying in favor of it. [LB47]

SENATOR CHAMBERS: Okay. [LB47]

RICHARD SMITH: But that doesn't mean that I wouldn't still think that it was a good idea. [LB47]

SENATOR CHAMBERS: That's all that I have. [LB47]

SENATOR EBKE: Thank you, Senator. Any other questions? Okay. Thank you. [LB47]

RICHARD SMITH: Thank you. [LB47]

SENATOR EBKE: Next up. [LB47]

KERRY EAGAN: (Exhibit 4) Good afternoon, Senator Ebke, members of the Judiciary Committee. My name is Kerry Eagan, spelled K-e-r-r-y E-a-g-a-n. I'm the chief administrative officer for the Lancaster County Board of Commissioners. I'm here to testify on behalf of the Lancaster County Board in support of LB47. There are five facilities located in Lancaster County which house persons serving sentences in state correctional institutions. Under existing law, Lancaster County is mandated to pay the costs of autopsies performed on individuals who die in these facilities. Each year approximately 12 such autopsies are performed in Lancaster County, an average cost of \$2,000. This means we spend \$24,000 for autopsies performed on inmates under the jurisdiction of the Nebraska Department of Correctional Services. Additionally, Lancaster County is responsible for the costs of grand juries involving the death of an inmate who died while serving a sentence in a state correctional institution. Based on an average of approximately 12 such grand juries per year, the county pays approximately \$5,150 per grand jury costs involving state inmates. Combined with the annual cost of autopsies, we average about

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\$29,150 per year for these inmates. The county board believes it's unfair to tax the property taxpayers of Lancaster County to pay autopsy and grand jury costs for state correctional institution inmates who come from all Nebraska counties. Accordingly, the board supports LB47 and respectfully requests the committee to advance it to General File. Thank you. I'd be happy to answer any questions. [LB47]

SENATOR EBKE: Okay. Senator Chambers. [LB47]

SENATOR CHAMBERS: Has Lancaster County ever objected to the five institutions that you mentioned which are located in Lancaster County? [LB47]

KERRY EAGAN: I don't know if we ever had any say in it, but I would say, no, there has been no official positions/resolutions from the county board objecting to... [LB47]

SENATOR CHAMBERS: And you are aware that there is quite a substantial contribution to the economy by virtue of those five institutions, aren't you? [LB47]

KERRY EAGAN: Oh, certainly there would be an economic boost from having the employment in those facilities in our county, no question about it. [LB47]

SENATOR CHAMBERS: And if that were not the case, Lancaster County might object if those facilities were actually drains on the county and the county taxpayers. Isn't that so? [LB47]

KERRY EAGAN: Excuse me. I didn't quite understand the context of the question. [LB47]

SENATOR CHAMBERS: If the five institutions cost Lancaster County money to be there, their presence drained money from Lancaster County instead of bringing money to Lancaster County, Lancaster County probably would object to their being there. Isn't that true? [LB47]

KERRY EAGAN: Oh, that's correct, yes. [LB47]

SENATOR CHAMBERS: Okay. I'm going to be more precise in the way I phrase my questions to you. How long have you held the job that you have now? [LB47]

KERRY EAGAN: I started in the county attorney's office in 1989 and with the Lancaster County Board in 1992. [LB47]

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SENATOR CHAMBERS: So you've been there for a while. [LB47]

KERRY EAGAN: Yes. [LB47]

SENATOR CHAMBERS: Are you aware of the Advocacy Commission which does assist counties in certain trials by providing legal assistance? [LB47]

KERRY EAGAN: Yes. [LB47]

SENATOR CHAMBERS: Are you aware that when they first came into being, the counties were required to pay one-third of the costs involved in those activities? [LB47]

KERRY EAGAN: I'm not personally familiar with that, no. [LB47]

SENATOR CHAMBERS: They were, and now they don't have to pay anything. So they're getting a benefit that formerly they had to pay for that they're not paying for now, and the Advocacy Commission is running into problems because that money from the counties is not coming forward for the benefit the counties are receiving. Now here's the question that I want to put to you directly. If this bill hadn't been initiated or instituted by Johnson County, Lancaster County was not anticipating this. Its board was not anticipating offering a bill like this, was it? [LB47]

KERRY EAGAN: I can say it's never been on our legislative priority list or even our proposal list. [LB47]

SENATOR CHAMBERS: And the bill, the law that requires a grand jury in the case of deaths while in custody or being taken into custody has been on the books for some years. Isn't that true? [LB47]

KERRY EAGAN: That's correct. [LB47]

SENATOR CHAMBERS: And the costs associated with those deaths, whether they be autopsies, investigations, or whatever, are absorbed and have been absorbed by Lancaster County. Isn't that true? [LB47]

KERRY EAGAN: Yes. That's true. [LB47]

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SENATOR CHAMBERS: I've been in the Legislature a long time and I've never heard a complaint from Lancaster County about having to pay those costs. So would I be, do you think, off the mark to say that Lancaster County has never complained about having to pay those costs to the point where they said legislation should relieve them of that responsibility? [LB47]

KERRY EAGAN: I wouldn't quite go that far. [LB47]

SENATOR CHAMBERS: How far would you go? [LB47]

KERRY EAGAN: Well, we've compiled a list of what we would consider unfunded mandates that primarily benefit the state. Certainly all of county government is mandated by state statute because the counties don't have any other authority than is provided by state statute. But there are a number of expenses that the state has transferred down to the county level and it's about...we have about six pages' worth where we feel it's primarily benefiting the state or a state function. I think certainly performing autopsies on state inmates would fall under that category. So in that sense, it has been on the county's radar. It's just never warranted us spending political capital to put it on our priority list or pursue it. But when it's here, we support it because it falls within that philosophical point of view that unfunded mandates that benefit primarily the state should be paid for by the state. [LB47]

SENATOR CHAMBERS: Unfunded mandates is not a philosophy; it's an abracadabra, smoke-and-mirrors nonsense and you know it. [LB47]

KERRY EAGAN: No, I don't. [LB47]

SENATOR CHAMBERS: You know that the counties don't exist as freestanding entities. They are subdivisions of the state. Is that correct? [LB47]

KERRY EAGAN: Oh, absolutely, Senator, yes. [LB47]

SENATOR CHAMBERS: So then when you talk about unfunded mandates, you're saying that you don't want the counties to carry out the duties that they have by virtue of being a subdivision. Isn't that what you're saying? [LB47]

KERRY EAGAN: No, that's not what I'm saying. [LB47]

SENATOR CHAMBERS: Well, what are you saying? [LB47]

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KERRY EAGAN: What I'm saying is certainly all of county government is mandated by state statute. I mean we couldn't...counties don't exist without state mandates and we are political subdivisions of the state. But there are certain functions which have a direct benefit to the property taxpayers of a particular county or of all the counties, and that is probably a more rational mandate. I think the term "unfunded mandate" is a bit broad and I would agree with you in that sense, but there are situations where the primarily beneficiary is state government. I think that's an area, if you're looking at property tax relief, I think that's an area that you can look at and make a distinction on the type of unfunded mandate that would be a concern to county property taxpayers. [LB47]

SENATOR CHAMBERS: Were not the counties created in order to carry out functions as a part of the state, because the state could not directly do all of these things themselves? [LB47]

KERRY EAGAN: Yes. We're political subdivisions of the state, created by state statute, yes. [LB47]

SENATOR CHAMBERS: You are a part of the state machinery, aren't you? [LB47]

KERRY EAGAN: Well, yes. Yes, we are. [LB47]

SENATOR CHAMBERS: All right. So then you have a bolt over here, and you have a bolt over there, and they attach pieces to a machine. They're part of that machine even though they're some distance from the machine to which they're attached, the part where the bolt is. I'm saying this for the record because I get fed up with these people coming from these counties talking about unfunded county mandates. Anything that is in the nature of sugar or a benefit, they take greedily and hungrily. There are counties who wanted to receive state prisoners because their jails were not full. And then, when they started realizing that there might be some cost because in their status as state prisoners there were requirements that had to be met, they're now whining and crying and saying it's too expensive. They wanted it as long as it was a profit. So here's why I'm talking to you like this. You've been around a long time. This notion of state-funded mandates was not around when I got into the Legislature and it was not a slogan at the time you took your job. This is something created by certain political entities, and as a representative of the state, I have to defend the state when inaccurate comments are made in a public forum which, if left unchallenged, would seem that the state is agreeing. Now here's what I want to ask you. Before you came here, did you do some research on how many autopsies had been performed in Lancaster County in connection with and because of that law that required a grand jury in the case of these deaths? [LB47]

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KERRY EAGAN: Yes, I contacted the county attorney's office, who's responsible for...as the state coroner and for forming grand juries. [LB47]

SENATOR CHAMBERS: Is that county attorney here today? [LB47]

KERRY EAGAN: Yes. No, Lancaster County Attorney. [LB47]

SENATOR CHAMBERS: Lancaster County Attorney? [LB47]

KERRY EAGAN: They're not here today, no. [LB47]

SENATOR CHAMBERS: Oh, so you're the conduit for information I'd be getting from them. [LB47]

KERRY EAGAN: Yes. [LB47]

SENATOR CHAMBERS: Okay. Did you or anybody from Lancaster County appear in opposition to that bill which would have required the impaneling of a grand jury in the case...all cases of these types of deaths? [LB47]

KERRY EAGAN: I couldn't answer that, Senator. I don't know. [LB47]

SENATOR CHAMBERS: You're such a valuable witness I hate to let you go, but I've asked you all I want to. [LB47]

SENATOR EBKE: Senator Krist. [LB47]

SENATOR KRIST: I'm going to get back on the unfunded mandate bandwagon. I have the privilege of serving on Agriculture this year and we opened up the Egg Act the other day, and we reversed an unfunded mandate back to the federal government. I've done a lot in juvenile justice and I've seen counties come in and talk about the unfunded mandates that we've put on them to house in detention centers in those counties. So I'm going to ask you very clearly, what is the price of the per diem, or the cost, to detain a youth in your detention facility? [LB47]

KERRY EAGAN: I don't see that's germane to this topic, but we've asked... [LB47]

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SENATOR KRIST: It's germane because I asked the question, sir, so please answer it. [LB47]

KERRY EAGAN: Okay. We have sent you...Senator, we've sent you a letter of the details. Our per diem... [LB47]

SENATOR KRIST: I'm putting it on the legislative record. Are you refusing to answer the question? [LB47]

KERRY EAGAN: I was in the process of answering. [LB47]

SENATOR KRIST: Okay. Please do. [LB47]

KERRY EAGAN: I've sent you a letter that details what our per diem is and how we calculate it. And there's disagreement on what should be included in that calculation, but you have been provided with that information. Our present...and that changes every year because of the population and the costs and the staffing, so you divide. If you have a lower population, of course the per diem is going to go up. We came up with a \$307 per diem for last year based on...and it's a rolling figure, too, because you can't know what the population is at any moment. So it's a figure that you develop from year to year. So it's \$307 is what our last per diem was. [LB47]

