

2011 HOUSE CONSTITUTIONAL REVISION

HCR 3052

2011 HOUSE STANDING COMMITTEE MINUTES

House Constitutional Revision Committee
Prairie Room, State Capitol

HCR 3052
March 9, 2011
Job #15214

Conference Committee

Committee Clerk Signature <i>Mary Mair</i>
--

Explanation or reason for introduction of bill/resolution:

A concurrent resolution for the amendment of section 10 of article V of the Constitution of North Dakota, relating to the governor's veto power.

Minutes:

Attachment #1

Chairman Koppelman: We'll open the hearing for HCR 3052.

Representative S. Kelsh, District 11: (See attached handout #1.) For the time that I have been here, it's always been the conventional wisdom that there is a constitutional prohibition against the Governor issuing a threat of a veto. When I looked into it, the language in the Constitution actually says under section 10, article X, 'a prohibition for the Governor to menace any member by the threatening use of the veto power'. My handout has the only definition in code and it's in contract law of what menace means in State code. It means unlawful imprisonment or bodily injury. This was another topic of discussion during the 1972 Constitutional Convention. They left it in even though there was a lot of debate. They wanted to take it out and leave it in statutory law as a quote "historical curiosity" from one of the delegates at that convention. As we look at this seriously, the Governor can already weigh in on legislation. The only time he can do it is when it reaches his or her desk. What this will do is allow the Governor to weigh in earlier in the process because ultimately the Governor does have a say in what we do here. Rather than waiting until the end when it reaches his desk to issue that veto of not, the Governor will be able to tell us what his feelings are on a piece of legislation. We can either bend to his will or try to force it through as we see fit. I'll stand for any questions.

Representative Holman: The way our Constitution is set up, we're perceived among states as a State with a weak Governor. Would this shift that slightly or don't you see it as having any effect?

Representative S. Kelsh: I do see it as having an effect. Roughly half the country from the plains states eastward have the governor has the ability to say I'm going to veto this piece of legislation. The other half of the country from the plains states west, the Governor is considered a weak Governor and does not have that ability. We're somewhere in the middle so we could go either way on this. I think it would be a good way the Governor to weigh in a little earlier in the process.

Chairman Koppelman: If we have longer sessions, would we need the Governor to weigh in earlier? Or does this not have anything to do with that?

Representative S. Kelsh: You can do one or the other.

Chairman Koppelman: We deal with separation of powers a lot. It's been an interesting session in that respect because we had quite a debate with the Governor's attorney in Judiciary committee over a bill that he insisted was unconstitutional because it contained the words 'the Governor shall'. His premise is that the legislature can't order the Governor to do something because he's a separate branch of government. The other day we had a bill on the House floor that I assume the Governor office liked and it said 'the Governor shall' and there was no opposition. Do you see this as something that might invite the Governor in a more active role into meddling with the legislative process? He has the veto right now and we can choose to override the veto or not as a legislature. Do you think the executive branch would have a greater authority to manipulate legislative action by saying 'if you do it this way, I'll veto it and if you do it the way I like, I won't'?

Representative S. Kelsh: I appreciate the discussion because that was the goal of introducing this resolution. You can use the term manipulate or influence. We want to be very careful that the Governor cannot threaten individual members by the use of a veto and say 'I'm going to veto *your* bill'. I do think the Governor should have the ability to weigh in and say 'I don't support this piece of legislation and I'm going to veto it if it reaches my desk in its present form'.

Representative Kasper: Could you repeat what you just said. Do you believe the Governor ought to be able to use that threat of a veto?

Representative S. Kelsh: I don't think the Governor should have the ability to go to an individual member of the legislature and say I'm going to veto your bill but rather make a public statement about I don't support this piece of legislation and therefore I'm going to veto it if it reaches my desk in its present form.

Representative Kasper: If the Governor could do that right now, the legislature is supposed to pass legislation and set public policy and the Governor as an executive is supposed to carry it out. I could see the opportunity for a strong headed Governor to totally change public policy by threatening to veto 10 to 20 bills that he or she didn't like. All of a sudden we're in the chamber trying to figure out what we're going to do. If we require the Governor to remain silent, we still pass the policy as a legislative body and he or she still has the veto power. Doesn't that help to separate the powers of the branches as opposed to what could occur with this amendment?

