MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION
SFN 2053 (2/85) 5M

ROLL NUMBER

DESCRIPTION

1228

2001 HOUSE JUDICIARY

HB 1228

2001 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1228

House Judiciary Committee

☐ Conference Committee

Hearing Date 01-24-01

Tape Number	Side A	Side B	Meter #
Tape I	x		218 to 4371
Committee Clerk Signature			

Minutes: Chariman DeKrey opened the hearing on HB 1228. Relating to authority of the administrative rules committee to void or suspend administrative rules and to provide an effective date.

John Walstad: An Attorney for the Legislative Council. Serve as Council for the Administrative Rules Committee. This bill is not a committee bill, but I am here today at the chairman's request to explain the bill, I am not for or against this bill. The Administrative Rules Committee has existed since 1978, prior to that agencies had the authority to adopt rules, but they were not published anywhere, the problem was the public had no access. The Legislative provided for the publication of the administrative code, gave that responsibility to our office, and created an Administrative Rules Committee to review rules as they were being made by agencies. From 1978 to 1995, if the committee did not like the rules or had some objections, had the option to object to those rules. In 1995, legislation was enacted giving the administrative rules committee authority to void rules. The authority to void rules extends to those only those rules that come

before the committee. The reasons to void rules is as found on page one and the top of page two. What this does, extends the authority of the committee to rules already in administrative code.

Chairman DeKrey: Can you speak to the constitutionality question?

John Walstad: Yes, it is still in question, but it is a state constitutionality not federal.

Rep Delmore: One of the problems we had before, was the time table, the number of days the agency meeting that, is that still a problem?

John Walstad: This bill is not a new one, I'm not sure that there is a problem there.

Rep Maragos: Do we have any testimony, what is the difference between 1997 and 1999 bills.

John Walstad: The bill is the same.

Chairman DeKrey: If there are no further questions, thank you for appearing for the committee.

Rep Grande: I put the bill in after having served on the Administrative rules Committee. We are hoping to explain how difficult it is to get work done without reviewing a rule beyond 1975.

Rep Onstad: can you give an example that anyone has asked about a problem this is creating.

Rep Grande: A builder in town asked how he was effected by a rule and it reached back beyond 1975.

Chairman DeKrey: Human Services get a lot of questions about rules.

Rep Eckre: Governor Schaefer vetoed the bill.

Chairman DeKrey: I don't remember that.

Rep Grande: I don't know.

Chairman DeKrey: Anyone else wishing to testify in support of HB 1228. Anyone wishing to testify in opposition to HB 1228?

Illona Jeffcoat-Sacco: director of the Public Utilities Division of the Public Service Commission (see attached testimony)

Rep Wrangham: What is the process to review the rule that may not fit what the legislature intended any longer?

Illona Jeffcoat-Sacco: If it is a repeal of a program, Legislative Council will just delete it. Otherwise we must purpose the change and follow the process to change the law, it could take up to 9 months. We respond to petitions that are filed by anyone.

Rep Klemin: Could Administrative Rules Committee file a petition.

Illona Jeffcoat-Sacco: I believe the committee could.

Rep Klemin: Once a petition is filed, is it within the discretion of the agency to deny the petition and not do anything further.

Irrona Jeffcoat-Sacco: In our agency we are not sure, so we never do that.

Christine Hogan: Executive Director of the State Bar Association of North Dakota: (see attached testifmony).

Rep Grande: As far as the unconstitutional part that you just brought up, as far as the rules were set in place in 1975, they have not been through the administrative rules process.

Christine Hogan: I am not prepared to address that point.

Chairman DeKrey: Are there any other questions for Ms Hogan, if not thank you for appearing in front of this committee.

Chuck Johnson: an attorney for the North Dakota Insurance Department. We do appear in opposition to the bill.There are checks in place whereby the Attorney General does review any rules , then renders an opinion where that rule is allowed and carried out the intent of the statute.