SENATOR KRIST: Which, for the legislative record, is approximately \$40 to \$55 more than the next county in line in terms of what they charge. [LB47]

KERRY EAGAN: Can't answer how they determine their per diem. I can answer how we determine our per diem. [LB47]

SENATOR KRIST: So I'll tell you what. We'll swap. We'll swap the additional costs that you're charging the state for per diem for your bills to do autopsies, because I think you come up ahead on that one. You get my point? [LB47]

KERRY EAGAN: Well, I don't agree with it. [LB47]

SENATOR KRIST: You don't have to. Thank you. [LB47]

SENATOR EBKE: Any other questions? Thank you, Mr. Eagan. [LB47]

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KERRY EAGAN: Thank you. [LB47]

SENATOR EBKE: Next up. [LB47]

ELAINE MENZEL: Chair Ebke and members of the Judiciary Committee, for the record, my name is Elaine Menzel, it's E-l-a-i-n-e M-e-n-z-e-l. I'm here on behalf of the Nebraska Association of County Officials, also known as NACO. While our legislative committee has not yet met this year, we did support the legislation that was introduced by Senator Watermeier two years ago that he referred to. And as he also indicated, it was--I hate to bring this up--but it was in response to an interim study on unfunded mandates. That was the title of the study and the purpose was to look at county functions and county role and that type of thing. There was, I believe, two or three pages' worth of items that were in the interim study, and this is one thing that he was, the senator, was asked to bring forward. We would once again like to thank him for introducing that. Certainly acknowledge that this is a small amount in comparison to some of the other items which counties are obligated to incur related to state statute. As you suggest, we are creatures of the state in our role. And I would, just at this point, not replicate what the other testifiers have said, but I would ask you to please support this and move it to General File. If there's any questions, I'd be glad to try to answer them. [LB47]

SENATOR EBKE: Senator Krist. [LB47]

SENATOR KRIST: Thanks for coming. I would ask you, for the record, to submit to legal counsel the official position of NACO when they meet on their legislative issues. [LB47]

ELAINE MENZEL: I... [LB47]

SENATOR KRIST: And second,... [LB47]

ELAINE MENZEL: On just this bill or on the... [LB47]

SENATOR KRIST: All. I know we're going to hear all of them, but particularly on this one because of the timing of the hearing... [LB47]

ELAINE MENZEL: Sure. [LB47]

SENATOR KRIST: ...and you not being able to represent the organization's requirements. [LB47]

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ELAINE MENZEL: Official position? [LB47]

SENATOR KRIST: So if you would, please, I'd appreciate that. [LB47]

ELAINE MENZEL: I would be glad to. [LB47]

SENATOR KRIST: Thank you, Chair. [LB47]

ELAINE MENZEL: Okay. [LB47]

SENATOR EBKE: Senator Chambers. [LB47]

SENATOR CHAMBERS: Senator Krist's question kind of verged on what I want to get into the record. I will never, by the way, kill the messenger. [LB47]

ELAINE MENZEL: Why, thank you. [LB47]

SENATOR CHAMBERS: Were you advised (laughter)... [LB47]

SENATOR KRIST: He's been known to wound them though. [LB47]

SENATOR CHAMBERS: Were you advised to come here today, though, by whoever is your supervisor? [LB47]

ELAINE MENZEL: We had conversations. I...and it was...well, I will tell you, as a staff member who has worked there for a period of time, we review all of the legislative bills and certainly recognized this as one that had been on our radar a couple years ago and, therefore, something that we would likely continue to support if we had met as a legislative body at this point. [LB47]

SENATOR CHAMBERS: But the fact is you are not representing here today NACO's position in the sense of NACO having taken a position on this bill. [LB47]

ELAINE MENZEL: Not an official, however, they're likely to support based upon... [LB47]

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SENATOR CHAMBERS: Leave the "however" off. That's where people...they get into the position of not being a messenger but an advocate and the shield that they were safe behind... [LB47]

ELAINE MENZEL: Blended? (Laugh) [LB47]

SENATOR CHAMBERS: ...is taken away. That's all I want to ask you. But here's something for people to consider as far as an unfunded mandate. My wife and I have four children. I made sure each one had an allowance. Not one of my children ever came to me and said, Daddy, that's an unfunded mandate when you tell me to sweep the floor. I'm his daddy and I tell him these are things you're to do and I don't have to give you an allowance or anything else. You have to do it because I told you to. So when these counties, which in a sense are the offspring of the state, want to come in with that nonsense about an unfunded state mandate, something that I might ordinarily have opposed I will then become a strong advocate of it, because they are misrepresenting what the relationship is between the counties and the state. And that's all that I have. Thank you. [LB47]

ELAINE MENZEL: Thank you. [LB47]

SENATOR EBKE: Any other questions? Thank you very much. [LB47]

ELAINE MENZEL: Thank you. [LB47]

SENATOR EBKE: Do we have any opponents, opponents of the bill? And if there are any other opponents, make sure to get in the on-deck chair. [LB47]

ELLE HANSEN: Good afternoon, Chairman Ebke, Senators of the Judiciary Committee. Legal name Ellen, known as Elle Hansen in the community, E-l-l-e-n or E-l-l-e, Hansen, H-a-n-s-e-n. I appear today in opposition to this bill because I believe that it is representative of a bigger problem in our state. We have an exploding population in our correctional facilities. It's indisputable. However, most of these who are incarcerated who are citizens in our state are nonviolent offenders. I believe that funding this bill would continue to--and this may be broad reach--continue to encourage the incarceration of nonviolent offenders in our state. Look at our prisons. They're not designed for people who have committed petty or even serious nonviolent crimes. They are designed to protect our society from people who would harm us. And then when nonviolent offenders come out of our prison system and know better now how to commit crimes, how to do better criminal activity because we've placed them with people who are probably worse off morally than they are, perhaps more mentally ill than they are, we're creating

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additional problems in our society. I would also like to take issue with the fact that like I understand that counties are not responsible for their own autopsies necessarily. Lancaster County sends all of the people who...or all of the bodies to be autopsied to Omaha. I don't believe any autopsies have ever been conducted in this county. Nebraska is the only state in the nation who delegates the responsibility of coroner to our sheriffs, which I think presents a bigger issue and problem that we need to look at. I don't believe that a sheriff has the...possess, is possessed of the qualifications of a medical professional in order to perform as a coroner. These are just ideas that came up in my mind when I read the bill, and I think that we need to stop before this is advanced to General File and take a bigger look at some of the issues that are contributing to the factors. In addition, I would have to agree with this being an issue of greed. Senator Chambers' line of questions really exposed a lot of, I believe, the motivations for why this bill was brought before this committee and before my Legislature to begin with, and I would just encourage you all to vote against advancing the bill to General File. Thank you. [LB47]

SENATOR EBKE: (Exhibit 2) Thank you. Any questions for Ms. Hansen? Thank you. Any other opponents of the bill? We have one neutral letter from Scott Frakes, director of Nebraska Department of Corrections. Are there any other neutral...is there any other neutral testimony? Okay. Senator Watermeier has left the building. He's done, right? Okay. This closes the hearing on LB47. We will proceed to LB102, Senator Hilkemann. Could I see a quick show of hands about how many might be testifying on this bill? Okay. Thank you. Senator Hilkemann. [LB47 LB102]

SENATOR HILKEMANN: (Exhibit 1) Good afternoon, Chairwoman Ebke and members of the Judiciary Committee. I am Robert Hilkemann, that's R-o-b-e-r-t H-i-l-k-e-m-a-n-n, and I proudly represent District 4 in the Nebraska Legislature. I am introducing for your consideration LB102, which seeks to change the penalty for witness tampering from a Class IV felony to a Class II felony if the tampering occurs as an attempt to change the outcome of a felony charge. As you well know, I'm not an expert in criminal law nor have I had the privilege of sitting on this prestigious Judiciary Committee. Therefore, I look forward to the testimony of the proponents that follow me who can answer your detailed questions about the need for this bill. As the introducer of the bill, however, I am committed to ensuring that as a state we are tough on crime and that most especially includes the protection of witnesses of violent crimes and domestic violence. I've included in the packet that the pages are handing out to you an editorial from the Omaha World-Herald from March of 2016 encouraging the Legislature to boost the penalty for witness tampering. I've also included a few news stories about instances of witness tampering, such as in 2016 in Omaha, Charles Trotter, a gang member who is accused of murdering two rival gang members. And at trial a key witness changed his testimony and suddenly could not remember anything of the event and a mistrial was declared. In 2016 in Norfolk, Jose Carmona, charged with first-degree sexual assault of a child, attempted to get others to talk to his victim on his behalf. In 2009 in Ashland, Jeffrey Glazebrook was convicted of killing 97-year-old Sadie

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McReynolds and mouthed the words "I will kill you" to a witness at his trial. In 2016 in Grand Island, Glen Griess faced charges of possession of methamphetamine and possession of a stolen vehicle; made 27 calls to the witness in his case stating that he would cut her head off. Even after brief research, I was honestly surprised by these stories and the frequency with which witness tampering is occurring. Ensuring that serious and violent crimes can be effectively prosecuted means ensuring that witnesses feel safe in coming forward with valuable information. Part of that protection includes ensuring that defendants having prosecution for violent felonies are faced with a harsh penalty for the intimidation, the threat of violence, or direct pressure to not testify applied toward witnesses. I ask this committee to prioritize the importance of strengthening the penalty for witness tampering in our state. I look forward to a good discussion and will be more than happy to work with the committee on ways you might see that we will make this bill better. Thank you for your consideration on LB102. [LB102]

SENATOR EBKE: Thank you, Senator Hilkemann. Senator Chambers, and I would note that Senator Morfeld has come in. [LB102]

SENATOR CHAMBERS: Not expecting you to be an expert, so I'm going to ask you these questions keeping in mind that you're a layperson. Are you aware that courts have said that when the police are interrogating a person, they can lie to that person and indicate they know what they don't know, that they have evidence which they don't have, can say somebody ratted them out when they haven't, and the courts have said they can do that? Are you aware of that? [LB102]

SENATOR HILKEMANN: I am not aware of that, Senator. [LB102]

SENATOR CHAMBERS: That's misleading and it's the state doing it and the courts approving of lying which could lead one person, because of the fear of what has been told him or her, to say, then I'll plead to something I didn't do because that's...this will get me, I know what they do. But at any rate, it's not a stick with one end. Law enforcement does a lot of things that are unlawful, they get away with things that a private citizen never could. If you kill somebody under the circumstances that a lot of cops do, they would never let you off in the way they do them. So I'm a person who looks with a jaundiced eye when these bills come to enhance punishments for everybody. But then the same people do all they can to exonerate police when they've obviously done very bad things. I'll give you one example. Then I'm going to let you go because somebody you said is going to testify. And I brought this up before the Legislature but it made no difference. It made nobody any difference until the Chicago police were required to produce and show the video. I read a very small article where it said, and it didn't give the race at that time: Youth shot 16 times in back by Chicago police. And nothing was charged. Cops on the scene lied and said that he had been a threat. They wrote false reports. They signed false affidavits. They lied outright. Then when the video came, the kid was not approaching them, and it was a black