Representative S. Kelsh: That's a good point and worth a discussion. As you look at other States where the Governor does have the ability to threaten a veto, I'm not sure that the Governor actually issues more vetoes or that it causes a lot of consternation in their legislative assembly. I do think that it is worthy having the Governor being able to weigh in earlier in the process rather than having us wait till the last minute to wonder what he or she is going to do.

Representative Kasper: There's precluding the Governor right now from weighing in the process. In this case, Governor Dalrymple can come down and visit with us, he can call us on the phone, he can call us up to his office, he can have press conferences, he can send his representatives down, and he can interfere or get involved as much as he wishes. That's totally different than saying 'if you don't, I'm going to veto this'. I think it might be a little too far reaching with what you're doing here Representative S. Kelsh.

Representative S. Kelsh: Again, very good discussion.

Representative Holman: Our process in many facets, the budget in particular, starts with the Governor. It's our job to take that budget and work with it. I don't see the Governor's role with this veto as dealing with a specific brand piece of legislation but with pieces within the legislation. We get a budget bill and it has 100 things on it. I can see this as the Governor having the authority to say 'if you leave that item like that in this budget then I'm not going to like it'. It does allow the Governor to express opinion on pieces of legislation rather than just the whole package. I think we have to look at it that way.

Representative S. Kelsh: When I researched this I found that this provision in the Constitution has never been challenge in court and has never been interpreted one way or the other, whether the language in the Constitution now prohibits the Governor from actually issuing a veto threat. The Governor, up to this point, has never gone to that point and said 'I'm going to veto this particular piece of legislation'. The word 'menace' in the language in the Constitution is troublesome. I think that we at least ought to take a look at amending that out and finding more appropriate language for what the conventional wisdom has always been and that is the Governor cannot issue a veto threat before it reaches his desk.

Chairman Koppelman: You're saying that the Governor should be able to weigh in earlier, should be able to issue a veto threat on legislation he doesn't like, but that he should not be able to tell a specific member of the legislature that I'm going to veto *your* bill. As I'm reading this section of the Constitution, it says that the Governor cannot menace any member by the threatened use the Governor's veto power. Isn't that basically what it says now? I know you're talking about conventional wisdom and practicality versus the words but isn't what you just described that you would like really what the Constitution says?

Representative S. Kelsh: I did ask Legislative Counsel when I had this drafted does that actually mean an individual member or does that mean the assembly as a whole. Mr. Bjornson said that's been interpreted to mean the whole assembly. It could be either an individual or all.

Chairman Koppelman: Any further testimony in support of HCR 3052? Opposition? Neutral? We are going g to close the hearing.

2011 HOUSE STANDING COMMITTEE MINUTES

House Constitutional Revision Committee
Prairie Room, State Capitol

HCR 3052
March 22, 2011
Job #15825

Conference Committee

Committee Clerk Signature <i>Mary Mair</i>
--

Minutes:

Chairman Koppelman: This is the governor's veto resolution. What are the wishes of the committee?

Representative Kasper: I remember this bill well. I like the way it is now where the Governor can have an emissary like the lieutenant Governor going around and visiting and giving an implication of what he likes and doesn't like and the lieutenant Governor is very diplomatic. I like the idea that we have three separate branches and the Governor is to implement the policy that the legislative branch sets. The judiciary branch is there to interpret if there's a difference of opinion. By allowing the Governor during a legislative session to blast a legislature for what they're doing stating that they are going in the wrong direction so he will veto a bill if the legislature passes it. I think that's why the Constitution says what it says now; to allow the legislature as we deliberate to make our decisions and let the Governor veto afterward if he or she so desires. I'd like to move a do not pass on HCR 3052.

Representative Streyle: Second.

Representative Owens: Thank you Representative Kasper for giving me a quandary here. I have to admit that part of me says OK, fine, I'd like to know when he was going to threaten a veto so that I can work the floor if that was really dead set on it and get the bill passed. You bring up a very good point about the separation and I'll take it a different angle but it still agrees with your premise of the separate branches. Without that threat of veto, the legislature required to act as the legislature would act in their good faith and their good humor as they would continue to process the legislation without interference of any outside undue influence. While part of me would like to know if what we are doing will be vetoed so that we could set it up so that the veto was meaningless, always know what the other side is doing so to speak. I appreciate the point of view of the separation in that case. I don't know which way I'm going to vote.