With that check and balance in place, reviewing rules that have been in place for a good number of years and the concern that we have this will render a certain amount of uncertainty into the laws and the rules that we have in place now. This bill short changes the process.

Rep Grande: If something has been done unfairly, and it comes to the forefront of the administrative rules committee, would it not be a good idea for the administrative rules committee to be able say to the agency, can you come down and clarify this rule.

Chuck Johnson: I think there is a bill that will help that quite a bit.

Rep Grande: That is right, that bill came through this committee, what about the past rules?

Chuck Johnson: Certainly I don't see a problem with the Administrative Rules Committee asking an agency to take a look or review a rule, there is a process in place to take care of that.

Rep Delmore: If there is a problem, and I can't get any relief from your agency, during the next legislative session, is there something legislatively to fix that rule.

Chuck Johnson: Yes, there is, go back to legislature and make a law then we have 90 days for remove the rule.

Rep Grande: we are looking at changing the law, it is a two year process before that person can see any result.

Chuck Johnson: That is true, but going thru the whole administrative rules process is about 6 to 9 months.

Chairman DeKrey: If there are no further questions, thank you for appearing in front of the committee and we will be in recess on HB 1228.

Chairman DeKrey: We will reconvene the hearing on HB 1228. Rep Bill Delvin: District 33, Finley ND. (see attached)

Rep Koppelman: District 13, west Fargo, ND, I am here to speak in favor of HB 1228. If the problem with the rule is one that is in history, this bill would give the committee the right to go back and check the rule and review it. Once the rule becomes effective at present we can't go back and fix any dealing with history. Please give the committee the right to go back and review the rules.

Chairman DeKrey: We will close the hearing on HB 1228.

2001 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1228a

House Judiciary Committee

☐ Conference Committee

Hearing Date 02-07-01

Tape Number	Side A	Side B	Meter #
TAPE I		x	4614 to 6223
Committee Clerk Signature	Joan Deers		

Minutes: Chairman DeKrey called the committee to order, we will take up HB 1228. We have amendments. Rep Grande goes over the amendments.

DISCUSSION.

COMMITTEE ACTION

Rep Grande moved the amendments, Rep Wrangham seconded. Voice vote on the amendments, amendments pass.

Chairman DeKrey: we now have hb 1228 before us, what are your wishes?

Rep Wrangham moved a DO PASS as amend, seconded by rep Grande.

DISCUSSION

The clerk will call the roll on a DO PASS as amend. The motion fails with a vote of 5YES, 9 NO 1 ABSENT

Rep Maragos moved a DO NOT PASS as amend, seconded by Rep Delmore.

The clerk will call the roll on a DO NOT PASS as amend. This motion passes 9YES< 5 NO and

1 ABSENT.

Carrier Rep Maragos

10271.0101
Title.0200

Prepared by the Legislative Council staff for
Representative Grande
January 29, 2001

VR
2/7/01

HOUSE AMENDMENTS TO HB 1228 HOUSE JUDICIARY 02-08-01

Page 1, line 6, remove "to void or suspend administrative rules"

Page 1, line 12, after "after" insert "review of"

Page 1, line 13, replace "called up for review" with "reopened"

HOUSE AMENDMENTS TO HB 1228 HOUSE JUDICIARY 02-08-01

Page 2, line 11, after "after" insert "review of"

Page 2, line 12, replace "called up for review" with "reopened"

HOUSE AMENDMENTS TO HB 1228 HOUSE JUDICIARY 02-08-01

Page 3, line 6, after "after" insert "review of"

Page 3, line 7, replace "called up for review" with "reopened"

HOUSE AMENDMENTS TO HB 1228 HOUSE JUDICIARY 02-08-01

Page 4, line 5, after "after" insert "review of" and replace "called up for review" with "reopened"

Page 4, line 30, replace "**Administrative**" with "**Review of administrative**" and replace "**called up for review**" with "**reopened**"

Page 4, line 31, replace "call" with "reopen review of" and remove "up for review"