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kid, and a cop shot him down and shot him 16 times. And only then was there an outcry. So I want to hear what whoever you say is going to testify explain why the jump from what the penalty is now to what they are recommending. Is this person who is testifying one who wanted this bill introduced? [LB102]

SENATOR HILKEMANN: Yes, that's correct. [LB102]

SENATOR CHAMBERS: Okay. That's all I will (inaudible) to you. [LB102]

SENATOR HILKEMANN: Okay. [LB102]

SENATOR EBKE: Senator Krist. [LB102]

SENATOR KRIST: I'm going to address a question to you, Senator, and if you want to pass it on, I understand. [LB102]

SENATOR HILKEMANN: Okay. [LB102]

SENATOR KRIST: The original wording of the bill, starting with line 19 on page 2, "Tampering with witnesses or informants is a Class IV felony. Jury tampering is a Class IV felony," those words are crossed out and you would want to replace them with "A violation of this section is a Class IV felony unless (the) tampering occurs as an attempt to change the outcome of a felony charge, in which case it is a Class II felony." I just want to know the logic in going from IV to II and the burden of proof that goes along with that in terms of unless it is tampering with an attempt to change an outcome of a felony conviction or a felony charge. And if you don't want to talk to it, that's fine. I understand. [LB102]

SENATOR HILKEMANN: Well, Senator Krist, what this involves is that making it going from a Class IV to a Class II makes it more serious. [LB102]

SENATOR KRIST: Understood. [LB102]

SENATOR HILKEMANN: And we're not talking about misdemeanors. We're only talking about in the cases of felonies. [LB102]

SENATOR KRIST: Okay. So we jump from IV to II. [LB102]

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SENATOR HILKEMANN: That's correct. That's for the penalty phase of this. That's correct. [LB102]

SENATOR KRIST: And I would like to hear the logic from going from IV to II and the burden of proof on whether or not it's specifically involved with jury tampering. That wasn't in...I don't think that was specifically named in the language or written in the language before. So I'll let your... [LB102]

SENATOR HILKEMANN: Okay. [LB102]

SENATOR KRIST: ...your expert... [LB102]

SENATOR HILKEMANN: Okay. [LB102]

SENATOR KRIST: ...fill me in. It's a question that I would put on the table for them. [LB102]

SENATOR HILKEMANN: Thank you. [LB102]

SENATOR KRIST: Thank you very much. [LB102]

SENATOR EBKE: Senator Halloran, did you have a question? [LB102]

SENATOR HALLORAN: Yes. Senator, thank you for the bill. Is there anything in your bill that addresses...that's addressing police abuse on a potential criminal or exonerating police abuse? [LB102]

SENATOR HILKEMANN: Not unless they're tampering with a (inaudible). [LB102]

SENATOR HALLORAN: So it is exclusively... [LB102]

SENATOR HILKEMANN: Right. [LB102]

SENATOR HALLORAN: ...dealing with tampering with witnesses or tampering with the jury, I should say. [LB102]

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SENATOR HILKEMANN: That...this has nothing to do with tampering with the jury. This has tampering with a witness. [LB102]

SENATOR HALLORAN: Tampering with a witness. [LB102]

SENATOR HILKEMANN: Right. [LB102]

SENATOR HALLORAN: Excuse me. [LB102]

SENATOR HILKEMANN: Right. [LB102]

SENATOR HALLORAN: Okay. Okay. No more questions. [LB102]

SENATOR EBKE: Okay. Any other? [LB102]

SENATOR CHAMBERS: One thing. [LB102]

SENATOR EBKE: Okay. [LB102]

SENATOR CHAMBERS: Did you just say tampering with victims? [LB102]

SENATOR HILKEMANN: No, I did not. [LB102]

SENATOR CHAMBERS: Oh, okay. I'm sorry, I misheard. [LB102]

SENATOR HILKEMANN: I said...I said only tampering with witnesses. [LB102]

SENATOR CHAMBERS: Okay. [LB102]

SENATOR HILKEMANN: Yeah. [LB102]

SENATOR EBKE: Okay. Thank you. [LB102]

SENATOR HILKEMANN: Thank you. [LB102]

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SENATOR EBKE: You going to stick around? Okay. First proponent. [LB102]

MATTHEW KUHSE: Good afternoon, Senator Ebke and members of the Judiciary Committee. My name is Matt Kuhse. First name is M-a-t-t, last name is K-u-h-s-e. I am currently the city prosecutor for the city of Omaha. I appear before you in support of LB102. Prior to being appointed the city prosecutor in June of last year, I served for 15 years as a prosecutor in the Douglas County Attorney's Office. I'll keep some of my comments brief because I sense some of the questions that Senator Chambers has and Senator Krist have might be directed at me. Witness tampering is a very serious problem in criminal prosecutions. And maybe directed to one of Senator Krist's questions about some of the motivations or why it moves from a Class IV felony to a Class II, I can only speak anecdotally and from my own personal experience. One of the biggest problems that prosecutors face on homicide cases, felony assaults, shootings, things of that nature, are...I can't think of the best term to use but when a prisoner is sitting in, waiting for trial on a murder case and you're faced with the proposition of serving life in prison or, well, if I get convicted of tampering with a witness I get convicted of a Class IV felony which carries a presumption of probation or a maximum of two years in prison, people make that decision. Two years in prison, of which they'll get a significant amount of time probably waiting for trial, versus life in prison, I think is a decision that goes on in many people's minds. And it's not just limited to homicides or violent cases. It very often occurs in domestic violence cases, which I spent a great deal of time in the county attorney's office prosecuting, and that people who get arrested for domestic violence crimes will, and it's very easy to do, make every effort to try and convince the victim not to appear in court. This type of tampering is sometimes done directly by the defendant. You heard Senator Hilkemann talk about phone calls. It can also be indirectly done as well. And it does instill a lot of fear in people and it causes people to...who maybe were cooperative when a crime initially occurred and talking to the police about what they saw and what they heard, over the course of time, because there's a long time between arrest and a trial date, a lot of times witnesses drop off and cases have to be dismissed, regrettably. Plea deals that maybe are not what is best for the community have to be reached because of this problem. It is a very real problem. It extends to child sexual assault cases, particularly, or in cases where a minor child is being abused by a family member, and also in sexual assault cases that are rooted in domestic violence. So increasing the penalty from a Class IV felony to a Class II felony I think can serve as a deterrent to prevent people from...maybe a little bit more thought goes into their mind before they engage in tampering when they realize the possibility of what they could get convicted of is a more significant of jail time rather than just a presumption of probation or two years in prison. [LB102]

SENATOR EBKE: Okay. Senator Krist. [LB102]

SENATOR KRIST: Excellent explanation and that's what I was looking for, why are we doing this, and you're saying that the jailhouse lawyers, no pun intended, or the lawyer himself may

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say, he...the lawyer would never say that but the person may say, I'll take the lesser of the risks and this pretty much tells him the risk is much, much worse if he tampers. You don't see any problem, though, with the burden of proof there to make that jump? How does that work in your world? [LB102]

MATTHEW KUHSE: The burden of proof would remain the same. I would still have to prove each and every element of a witness tampering charge beyond a reasonable doubt in order to convict a defendant of witness tampering. And it's not always a very easy thing to do, to prove someone guilty of witness tampering, but I guess that's the prosecutor's problem to figure out in the courtroom or at trial. I just think moving it from a Class IV felony to a Class II felony, my hope, would cause defendants some pause before engaging in that type of behavior. [LB102]

SENATOR KRIST: Thank you. Great answer. [LB102]

SENATOR EBKE: Senator Morfeld and then Senator Chambers. [LB102]

SENATOR MORFELD: Thank you for coming today. This is a pretty big leap from a Class IV to a Class II. Have you looked at what other states do? Has there been...is there any evidence that moving this to...is there any evidence that this is more of a deterrent other than the fact that it's obviously a much stiffer penalty in other states? [LB102]

MATTHEW KUHSE: I had every intent, before coming here today, to looking into what other states do. I have looked at other states' witness tampering statutes and this one is somewhat a model of what other states use. I will say the state of Minnesota has a very comprehensive witness tampering bill. Instead of a couple of paragraphs, theirs is seven, eight, nine, ten paragraphs covering a multitude of possibilities. In terms of the penalty range, I didn't look at that. Unfortunately, in my job, I go into work every day with a set of goals and by about 9:30 I'm misdirected into other things. [LB102]

SENATOR MORFELD: I can relate to that. Thank you. [LB102]

SENATOR EBKE: Senator Chambers. [LB102]

SENATOR CHAMBERS: I like to get the whole picture. When we look at the existing language, starting in line 3, "A person commits the offense of tampering with a witness or informant if, believing that an official proceeding or investigation of a criminal or civil matter is pending or about to be instituted, he or she attempts to induce or otherwise cause a witness or informant to: (a) Testify or inform falsely; (b) Withhold any testimony, information, document, or thing; (c)

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Elude legal process summoning him or her to testify or supply evidence." Suppose the person has that belief but there is no such investigation or any criminal or civil matter pending? You'd punish the person strictly for what he or she misbelieved. Isn't that true? [LB102]

MATTHEW KUHSE: Are you asking about the person believes that there's an official proceeding but there really isn't? [LB102]

SENATOR CHAMBERS: Right. There's nothing. Let me give you an example. I like to make it clear, as I said. I tell Senator Morfeld, I'm going to give you \$30 and I want you to get on a bus and go as far as you can and stay there for a weekend, because I think that there's a criminal investigation. Then you find out that I thought there was a criminal investigation, now it's been established, but there is none. But I wanted him to go away because I thought there was one. So then I get...I can be charged with witness tampering, can't I? [LB102]

MATTHEW KUHSE: Under the reading of the statute in the example that you gave, yes, that could happen. [LB102]

SENATOR CHAMBERS: What I'm trying to show, and there are new senators here who don't believe I know what I'm talking about, you're experienced, this is poorly written language because it allows a person to be convicted of a crime when...for witness tampering when there was no crime committed. There was no investigation, nothing, but a person misbelieved it and did something and can be convicted of a crime. [LB102]

MATTHEW KUHSE: Under the example that you gave and under the language of the statute, you're right, that could happen, yes. [LB102]

SENATOR CHAMBERS: So would you agree--and it's a leading question so I won't have to ask a lot of questions--that simply because something is in a current law, that in itself ensures that the law is well-written and as clear as it needs to be? [LB102]