Representative Winrich: I have a hard time seeing this as a threat to the separation of powers. The Constitution very clearly defines the veto authority as one of the privileges of the Governor. To say that he might use it seems to be well within his Constitutional powers. I don't think this seriously threatens the separation of the three branches. We have a number of relics in our Constitution of a different age going back to when the Constitution was adopted. This seems to me to be one of them. That age was

characterized by a view that government officials were out to get whatever they could for themselves. The Governor might be characterized as menacing, as the Constitution says, legislators by threatening vetoes. Legislators might be characterized as going after the states money by raising their salary and then taking the job that they raised it for and we have another Constitutional amendment that proposes a change in that regulation which I think are evidence that these are relics of another political age. I will oppose the do not pass on this. I think that this would be a good thing to have as an option and I don't think it would result in a lot of veto threats.

Representative Holman: I don't have exact information but I would assume most states do not have this restriction. We may be the only one or one of a very few and they seem to operate right. The federal government does not have this restriction as far as I understand. That seems to work ok there. I can see both sides of this too and I certainly like the way we operate. I thought of this proposal just the other day when the logo bill was moving through the process. It was not until the Senate had acted that the Governor explained what he was going to do and that is following the law as it stands right now. Another example of a situation from my experience in higher education; we have a separation there too and college presidents don't lobby us or lobby the Governor because constitutionally they can't.

Chairman Koppelman: They have in past sessions.

Representative Holman: I know. It happens and we see them here but actually they have pretty much the same restriction so that they are not here doing one on one lobbying. That came as a result of interference in the process. I'm going to vote against this motion too because I think it works well in most places. A Governor could wait till the very last day until we are all home and veto five bills without letting us know and all of a sudden we're back in a special session or we could say let's do it in two years. There could be some problems with that gag order on the Governor and us not knowing what is going on. Maybe we do anyway.

Representative Kasper: We have in the House IBL committee right now two bills that we're hearing and a subcommittee that we're contemplating amendments. The one bill is on the makeup of the State Investment Board where there are eleven members right now, the Governor, Treasurer, Land Management person, Insurance commissioner, and six public employees, three from TFFR and three from PERS. Senator Christmann brought in an amendment to change the makeup and we are debating that. You ask 'do you know where the Governor stands?' The lieutenant Governor was down there testifying against the bill so therefore yes, we certainly can know and do know at any point in time if the Governor has concern about a bill. The Governor himself can testify for or against a bill. The lieutenant Governor can do so and any of the Governor's cabinet can do so and any executive branch can do so. Obviously only the Governor has the veto power. I submit that we know where the Governor stands in most cases where there's a problem or a question on a bill. You can go and ask the Governor if you want to and there's nothing that says that the Governor can't tell that he likes or doesn't like the bill. He may not want to but he could if he so desired so long as he didn't say 'I'm going to veto that bill if you guys pass it'. That's the line and I think that's the line that we need to keep. We as a legislative body are here to make decisions based upon the facts in front of us to the best of our abilities

when we press the red or the green button. It's the Governor's obligation to make him or her decision after the legislature sends legislation down to him or her to consider. I don't have any problem at all about knowing where the Governor is on a bill. This is my sixth session and I can't think of any bill I've ever had before that I was wondering where the Governor was. I always knew where the Governor was and you can always ask him. Representative Owens, I can understand a little bit of your reluctance but I think the bigger issue is by changing the Constitution; we change the dynamics of the separation of the powers between the legislature and the Governor. To me that's going too far.