MATTHEW KUHSE: Yes, I think that presumption is fair. [LB102]

SENATOR CHAMBERS: There are changes that I see which these new senators are not going to do it because they've got their marching orders already. But at least I'll be able to refer to what happened and, in exchange, based on what the law is right now--and I'm not even talking about the new language--this is already here, you had nothing do with that whatsoever. [LB102]

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MATTHEW KUHSE: Correct, because I think in response to what Senator Morfeld asked, when I was looking at other states they use virtually the exact same language, so it's based on some model code or something out there from some national standard. [LB102]

SENATOR CHAMBERS: But, see, I never follow them because they're wrong. They don't have somebody like me in their state who will question people,... [LB102]

MATTHEW KUHSE: Right. [LB102]

SENATOR CHAMBERS: ...question codes, question the fact that 30 people said, because the other 29 followed that 1. But now I'd like to get to the underlying language. What did you say you do now, because you said you used to work with the county attorney? [LB102]

MATTHEW KUHSE: I worked for 15 years in the Douglas County Attorney's Office. I was appointed as a city prosecutor in Omaha in June of 2016. [LB102]

SENATOR CHAMBERS: You're the gentleman I talked to on the phone. [LB102]

MATTHEW KUHSE: I am the very... [LB102]

SENATOR CHAMBERS: I'd never met you before. [LB102]

MATTHEW KUHSE: ...I am that very same person. [LB102]

SENATOR KRIST: Oops. [LB102]

SENATOR CHAMBERS: Okay. (Laughter) He's a nice kid. [LB102]

SENATOR EBKE: Well, there you go. [LB102]

SENATOR CHAMBERS: As old as I am, I can say about anybody in here "nice kid" and they can't be offended. (Laughter) But anyway, getting to the language, from your experience when you were a county attorney where felonies were charged and prosecuted, how many of the...what percentage of the people do you...would you say--and it's pure speculation--knew what the punishment for a crime was? [LB102]

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MATTHEW KUHSE: There's so many factors that can go into that. Presumably when somebody has had more convictions on their record, it's presumed that that defendant is more, quote unquote, experienced... [LB102]

SENATOR CHAMBERS: Uh-huh. [LB102]

MATTHEW KUHSE: ...with the criminal justice system and would know that. There is also the factor that I think Senator Krist mentioned that when you're housed in a correctional institute, you're also housed with people who are very knowledgeable and might give you some free legal advice about what to do. In terms of what percentage, I think that defendants know that they face this possibility. I guess I would parse it out. In domestic violence cases, I think 90 percent of people charged with domestic violence crimes are aware of this and aware of the possibility of it. In terms of more violent felonies, homicides, sexual assaults, robberies, things of that nature, the number might be a little bit smaller but it would certainly be over half, in my opinion, just as you said, a supposition. [LB102]

SENATOR CHAMBERS: Now I want to ask the question a different way. What is the penalty for a Class II felony? [LB102]

MATTHEW KUHSE: One to 50 years. [LB102]

SENATOR CHAMBERS: What is the penalty for a Class IV felony? [LB102]

MATTHEW KUHSE: Currently, it's zero to...presumption of probation is zero to two years with nine months post supervised release. [LB102]

SENATOR CHAMBERS: And you are experienced. You've dealt with that and you had to think. [LB102]

MATTHEW KUHSE: I did. [LB102]

SENATOR CHAMBERS: I would bet you, if you stopped 1,000 people on the street and said, what is a Class II felony, they wouldn't even know what you're talking about. And here's what I'm getting to. I don't think people know what the name of the crime is that they commit may be a felony. And they might think that a strong misdemeanor is really a felony. They don't really know. I don't think the idea of the punishment enters the mind, and I know a lot of criminals and a lot of my friends, well, I've never had a lot of friends but a lot of people that I know and had a cordial relationship with have gone to prison. None of them thought they were going to get

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caught. If they thought they would get caught, they wouldn't have done it. If I am sticking up a bank and I think I'm going to get caught, I'm not going to go in the bank and do it. That's why I put on a mask or I try to hide my face. If everybody who commits a crime knew he or she was going to be caught, there wouldn't be many crimes committed by sane people. So jumping this penalty up in this fashion I don't think is going to do anything except make some prosecutors have an additional club to hold over somebody's head to compel a plea where the person may not have done anything at all, because in a lot of these kind of cases that we would have here, it's one person's word against another. So if you have a clean-cut young man like Senator Morfeld, then you have a rugged-looking guy like me, and I also happen to have a scar across my face running from my left eyebrow across my nose and down my right cheek, that's not going to work to my benefit if I go before a jury. And I knew...I had a friend like that and he was told by a prosecutor, that jury will look at you and they'll convict you, and he hadn't done it but he pleaded guilty because his lawyer was with him and the lawyer agreed. Those things happen. You probably don't know that because you're very young, but I'm going to tell you they do. And I know people whose word I'd take, even though they've been on what is considered the wrong side of the law, who have pleaded to things that they didn't do. But how do you justify jumping from the Class IV, which as you pointed out has no minimum, to a Class II? How do you justify that when, as Senator Krist kept pointing out, you have the key word, "unless"? There's going to be a lot of speculation. That "unless" to me creates ambiguity, it creates uncertainty, it creates a trap for the unwary, and an invitation for falsifying evidence. So how do you prove the "unless," that it was...well, before we get there, in line 18, "an attempt to change the outcome of a felony charge." What do they mean by "outcome of a felony charge"? [LB102]

MATTHEW KUHSE: I'm assuming what they mean by... [LB102]

SENATOR CHAMBERS: No assuming. [LB102]

MATTHEW KUHSE: All right. The way I read attempting to change a felony charge would be to avoid a conviction, avoid a trial, have witnesses not show up, probably in line with what's referred to in subsection 1(a), 1(b), 1(c), or 1(d). [LB102]

SENATOR CHAMBERS: But when it says "the outcome," it doesn't say the outcome of a trial. [LB102]

MATTHEW KUHSE: True, it says an "outcome of a felony charge." [LB102]

SENATOR CHAMBERS: Right. The only outcome of felony charge would be go to trial. [LB102]

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MATTHEW KUHSE: Well, or it could be "the outcome of a felony charge" could mean pleading to a lesser charge, having it dismissed, getting a misdemeanor instead of a felony. I think those could arguably be different outcomes of a felony charge. [LB102]

SENATOR CHAMBERS: I deem you to be a reasonable man. [LB102]

MATTHEW KUHSE: Thank you. [LB102]

SENATOR CHAMBERS: Do you deem me to be a reasonable man? [LB102]

MATTHEW KUHSE: Yes. [LB102]

SENATOR CHAMBERS: And we disagree on this. [LB102]

MATTHEW KUHSE: Yes. [LB102]

SENATOR CHAMBERS: So when reasonable people can disagree, there may be ambiguity at the least in what we're dealing with here. [LB102]

MATTHEW KUHSE: That's fair. [LB102]

SENATOR CHAMBERS: And you had to mention all of the possible things that could constitute an outcome. We don't know which one it would really be because from the language we don't know what they mean when they said "outcome of a felony charge," not a trial. But that's all that I...or even a conviction. [LB102]

MATTHEW KUHSE: True. [LB102]

SENATOR CHAMBERS: It doesn't say what would be the outcome of a conviction. But you've helped me at least put some things on the record and I appreciate it. Thank you. [LB102]

MATTHEW KUHSE: Thank you, Senator. [LB102]

SENATOR EBKE: I would note Senator Hansen is here. Any other questions? Senator Halloran. [LB102]

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SENATOR HALLORAN: Yes. If there was...I'm intrigued and this will astonish Senator Chambers but I three-fourths agree with him on this is probably not going to be a deterrent. Crimes are oftentimes an irrational thing. And we expect some level of rationality of them understanding that they might have a more severe penalty if they go this far with it. But that being said, Senator Chambers offered up a hypothetical in which he presupposed that there might be a hearing that he...a trial hearing that he might have to be subject to in that he offered Senator Morfeld \$30 to take a bus ride which, A, I will contend would not send him far enough. (Laughter) [LB102]

SENATOR MORFELD: Point taken. [LB102]

SENATOR HALLORAN: But I think, if I understand Senator Chambers' point, could someone be drawn into breaking the law if they thought they were subject to a hypothetical trial and it turned out it was...or a trial but it turned out that it was not a trial? In other words, to me that would be impossible. You would have no reason to go after Senator Chambers if the trial did not exist and he tampered with a witness to avoid, right, to avoid a hearing. [LB102]

MATTHEW KUHSE: If what I...I don't want to assume the wrong thing. If what you're saying is that Senator Chambers is basically lying that there is a trial... [LB102]

SENATOR HALLORAN: He presupposes there's a trial. I would not... [LB102]

MATTHEW KUHSE: Oh, if he's... [LB102]

SENATOR HALLORAN: ...I would not suggest that Senator Chambers would lie about anything. [LB102]

MATTHEW KUHSE: If he's presupposing that there's a trial or some sort of official proceeding and that he engaged in the bribery, however you want to phrase it,... [LB102]

SENATOR HALLORAN: Right. [LB102]

MATTHEW KUHSE: ...tampering... [LB102]

SENATOR HALLORAN: Tampering. [LB102]

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MATTHEW KUHSE: ...with the senator, as I told Senator Chambers, that, yes, conceivably could be charged as tampering. [LB102]

SENATOR HALLORAN: So why would you go after Senator Chambers if there, in fact, was not a hearing that he was trying... [LB102]

MATTHEW KUHSE: I'm not saying that I would,... [LB102]

SENATOR HALLORAN: Okay. [LB102]

MATTHEW KUHSE: ...but in the line that says believing that an official proceeding or investigation, so forth, is pending, if he believes it and does it, that is possibly a crime. Or if you're asking me personally if I would charge that particular offense,... [LB102]

SENATOR HALLORAN: Would you? [LB102]

MATTHEW KUHSE: ...no, I would not. [LB102]

SENATOR HALLORAN: Okay. That's fine. Thank you. [LB102]

SENATOR EBKE: Senator Baker. [LB102]

SENATOR BAKER: Thank you. I'm sorry, I've forgotten your name. [LB102]

MATTHEW KUHSE: It's Matt Kuhse. [LB102]

SENATOR BAKER: Are you aware of any states that have different degrees of witness tampering... [LB102]

MATTHEW KUHSE: Yes. [LB102]

SENATOR BAKER: ...with different penalties? [LB102]

MATTHEW KUHSE: The state of Minnesota does. [LB102]

SENATOR BAKER: Okay. How do you feel about that? [LB102]

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MATTHEW KUHSE: Their bill I consider very comprehensive. As I indicated to, I believe, Senator Morfeld's question, it's fairly comprehensive and covers a variety of circumstances in terms of if this happens then it's this type of crime, if this happens it's this type of crime. It's fairly comprehensive and that's one that I've looked at. And as I indicated, most states that I looked at--I looked at the surrounding states first and then other states kind of a little further out--have this, again as I told Senator Chambers, what I believe to be some sort of model code that it's based on. But there are states that have what I would call graduated sanctions, depending on the class of crime and the level of tampering that's involved. [LB102]

SENATOR BAKER: Do you think that would be better if that were true in Nebraska? [LB102]

MATTHEW KUHSE: I think that anything that increases the penalty for tampering, I still firmly believe, would be a deterrent. And obviously, that's my opinion on the matter. I think anything that increases the possibility of a penalty based on a witness tampering in a felony case I think is good. It's just the zero to two years being with the changes to the Class IV felonies from LB605, and I again point out with the presumption, I mean they are supposed to be presumed to be placed on probation first, creates a problem when a defendant might engage in this thought process about what's the worst outcome, two years or life? [LB102]

SENATOR BAKER: Thank you. [LB102]

MATTHEW KUHSE: Thank you, sir. [LB102]

SENATOR EBKE: Senator Chambers, did I see your hand up? [LB102]

SENATOR CHAMBERS: I'm a stickler for words in criminal statutes because words mean something. I don't look at what an intelligent, reasonable prosecutor might or might not do. I look at what the words of the law allow to be done. And the words of this law says that everything hinges on what the individual believes, not what actually is. If the person is delusional, that person commits an act which by statute is defined as a crime, although there couldn't be a conviction for it, but it's a crime. And the language in the existing law goes on to say, "an official proceeding," whatever that may be, "or investigation of a criminal or civil matter," and civil is much broader than criminal,... [LB102]

MATTHEW KUHSE: Yes. [LB102]

SENATOR CHAMBERS: ..."is pending or about to be instituted." It hasn't even been instituted. But if you believe it's going to be instituted and you attempt to induce or cause a witness or

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informant to testify or inform falsely, I say, look, man, I want you to say you don't know anything about this, and he actually knows, but to him it's not even a crime so he accepts my money. I'm unpopular. They find out that I believed that what I did was a crime and I was going to be charged with it and every time I see a cop I'm worried, but you're the only one who knows about this so take this and make yourself scarce. Then he and I fall out. And then he reports me for what I did. This law would authorize the prosecutor to charge me with a crime. I could be charged with a crime because I believed. And people want to get away from what the law says. That's why I tell my colleagues, read the bill. Everybody wants to say what is not likely to happen. Then let's write the law so that those unlikely things cannot happen under the law as it's written. The belief of the individual, first of all, is the key thing. The person can be mistaken in his or her belief. That's not allowed for under this law. It doesn't require the person to have any knowledge under this law. The only thing that even approaches intent is when you try to get somebody to do something. Your intent is to get them to do this or that. But when it comes to the underlying gravamen of the offense, the person has no intent whatsoever. There was no crime. If I think that a piece of candy is poison but it's just a mint and I give it to you, I cannot be charged with attempted murder because when I gave you something that couldn't possibly kill you, I thought it would and I gave it to you. Or as a prosecutor, do you think you could charge me with attempted murder because it was my intent to kill you? So I gave you a mint thinking it was poison and it wasn't. Could you charge me with attempted murder? [LB102]

MATTHEW KUHSE: No, I don't believe so. [LB102]

SENATOR CHAMBERS: Say it again. [LB102]

MATTHEW KUHSE: No, I don't believe so. [LB102]

SENATOR CHAMBERS: Exactly. But on this, it's the belief. If I believed that it was poison, and Brother Morfeld saw me give it to you, and I told him to go, then the elements for a crime under this statute, as it's written, would exist and a prosecutor could. And if a prosecutor didn't like me, the charge could be brought knowing there would be no conviction but I could be inconvenienced. A judge could be persuaded that I'm a flight risk and a bond could be placed on me that I couldn't make. Then by the time they decided the charade had gone far enough and they let me go, I've spent time in jail. People know that I was arrested. They know that I was suspected of attempting a murder. See, you all are so naive, you all don't think these things happen. I live in a community where they happen. That's why I say the police are our ISIS. We fear the police in the way white people fear ISIS. That's why I made a statement in the Judiciary Committee setting. The committee members heard the context in which the statement was made. You hear the context in which I make it. You wouldn't go out of here and say, Chambers compared the police to people who go out and cut people's heads off, who kill children, who kill

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women and everything else that ISIS is accused of doing. Well, suppose I would say President-to-be Donald Trump accused the intelligence community of wanting to do things like wiping out all the Jews, wiping out all the gypsies, wiping out all of the Russian captives, wiping out all the homosexuals, and dominating everybody where their mind will take them. Maybe that's what I get when Donald Trump said what was done by the intelligence community is what would be done in Nazi Germany. I know what was done in Nazi Germany. Now suppose I genuinely believe he means everything the Nazis did the intelligence community would do, but not one official in Nebraska said anything in opposition, although they were critical of me. And here's the point I'm trying to get through with all this that I'm saying. The criminal law should be precise. It should clearly let a person know what he or she can do without punishment and what, if he or she does, will result in punishment. And we shouldn't have statutes so loosely drawn as this one where a mistaken belief can lead to a person being charged with a crime that would carry a penalty currently of a Class IV felony or a charge. And that's all that I have, but I think the record is clear and I'm going to have this transcribed and I'm going to show it to some of my naive colleagues on the floor of the Legislature who think I don't know what I'm talking about and that such things, as I say, couldn't possibly happen because some senator told them it won't happen. And I think if my good friend Senator Hilke had been aware of all these things, he might have wanted some additional information before he brought a bill like this. But that's all I have. And you are a fine person. You're very fair. And he and I did have a collaborative meeting where we brought about a result that we both thought was very just and it could not have occurred without both of us cooperating. So I have no rancor toward this man and I'm giving him his dues while he's alive. Everybody else is going to wait till you in a box and you don't have to hear it. (Laughter) [LB102]

SENATOR EBKE: Lucky you. Any other questions? Thank you. [LB102]

MATTHEW KUHSE: Thank you, Senators. [LB102]

SENATOR EBKE: Are there any other proponents? Hang on just a second. Are there any other proponents that will be speaking? Okay. If so, if the opponents want to start lining up, we'll move quickly I hope. [LB102]

GREG GONZALEZ: Good afternoon, Senator Ebke and members of the Judiciary Committee. My name is Greg Gonzalez, deputy police chief, Omaha Police Department. I'm here today on behalf of the police chief in support of LB102. I know there's been a lot of discussion on whether there's a crime or the bill would truly be a deterrent. So I'm going to speak. My opinion is that there is a deterrence, but I'm going to speak on behalf of probably half my career working violent crime, and in particularly the homicide unit and gang and drug crimes. There's no better witness than an eyewitness. I think that it's very important, at least in our jurisdiction, to have

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folks that want to come forward to want to tell the truth, because we may not always have that DNA, we may not always have that smoking gun, if you will. So we truly rely on witnesses. And so to get witnesses to come forward and then the day of trial or trial preparation to not have them is very disheartening. I think that this bill, what it does do, at least raising our setting from a Class IV to a Class II felony really adds credence to the system insofar as protecting the integrity of our witnesses. And I think that's the one key important piece here today. I don't really want to belabor the language of the law because, as Senator Chambers had pointed out, there's probably some work to do on that. We'd be more than happy to assist in some of that. But I think for a jurisdictional piece for us, it's going to be very important, as we really attempt to drive violent crime down in our city and gun crimes, to be able to have suspects that are involved in organized crime understand the importance and the penalty of tampering with witnesses. So having said that, I think we are in support of the bill. I'm here for any questions and thank you for your time. [LB102]

SENATOR EBKE: Senator Krist. [LB102]

SENATOR KRIST: I think...thanks for coming. I think what you heard, I have concerns that if we're going to open this up and we're going to change a felony conviction or a class, that the words to me are, as Senator Chambers said, and I've tried to express, not really clear. If we're going to open this up and change it, I think it's worth us taking our time and making it right. And if Minnesota is a better example or if Oklahoma is a better example or if there's something at the national level that we should look at, I do understand that it's very difficult for you to have an event and then for the witness to look at a lesser crime and put him on a bus and send him someplace, although he said he's not going on a bus. He wants an airplane ticket if he's going to go anyplace. But not making light of it, I think the intent is there and I would agree with it, but I think anytime we open up a law and change it, we should critically look at what's happened in the past. So thanks for coming and keep up the good work. [LB102]

SENATOR EBKE: Senator Chambers. [LB102]

SENATOR CHAMBERS: I'm not going to go into with you what I did with the prosecutor, because those were legalistic questions. First of all, I'm glad to see you again, Brother Gonzalez. Oh, not brother, that will get him in trouble. (Laughter) If I could find a way to get people in my community or any community to come forward, I would do it. I don't think this will do it. I had a program on television, public channel, Ben Gray didn't like--he's a city councilman--didn't like the way he was portrayed. So he and the mayor and Cox took the whole thing off. I would say on that channel if you know anything about anybody or think you know, give it to me and I will tell on them. And I said that on television. Everybody knew that if I was aware that somebody had done something, I would tell. They could call me a snitch or anything else. I'm not in favor of

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giving those people a shield. But here's something else I know. I don't live in the streets but I used to be on the street more than I am now, so I know a thing or two. If people are afraid, no matter what the punishment is for somebody who might threaten, they're not going to say anything. Enhancing the...changing the law like this is a policy change that the Legislature makes, and I'm not willing to make them just to accommodate something that's kind of out there that might work and might not. I don't believe it will work at all. What has to be done, and it can't be done, is to assure somebody that if you tell on this person we're going to guarantee that this person is convicted, that this person is going to prison, that neither this person nor friends can get you. I know people who were promised certain things by the police and then after they did what they were asked to do, it was turned against them because they were told now, if you don't go out here and get some buys for us, we're going to put the word out that you're a snitch. You might think that doesn't happen. I know what happens on the street. And that's why when bills like this are brought, the intent is not what I'm challenging at all. If the target is there and I shoot over here, I'm not going to ever hit the target. This is not going to hit the target. Even witness protection programs have broken down and people who have been in them or thought they were in them find out they weren't in them and they're not protected at all. So there's kind of a basic distrust. And I'm not putting it on you at all because we've talked about other things and I know that you're a sincere person. I believe you are a good police officer. But I have to disagree with this approach because I don't think it's going to achieve the result. I was talking to the chief one time. He came to my office even. And there was a person afraid to give information and had left the city. I said, Chief...and you can ask him and I'm going to say enough to disguise the case so nobody, if they might know or watch us, will get it. The crux of it was: Give me the information that this person has, the information that you know this person has, and I'll be the source of the information; I will make a call and I'll give the information and my name can be attached to it. That's how far I've been willing to go. I'm not afraid of anything or anybody. And I look at how cowardly my colleagues are sometimes. They don't have any idea of the life that I live or the things that I do or how hard somebody like me tries to help in my community. The only thing I'll never do is say I'll take a gun, go out here and capture criminals or go out here and confiscate guns. But if you or the chief know of anything that a man like me can do, tell me. But we both know there's a limit to what can be done in that regard. I'm as frustrated as you are, maybe even more so, because I live with it all the time. [LB102]