Chairman Koppelman: I was asked by a member of the media about this resolution as chairman of the committee and I said I want to be careful what I say because I don't want to telegraph my opinion or influence the outcome. I do think that much of my pondering on this issue has already been discussed in our discussion here. The things that keep coming back to me are the fact that there are certain bills that the Governor doesn't talk about until the bill has come back from both chambers. I think that's kind of nice. It may be an issue that he perhaps didn't have a strong opinion on or maybe wrestled with his decision but didn't try to interfere with the process. I think that's refreshing. There was an editorial that ran somewhere that said this is a great idea because a few sessions ago the Governor called the legislature back vetoing a budget bill after the session and it required a couple more days of a special session and if the legislature only had known how the Governor felt before we left town, we wouldn't have done that. I was here and a lot of you were here and we knew how the Governor felt and it's never a surprise. Governors have ways of getting that opinion across. This session in the Judiciary Committee, the Governor's attorney was down opposing a bill because of some language in it that he felt threatened the separation of powers. I don't think it's a make or break situation either way if this is in the Constitution or if it's not. I do like some of the things we do in North Dakota like taking down our political signs on Election Day which is probably unconstitutional but we do it. It's a gentlemen's gentle ladies agreement and so for that reason, I'm going to support the motion.

Representative Owens: Representative Kasper brought up what I consider a very good point and then I wanted to see where the discussion would go. What Representative Holman said was interesting because I had to think back to my very first session. I worked on this one thing for the transportation funding bill, talked to everybody, got it through, and after we went home, guess who line item vetoed that portion of the bill. It's aggravating but we didn't call people back just to override that. It still felt like a couple of months wasted of my time but still worked on it independent. I had decided a few minutes ago in the middle of the discussion before Representative Kasper spoke again. So let's see what happens.

Chairman Koppelman: I found myself wondering during the hearing whether a Governor couldn't try to manipulate the legislative process more than occurs now by saying 'if you leave this bill in its current form, I'm going to veto it but if you amend it this way, I won't'. I see that as a little too much intrusion from the executive. That's my personal opinion not as chairman. Call the roll for a do not pass recommendation on HCR 3052.

6 Yes, 2 No, 3 Absent

Do Not Pass

Carrier: Representative Streyle

Date: March 22, 2011
Roll Call Vote # 1

2011 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HCR 3052

House Constitutional Revision Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: Do Pass Do Not Pass Amended Adopt Amendment
 Rerefer to Appropriations Reconsider

Motion Made By Rep. Kasper Seconded By Rep. Streyle

Representatives	Yes	No	Representatives	Yes	No
Chairman Koppelman	✓		Representative Conklin	AB	
Vice Chairman Kretschmar	✓		Representative Holman		✓
Representative Kasper	✓		Representative Winrich		✓
Representative Louser	✓				
Representative Meier	AB				
Representative Owens	✓				
Representative Schatz	AB				
Representative Streyle	✓				

Total (Yes) 6 No 2

Absent 3

Floor Assignment Representative Streyle

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HCR 3052: Constitutional Revision Committee (Rep. Koppelman, Chairman)
recommends **DO NOT PASS** (6 YEAS, 2 NAYS, 3 ABSENT AND NOT VOTING).
HCR 3052 was placed on the Eleventh order on the calendar.

2011 TESTIMONY

HCR 3052

12.1-12-06. Threatening public servants.

1. A person is guilty of a class C felony if he threatens harm to another with intent to influence his official action as a public servant in a pending or prospective judicial or administrative proceeding held before him, or with intent to influence him to violate his duty as a public servant.

2. A person is guilty of a class C felony if, with intent to influence another's official action as a public servant, he threatens:

a. To commit any crime or to do anything unlawful;

b. To accuse anyone of a crime; or

c. To expose a secret or publicize an asserted fact, whether true or false, tending to subject any person, living or deceased, to hatred, contempt, or ridicule, or to impair another's credit or business repute.

3. It is no defense to a prosecution under this section that a person whom the actor sought to influence was not qualified to act in the desired way whether because he had not yet assumed office, or lacked jurisdiction, or for any other reason.

12.1-12-02. Illegal influence between legislators or between legislators and governor.

Any person who violates the provisions of section 9 of article IV or section 10 of article V of the Constitution of North Dakota is guilty of a class C felony.

9-03-06. Menace defined.

CONTRACT LAW - ONLY
DEFINITION OF "MENACE"

Menace consists in a threat:

1. Of unlawful confinement of the person of a party to a contract, of the husband or wife of such party, or of an ancestor, descendant, or adopted child of such party, husband, or wife, or of confinement of such person, lawful in form but fraudulently obtained, or fraudulently made unjustly harassing or oppressive;
2. Of unlawful and violent injury to the person or property of any person specified in subsection 1 hereof; or
3. Of injury to the character of any such person.