GREG GONZALEZ: I appreciate that. [LB102]

SENATOR EBKE: Any other questions? Thank you. [LB102]

GREG GONZALEZ: Thanks for your time. [LB102]

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SENATOR EBKE: Uh-huh. Okay. I don't think we have any more proponents, so opponent? Go ahead. [LB102]

MANDY GRUHLKEY: (Exhibit 3) Okay. Madam Ebke, Senators, good afternoon. My name is Mandy Gruhlkey. That's M-a-n-d-y G-r-u-h-l-k-e-y. I am an attorney with the public defender in Sarpy County. I'm here on behalf of the Nebraska Criminal Defense Attorneys Association in opposition to this bill as it's written. I did provide a letter that I believe has been circulated and I'd like to just highlight a couple of those points and then also have some brief comments to the other people that have testified. First and foremost, we do not think at the NCDAA that this is the time for this sort of change. The last two years, in 2015 and 2016, there have been two bills, LB605 and LB1094, that have been passed with overwhelming support and also signed by the Governor. These two bills accomplish significant revisions for the Criminal Code in criminal procedure. We feel that now it would be more prudent to see how these reforms actually play themselves out before reverting to increasing penalties just a year after these bills have been put into play. The other issue that we had that has already been touched on is the language within this bill, primarily, "the outcome of a felony charge." Does this mean conviction? Does this mean a sentence? There's just a lot of unclear terms there and a lot of assumptions that could be made, which would really play out in a courtroom in a way that would be confusing for everyone. So we feel that with that wording, that that's going to be a problem. The other issue is that this, as has been pointed out before, this is a huge leap from a Class IV felony to a Class II. Essentially, we're talking from 0-2 years to 1-50. I know that there were some points that were made by the other speakers and some examples of some cases wherein such a murder case and tampering with the witness, but we can't let this bill take hold of all of the cases that it could possibly encompass, especially a Class IV felony. So the way that this bill is written, if somebody is charged with a Class IV felony, if they are convicted of tampering, they could get another additional 50 years to something that would have only been a 2-year sentence. The one thing that I also would like the senators to take into consideration is that defendants aren't the only ones that are accused of tampering with a witness. In addition to the defendants, also a lot of times family members are. I've been parties to...a party to a case where my client's mother spoke to the victim, who would be a witness, and tried to convince her that probation would be better than jail. My client could have been charged with tampering with a witness or, excuse me, my client's mother could have been charged with tampering with a witness, essentially being...and could have faced 1 to 50 years in jail. So that's a huge penalty for something that a lot of these people don't even realize is a crime. And I know that Mr. Kuhse...I believe what I heard earlier was that he said that he believes that half of the people, the defendants that are charged, know that tampering is a crime. I will tell you, in the clients that I talk to when I counsel my clients, I tell them, you cannot talk to the victim about this charge, you cannot tell them not to come, you cannot tell them that probation would be better for your children. And a lot of my clients are genuinely...they're genuinely confused by this. They don't understand that they can't have these conversations with their wife, who's the victim or a witness to a crime. And not that ignorance of

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the law is an excuse, but I just think that we have to be really cautious that with increasing a penalty on something like this really could have a huge, substantial effect, that it's really an overbroad jump. The other thing that I wanted to point out is just that I would encourage prosecutors to look in the statute and see what other crimes apply, including accessory to a felony. In that language, there is tampering. In the language of that statute it does, in (1)(c), it makes tampering an accessory and in that statute it does...it would have the effect of increasing the penalty from a Class IV felony to something greater on the crimes that are greater than a Class IV felony. I would encourage you to look at that statute. I think that would really have a good effect on this. So for those reasons, we just ask that the committee vote against advancing this bill to General File as it's written. [LB102]

SENATOR EBKE: Any questions? Senator Halloran. [LB102]

SENATOR HALLORAN: I thank you for your testimony. Is there anything such as a perfect law? [LB102]

MANDY GRUHLKEY: Probably not. [LB102]

SENATOR HALLORAN: Okay. [LB102]

MANDY GRUHLKEY: No. [LB102]

SENATOR HALLORAN: And I think you alluded to it but understand I'm a layman. How would we make this bill more perfect down the road? Can't do it now, probably, but how would we make it more perfect? [LB102]

MANDY GRUHLKEY: Right. I think that conversations with all the parties that would be affected would be a huge thing, you know, or the different organizations that would have an impact. So I think that that might be one thing that would help so that we could really talk about what the possible effects this would be. I do definitely think looking at the word "outcome" would be one thing here, also the part of the bill that wasn't underlined but that Senator Chambers really talked about. I mean there's just a lot of points in this bill that probably need to be reworked. [LB102]

SENATOR HALLORAN: Okay. Justice is a fragile thing. Senator Chambers, to his credit, points that out a lot. It's a fragile thing and I can't think of anything that breaks that fragile glass of justice more than tampering with a witness. Threatening to have someone...threatening to kill someone, cut their head off, I think that would change my testimony. [LB102]

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MANDY GRUHLKEY: Correct. [LB102]

SENATOR HALLORAN: And so that being the case, I just would encourage you and the kind senator and all the necessary groups, not to make this a long-term interim study, but to get together before the next session and see what we can do to make the law stronger, not saying it's going to be a deterrent because, to Senator Chambers' point, ultimately it probably won't be, but (inaudible). [LB102]

MANDY GRUHLKEY: Right. Thank you. [LB102]

SENATOR EBKE: Okay. Thank you. [LB102]

MANDY GRUHLKEY: Thank you. [LB102]

SENATOR EBKE: (Exhibit 2) Is there any other opponent testimony? I have a letter from Amy Miller of the ACLU who testified, submits testimony, written testimony in opposition to the letter (sic). Anybody in the neutral capacity? Senator Hilkemann. Senator Hilkemann waives. This concludes the hearing on LB102 and we're going to do something just a little bit different. We're going to take five minutes, no more, but our staff doesn't get to get up and move around, so we're going to give them the opportunity for five minutes. So we will be back at 3:10.

BREAK

SENATOR EBKE: Thank you all for returning on time. We were having a little bit of technical difficulties and we were trying to get those straightened out over here. We will proceed with LB57. Senator Morfeld. [LB57]

SENATOR MORFELD: (Exhibit 1) Thank you, Chairwoman Ebke. Members of Judiciary Committee, my name is Adam Morfeld, for the record, that's A-d-a-m M-o-r-f-e-l-d, representing the "Fighting" 46th Legislative District here today to introduce LB57. I apologize for not being here earlier and apologize for leaving right after. Apparently ethics credits and CLE do not carry over from one year to the next, so I am busy this afternoon becoming ethical. That being said, the purpose of LB57 is to adopt the Uniform Unsworn Foreign Declarations Act. Nebraska law sometimes requires the use of sworn statements. False statements under oath are then subject to the Nebraska perjury statutes which provide for misdemeanor or felony charges if the statement is false. It is sometimes very inconvenient or impossible for a person who is in a foreign country to get a statement sworn to. In some countries, this means going to the U.S. Embassy or Consulate, and this is especially difficult in war-torn countries or where there is

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terrorist activities that are present. For over 30 years, federal law has allowed unsworn statements made in foreign countries to be recognized in federal courts as the equivalent of sworn statements as long as there is certain language in the document that makes the declarant's statement subject to federal perjury statutes. The purpose of LB57 is to mimic the federal law and allow a foreign declaration to be unsworn and yet treated as sworn in Nebraska law if it states that it is subject to Nebraska's perjury laws if not true and correct. With a minor exception, LB57 is identical to two legislative bills introduced in prior legislative sessions. Those bills were all unopposed in the hearings before the Judiciary Committee and all came out of committee without opposing votes in the committee but with a minor amendment. The committee amendments disallowed the use of unsworn foreign declaration to be recorded pursuant to the filing of conveyance of a lien or any interest in real estate or a power of attorney. LB57 as introduced incorporated these two restrictions in the bill on Section 6, at page 5, lines 20 to 22. The Uniform Unsworn Foreign Declarations Act has been adopted in at least 21 other states and the District of Columbia. Section 8 provides for a form for use in unsworn statements to make the statement given under penalty of perjury. I urge your favorable consideration of LB57 and would be happy to answer any questions that you may have. [LB57]

SENATOR EBKE: Senator Baker. [LB57]

SENATOR BAKER: Thank you, Chairman Ebke. Senator Morfeld, can you explain the fiscal note? [LB57]

SENATOR MORFELD: I cannot because I have not read it yet. I cannot explain the fiscal note but I will look into that further and get back to you, Senator Baker. [LB57]

SENATOR BAKER: Thank you. [LB57]

SENATOR MORFELD: Thank you for bringing that to my attention. [LB57]

SENATOR EBKE: Any other questions for Senator Morfeld? You're going to waive? [LB57]

SENATOR MORFELD: I might have a thing or two to say after Professor Lenich speaks. [LB57]

SENATOR EBKE: Oh, okay. So you're going to be here for a little bit. Okay. [LB57]

SENATOR MORFELD: Yes. Thank you. [LB57]

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SENATOR EBKE: Okay. Our first proponent. Is that ethical? (Laughter) He didn't hear. [LB57]

SENATOR MORFELD: Wait, what did you say? [LB57]

SENATOR EBKE: I said, "Is that ethical?" (Laughter) [LB57]

LARRY RUTH: (Exhibit 3) Senator Ebke and members of the committee, my name is Larry, L-a-r-r-y, Ruth, spelled R-u-t-h. I'm appearing today on behalf of the Nebraska Uniform Law Commission and I'm appearing in behalf...in support of LB57. You've got LB57 in front of you. Tomorrow you're going to have an LB37, and Senator Harr has LB141 in another committee. These are all three the product of the Uniform Law Commission. And I thought it might be helpful, as I've done a couple different times for the new senators on the committee who are appearing here on the committee for the first time, to let them know who the Uniform Law Commission is. First of all, and I believe you said I could do this for a couple of minutes... [LB57]

SENATOR EBKE: Go ahead, yeah. [LB57]

LARRY RUTH: ...and not short our time. [LB57]

SENATOR EBKE: No, we're fine. We're fine. [LB57]

LARRY RUTH: First of all, the Uniform Law Commission is a commission that's 65-70 years old. It's been around a long time. And it's really been around much longer than that but in Nebraska at least that long. And the purpose of the Uniform Law Commission in Nebraska is to draft legislation with other states who have similar commissions, and they all have this kind of commission, on statutes where uniformity is desirable and then go back to the Legislature and recommend that they be enacted. LB57 is one of those bills, and then tomorrow is LB37. I won't be doing this again tomorrow for your benefit, however. The members on this Uniform Law Commission include: Judge Arlen Beam, he is an Eighth Circuit Court of Appeals judge in the federal system; Harvey Perlman, former dean of UNL Law and the chancellor, of course; Joanne Pepperl, your own Revisor; myself, I'm a retired attorney here in Lincoln; Steve Willborn, who is a former dean of the law school at UNL; James O'Connor, a practicing attorney in Omaha; and John Lenich, who you'll be hearing from shortly. He's on the faculty at UNL Law and apparently at one point was the nemesis or something like that of one of your senators. The Nebraska Uniform Law Commission is part of the ULC in Chicago. We have this national or it's an umbrella organization and we all meet in the annual meeting every year and we adopt or approve drafts of legislation to bring back to you, but there's a very extensive committee structure within

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the organization that actually does all the work. We have a lot of observers come in who are from the different industries. We really try to get to the...a consensus measure which can then contribute to uniformity. The real important thing about this is that we probably work on laws that most other interest groups aren't going to have a lot of interest in and they are ones dealing with state law that is kind of behind the scenes. We're really big on jurisdiction, what court should have jurisdiction of a case, of a situation. For example, your mother goes to Arizona to live with a brother, and that while she's down there and she has a house up here there might be a question of her needing a guardianship. Which state would require...would be required to...be allowed to have the guardianship? Would it be Arizona or Nebraska? Well, we come up with laws that have worked things like that out. We also do an awful lot of work in the commercial activity. Fortunately for you, most of those bills don't go to this committee. They go to Banking, Commerce and Insurance Committee. And I just bring forth a volume of law from your red books. This is Volume 6 of the Uniform Commercial Code dealing with business transactions, the basic law for all business transactions of a civil nature, of course. That's the work of this commission. We're also strong in the family law area with things in the area of children and youth, and then in this particular case we work on such matters as what would be the appropriate way to treat problems that are arising for our citizens in state or, in this case, internationally. I give to you now the list of all the uniform laws we've ever had adopted in Nebraska, not for us to talk about them but just to give you a sense of the breadth of the interest that we have and to show you that such things as the Anatomical Gift Act that you've been working on from time to time, guardianship, Commercial Code are all bills that have originated from the Uniform Law Commission. And there's some 155 or 160 of them, I think it is, a long and illustrious list of good legislation. If you have any questions, I'd be happy to answer them. [LB57]

SENATOR EBKE: Any questions about the Uniform Law Commission? Senator Chambers. [LB57]

SENATOR CHAMBERS: This young man is...his name is Larry Ruth. When he's on that commission or whatever it's called, it is a respectable commission. When he's no longer there, it will be deemed ruthless. (Laughter) [LB57]

LARRY RUTH: I got to (inaudible). [LB57]

SENATOR EBKE: Senator Krist. [LB57]

SENATOR KRIST: When I boil this down, and I've had some experiences in my military career of being abroad where there has...we've actually had to bring people back for reasons, and I understand the purpose, but boil it down for the layman and for the record, what does this do? [LB57]

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LARRY RUTH: This allows in situations where you have to have a sworn declaration under Nebraska law, it says you don't have to have a sworn declaration as long as you're making your statement subject to the perjury laws of the state of Nebraska. And once you do that, then you have the appropriate credibility and authority to do it and have it considered as a sworn statement, have the same effect. [LB57]

SENATOR KRIST: In your professional legal opinion, what would be the chances that these unsworn statements would result in litigation and/or imprisonment of someone who has issued that unsworn statement? [LB57]

LARRY RUTH: Well, John Lenich will be able a little bit better to tell you the circumstances under which these unsworn statements are used. They're probably not used in those particular situations. They would be more like a motion for summary judgment when there's nobody...when the defendant has not answered and you still have to put evidence on the record that such and such occurred. Now there, that's a civil matter. [LB57]

SENATOR KRIST: Sure. [LB57]

LARRY RUTH: There are a lot of places in Nebraska law where just willy-nilly you have to take something before a notary public to get it sworn to, and this would ease that burden if you're going to be traveling. [LB57]

SENATOR KRIST: Good. Thank you, sir. [LB57]

LARRY RUTH: Yeah. [LB57]

SENATOR EBKE: Any other questions? Okay. Thank you. [LB57]

JOHN LENICH: (Exhibit 4) Good afternoon, Senator Ebke, members of the committee. My name is John Lenich, J-o-h-n L-e-n-i-c-h. I'm a professor at the University of Nebraska Law College. I'm also the civil reporter for the Supreme Court's Practice and Procedure Committee, and a member of the Nebraska Uniform Law Commission. As Senator Morfeld indicated, the purpose of this bill is to allow written declarations made under penalty of perjury to be used instead of an affidavit in many of the places, not all, that our statutes require the use of an affidavit. Now in a very real sense, a declaration and an affidavit, they're functionally the same because our statute, Section 25-1241, they define an affidavit as a written declaration. It's a statement by a witness under oath. And that oath really serves two purposes: one is to impress upon the individual that they need to be truthful in what they're signing; and secondly, to provide

a predicate for prosecuting the individual for perjury if by some chance the statements the individual makes are false. Now a declaration isn't made under oath but it's made under a statement that this is under penalty of perjury, and that statement serves the same basic purpose because, again, it impresses upon the individual the need to be truthful in what he or she is saying. And under the amendments in LB57, it could also serve as a predicate for prosecuting the individual for perjury if his or her statements are false. Now the primary impetus for this bill is that if someone is overseas and needs to execute an affidavit, it's pretty tough to do because under Section 25-1245 of our revised statutes, the affidavit has to be executed before someone who is authorized to take a deposition. And under the Nebraska Supreme Court's discovery rules, Rule 27, you need a person who is authorized to administer oaths in the place where the examination is held, which would mean where the affidavit is executed, either by the law of that jurisdiction or by the law of the United States. Now there are a couple other exceptions but they don't really come up very often. But if you're overseas, it can be difficult to find that person, especially if you're traveling as a Nebraskan overseas. You can always look perhaps to the United States Embassy or Consulate, but you know they're not always open and they're not always readily accessible. For example, in Brazil, which is a country almost the size of the United States, we've got one embassy in the capital of the country, and then three consulates in coastal cities and that's about it. Plus, even if you, you know, you might say, well, your lawyer can tell you, well, find somebody who's authorized to administer the oath under Brazilian law, and that will work but how do you do that, you know, if you're not familiar with Brazilian law? So that's really the idea here, is the declaration and the affidavit, they're functionally the same but requiring the affidavit it makes it much more difficult for folks and there's really no good reason to make it difficult. As Senator Morfeld indicated, the federal system has been accepting declarations for 30 years and, you know, it is an issue that does come up because the world is smaller. Nebraskans travel for pleasure and business routinely. Foreign companies do business in Nebraska. Our companies do business overseas, so they're in litigation here in Nebraska. And there are a number of places where they may need affidavits, whether it be a motion for continuances, temporary child custody, motions for summary judgment, all sorts of places. Now there are some places where you don't want to have declarations used. For example, when you're dealing with real estate conveyances, powers of attorneys, self-authenticated wills because another thing an affidavit...the notary is supposed to do is make sure the person who is signing is actually the person. If you have that happening in a court proceeding, you've got a lawyer who is getting the declaration from the individual. If it turns out that this wasn't the individual who supposedly the declaration is coming from, maybe we could vacate the judgment, vacate the order that was entered. But if you've got somebody who's acting under a power of attorney, then they could take...they can act pretty quickly to empty the money, and that's why the bill makes good exceptions in subsection (sic--Section) 6 saying not for conveyances of real estate, powers of attorney, or self-authenticating wills. And I see my red light is up. I apologize for going over. [LB57]

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SENATOR EBKE: It's okay. Did you have anything more that you needed to add? You got it all? [LB57]

JOHN LENICH: I'm sorry? [LB57]

SENATOR EBKE: You got it all...you got (inaudible). [LB57]

JOHN LENICH: I got everything else, basically, Senator. [LB57]

SENATOR EBKE: Okay. Okay. Great. Any questions? Senator Krist. [LB57]

SENATOR KRIST: I'm just going to ask the same question I asked Mr. Ruth. [LB57]

JOHN LENICH: Uh-huh. [LB57]

SENATOR KRIST: In this package, you've listed...or you have enumerated the exceptions and yet it's the first time I've ever seen a fiscal note like this where the prison system counts on somebody cheating and being sent to prison as part of a fiscal note. In your experience with other states that have passed this type of legislation, how often are there challenges to these unsworn statements? I mean is this...is it...I know I'm asking you to look in your crystal ball, but (inaudible). [LB102]

JOHN LENICH: A challenge in terms of the accuracy of the statement or...I'm not sure I... [LB57]

SENATOR KRIST: To make a challenge that would send someone to prison for making an unsworn statement. [LB57]

JOHN LENICH: I would say very, very rare, Senator, because perjury is oftentimes very difficult to prove, because one of the realities is sometimes the truth of the matter, people perceive events differently. So there can be two people who really believe what happened, they see it very differently. And they may both...put it under penalty of perjury. It doesn't necessarily mean that they are telling a knowing all statement. It's just we perceive things differently. Perjury prosecutions tend to be very, very rare. [LB57]

SENATOR KRIST: Thank you very much. [LB57]

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SENATOR EBKE: Senator Chambers, did you have a question? [LB57]

SENATOR CHAMBERS: I was just going to say never ask a professor have you said everything you want to say. (Laughter) [LB57]

SENATOR EBKE: Anyone else? Senator Halloran. [LB57]

SENATOR HALLORAN: Just for clarity, Section 6,... [LB57]

JOHN LENICH: Yes. [LB57]

SENATOR HALLORAN: ...that's basically the form that... [LB57]

JOHN LENICH: Oh, I'm sorry, Senator. The uniform act in Section 6, that's the form. What's happened is as this...what I meant was Section 6 of LB57... [LB57]

SENATOR HALLORAN: Right. Right. [LB57]

JOHN LENICH: ...because the numbering is a little different once they added the penalty provision. [LB57]

SENATOR HALLORAN: I understand, but I'm in Istanbul and I want to, you know, I want to have an affidavit (inaudible). [LB57]

JOHN LENICH: Then that's the form. [LB57]

SENATOR HALLORAN: That's the form? [LB57]

JOHN LENICH: You would use that. You can type that in. You can send your "EF" to your lawyer and that could be filed electronically with the court the same day. [LB57]

SENATOR HALLORAN: Can I use this in Hastings, Nebraska? [LB57]

JOHN LENICH: No, you cannot, because you...at least it's still within the geographical boundaries of the United States, because this one is limited basically to foreign declarations. [LB57]

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SENATOR HALLORAN: Hmm, so it's an advantage to be in a foreign country for this (inaudible). [LB57]

JOHN LENICH: For purposes of this. Now there is another uniform bill that would allow declarations to be used, signed internally, and that's true in many, many states. But this act would only (inaudible)... [LB57]

SENATOR HALLORAN: No, I understand. I understand. [LB57]

JOHN LENICH: ...outside the country. [LB57]

SENATOR HALLORAN: Okay. No. Thank you. [LB57]

SENATOR EBKE: Anything else? Thank you. [LB57]

JOHN LENICH: Okay. Thank you, Senator. [LB57]

SENATOR EBKE: Are there any other proponents to the bill? Are there any opponents? Anybody in the neutral? Senator Morfeld. [LB57]

SENATOR MORFELD: Thank you very much for bringing the fiscal note to my attention. We actually looked at the fiscal note last year for the nearly identical bill and the Department of Corrections reported zero dollars. So I think they're perhaps counting on an influx of people that are perjuring themselves overseas outside of our jurisdiction, and then pulling them back into our jurisdiction and putting them into our correctional system. So we'll look into that issue and see if we can't resolve the fiscal note, because I know that right now the budget situation is not ideal. I'd like to also note that since Professor Lenich testified in support of my bill, he's forgiven for scaring the crap out of me in the appellate advocacy nearly three times during my oral argument. (Laughter) And with that, I'd be happy to answer any questions or finish becoming ethical. [LB57]

SENATOR KRIST: He obviously didn't scare you enough. (Laughter) [LB57]

SENATOR EBKE: Okay, thank you, Senator Morfeld. [LB57]

SENATOR MORFELD: Thank you very much. [LB57]

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SENATOR EBKE: Uh-huh. This closes...do we have any letters? [LB57]

LAURIE VOLLERTSEN: Yes. [LB57]

SENATOR EBKE: (Exhibit 2) We do have one letter of proponent from Bub Windle of the Nebraska State Bar Association. Okay, LB93, Senator Hansen. [LB57 LB93]

SENATOR HANSEN: Thank you. Good afternoon, Chair Ebke and members of the Judiciary Committee. My name is State Senator Matt Hansen, M-a-t-t H-a-n-s-e-n. I represent Legislative District 26 in northeast Lincoln. Today I'm here to introduce LB93, which would adopt the Automatic License Plate Reader Privacy Act. I brought the same or virtually similar bill last year as LB831, where it advanced out of committee but did not receive a priority designation and was not debated on the floor. Thus, I am reintroducing it here again this year. Automatic license plate readers, or ALPRs, are high-speed cameras that utilize computer technology to automatically convert license plate data into computer readable data. They could vary between hand-held mobile versions to those more permanently mounted to a car's dashboard or to a fixture such as a streetlight. Naturally, this technology provides potential benefit for law enforcement with the obvious examples of being able to scan high amounts of traffic against lists of license plates connecting stolen cars, missing persons, AMBER Alerts, etcetera. However, as with any technology that enables government to collect data on citizens, there are concerns. For example, ALPRs could compile an extensive list of where citizens go and could be used to re-create their day-to-day habits. Things such as what time people get home from work to what doctor's office they visit could be contained inside the information in such an ALPR database. Thus, it makes sense to implement a policy of best practices of who can access that data, how long that data would be retained. For example, a journalist discovered in 2015 that the Boston, Massachusetts, Police Department had an ALPR database that was actually searchable by the public through an unsecured Web site. Naturally, when we think of situations of stalking and harassment, such an open database is a concern. Further, there are reasons that we would want to ensure that ALPR should only be used for limited and proper purposes. And perhaps the most infamous and ironic misuse of this technology, a Canadian police chief was fired amidst allegations that he used ALPR technology to follow and harass a journalist who was critical of that very same camera use. Thus, I believe that due to these concerns, the Legislature should protect citizens' privacy by both requiring proper database security and codifying the official uses of ALPR technology, which is why I've introduced LB93. This is becoming a trend among state governments. According to the National Conference of State Legislatures, 12 states have enacted laws that restrict or prohibit the use of ALPR technology by law enforcement, including Arkansas, California, Minnesota, and North Carolina in the past two years. Believe the time is right to adopt and codify a set of best practices, such as those proposed by this bill. A previous survey of Nebraska law enforcement agencies done by the ACLU showed that the Omaha Police Department had used ALPR technology in the past but has since stopped using them and erased

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their database. The Lincoln Police Department, to my knowledge, has already adopted written policies similar to the provisions of the bill. And the Nebraska State Patrol was only using this technology in a limited fashion as they only possessed, at most, one working ALPR camera. I think even that has become disused. Seeing the limited use currently in Nebraska, it would seem prudent for the Legislature to take proactive action before the technology expands further so all law enforcement agencies and citizens could share an understanding of how the technology can be used. This bill provides a listing of the entities that may use ALPR technology, a listing of which databases may be crosschecked, and a list of situations which an ALPR system could be used. It also provides a listing of how a data system can be used or shared, as well as who can request data, including protecting the right of defendants in a criminal case. It also further requires annual reports of ALPR data to the Nebraska Commission on Law Enforcement and Criminal Justice. In closing, I believe this is the proper time for the Legislature to codify and enact best practices in this area. Protecting privacy of our citizens should be one of our highest concerns. I would also like to thank the Nebraska State Patrol and the city of Lincoln for working with me on this bill. I've had productive conversations with them, including today, and have more planned for next week to continue talking about how these will...would make this bill best work in practice with their agencies. With that, I'd be happy to take questions from the committee. [LB93]

SENATOR EBKE: Are there any questions? I see none. You're going to hang around, I presume. [LB93]

SENATOR HANSEN: I plan to, yes. [LB93]

SENATOR EBKE: Thank you. [LB93]

SENATOR HANSEN: Thank you. [LB93]

SENATOR EBKE: First proponent. [LB93]

AMY MILLER: (Exhibit 1) Good afternoon. My name is Amy Miller, that's A-m-y M-i-l-l-e-r. I'm legal director for the ACLU of Nebraska. We're a nonprofit, nonpartisan organization who works on constitutional rights, and we applaud LB93 because it both permits the use of ALPR technology for police for appropriate reasons, but also provides some limits and some guidelines to make sure that we also balance the privacy rights of Nebraskans. The technology, as my testimony points out on the first page, is incredibly powerful. They can collect up to 1,800 license plate numbers in one minute. That means up to 3.2 million plates in three months, according to a study that was done in northern California where the technology was in use. Now in Nebraska, when we did our survey, we started back in 2012 along with a nationwide effort to

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determine how ALPR technology was being used. We did only survey our three largest entities: Omaha Police, Lincoln Police, and State Patrol. And at that time, all three were using the technology but had no written guidelines, no limits, no data retention policy. And so it was technology that currently was operating without any sort of rules in place. Now the technology, while capturing lots and lots of plates, has the problem that it's mostly capturing the plates of innocent Nebraskans. On the second page you'll see the Nebraska State Patrol had actually measured how effective the technology was. And out of 7,000 scans in one month's time by the Nebraska State Patrol, they had 14 hits, that's .002 percent, and of those, 14 were false alarms. The driver had committed no wrongdoing. There was just an error in the check. Now that's not unique to Nebraska. A national study discovered that again 99.09 percent of the plates captured were drivers who had no wrongdoing and there was in fact mostly then were just gathering and retaining data of innocent people. Since our 2012 investigation and starting this conversation, we resurveyed the departments. And as Senator Hansen pointed out, the use is shrinking and LPD at least had passed internal policies. What we need, though, is a statewide policy. We're not sure whether there's other agencies in the state using it. Our survey at this point has not gone beyond those three departments. Given the fact that this is mostly collecting and swooping in information about innocent Nebraskans, the privacy rights are very keen. Now I have been asked by almost everyone that I've talked about with this subject: But your license plate is right out there where everybody can see it; how is there a privacy concern? I mean, it's right there. And the question actually is not about the snapping of the picture because, of course, the camera can see it, I can see it, an officer can see it. The problem is holding on to the picture, putting it into a database. Essentially, if you had a picture of where Amy Miller's car was as I drove through the state of Nebraska, you'd have a lot of information about Amy Miller. And if you had retained that information over a period of a month or a year, you would be able to map out: Was I visiting Alcoholics Anonymous meetings? Was I parked in front of a mental health clinic? Was I parked in front of the house of someone that was not my spouse? The information revealed would be potentially very damaging and there's no need for the police departments to be retaining, for countless periods of time, information that is potentially sensitive and draws a keen map of each individual Nebraskan's activities. We really do believe that LB93 provides a balance so the technology can continue to be used but puts in appropriate safeguards so that moving forward, as the technology improves and possibly expands, we'll make sure that we're making an appropriate balance between two competing interests. I'm happy to answer any questions you may have. [LB93]

SENATOR EBKE: Thank you, Ms. Miller. And your full testimony is part of the record. [LB93]

AMY MILLER: Thank you. [LB93]

SENATOR EBKE: What questions are there of Ms. Miller? You lucked out. Thank you. [LB93]

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AMY MILLER: Thank you. [LB93]

SENATOR KRIST: It's because she's good. [LB93]

SENATOR EBKE: Are there any other proponents? I see no one in the chair but I'll give you a chance anyhow. Any opponents of the bill? Is anybody here to testify in the neutral? Do we have any other letters besides this one from the ACLU? Okay. Well, Senator Hansen. [LB93]

SENATOR HANSEN: Thank you, Senator Ebke. I will close just by saying I'm happy to continue working with stakeholders such as State Patrol, Lincoln Police Department, and the committee. And seeing I'm at the mercy of the committee and if there's any questions that have come up in the last minute or so. There are. [LB93]

SENATOR EBKE: Senator Krist. [LB93]

SENATOR KRIST: Just for the new members on the committee, last year when you brought this, refresh my memory. I believe you had several of the police departments and the association come and register concerns or complaints... [LB93]

SENATOR HANSEN: Uh-huh. [LB93]

SENATOR KRIST: ...against this piece of legislation. So notably, those of us who have been on this committee for a while will say that you either did a great job of making sure you've satisfied their concerns, or they've seen the light. Either one, I commend you on your work. [LB93]

SENATOR HANSEN: Thank you. Thank you. And just to add to that, I mentioned it's the same bill as last year. It's the same bill as last year including one amendment that we had from the State Patrol that alleviated their main concern which was related to highway weigh stations. [LB93]

SENATOR KRIST: Good job. [LB93]

SENATOR HANSEN: Thank you. [LB93]

SENATOR EBKE: Okay. No other questions? Thank you, Senator Hansen. This concludes the hearing on LB93 and this concludes our hearings for the day. Just a reminder to all members, we're planning on "execing" at 12:30 tomorrow, 12:30 here. [LB93]