HOUSE AMENDMENTS TO HB 1228 HOUSE JUDICIARY 02-08-01

Page 5, line 2, after "reason" insert "review of" and replace "called up for review" with "reopened"

Page 5, line 3, remove "called up", after "for" insert "which", and after "review" insert "has been reopened"

Page 5, line 8, replace "**Administrative**" with "**Review of administrative**" and replace "**called up for review**" with "**reopened**"

Page 5, line 9, replace "call" with "reopen review of" and remove "up for review"

Page 5, line 11, after "reason" insert "review of" and replace "called up for review" with "reopened"

Page 5, line 12, remove "called up", after "for" insert "which", and after "review" insert "has been reopened"

Page 5, line 15, remove "called up", after "for" insert "which", and after "review" insert "has been reopened"

Page 5, line 16, replace "1999" with "2001"

Renumber accordingly

Date: 02-07-01
Roll Call Vote #: 1

2001 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1228

House JUDICIARY Committee

☐ Subcommittee on _____
or
☐ Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass as amended

Motion Made By Rep Wrangham Seconded By Rep Grande

Representatives	Yes	No	Representatives	Yes	No
CHR - Duane DeKrey	✓				
VICE_CHR --Wm E Kretschmar		✓			
Rep Curtis E Brekke		✓			
Rep Lois Delmore		✓			
Rep Rachael Disrud		✓			
Rep Bruce Eckre		✓			
Rep April Fairfield		✓			
Rep Bette Grande	✓				
Rep G. Jane Gunter		✓			
Rep Joyce Kingsbury	✓				
Rep Lawrence R. Klemin	✓				
Rep John Mahoney					
Rep Andrew G Maragos		✓			
Rep Kenton Onstad		✓			
Rep Dwight Wrangham	✓				

Total (Yes) 5 No 9

Absent 1

Floor Assignment _____

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

Carlson

Date: 02-07-01
Roll Call Vote #: 2

2001 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB-1228

House JUDICIARY Committee

☐ Subcommittee on _____
or
☐ Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Not Pass as amend

Motion Made By Rep Maragos Seconded By Rep Delmore

Representatives	Yes	No	Representatives	Yes	No
CHR - Duane DeKrey		✓			
VICE_CHR --Wm E Kretschmar	✓				
Rep Curtis E Brekke	✓				
Rep Lois Delmore	✓				
Rep Rachael Disrud	✓				
Rep Bruce Eckre	✓				
Rep April Fairfield	✓				
Rep Bette Grande		✓			
Rep G. Jane Gunter	✓				
Rep Joyce Kingsbury		✓			
Rep Lawrence R. Klemin		✓			
Rep John Mahoney					
Rep Andrew G Maragos	✓				
Rep Kenton Onstad	✓				
Rep Dwight Wrangham		✓			

Total (Yes) 9 No 5

Absent 1

Floor Assignment Rep Maragos

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

REPORT OF STANDING COMMITTEE

HB 1228: Judiciary Committee (Rep. DeKrey, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO NOT PASS** (9 YEAS, 5 NAYS, 1 ABSENT AND NOT VOTING). HB 1228 was placed on the Sixth order on the calendar.

Page 1, line 6, remove "to void or suspend administrative rules"

Page 1, line 12, after "after" insert "review of"

Page 1, line 13, replace "called up for review" with "reopened"

Page 2, line 11, after "after" insert "review of"

Page 2, line 12, replace "called up for review" with "reopened"

Page 3, line 6, after "after" insert "review of"

Page 3, line 7, replace "called up for review" with "reopened"

Page 4, line 5, after "after" insert "review of" and replace "called up for review" with "reopened"

Page 4, line 30, replace "Administrative" with "Review of administrative" and replace "called up for review" with "reopened"

Page 4, line 31, replace "call" with "reopen review of" and remove "up for review"

Page 5, line 2, after "reason" insert "review of" and replace "called up for review" with "reopened"

Page 5, line 3, remove "called up", after "for" insert "which", and after "review" insert "has been reopened"

Page 5, line 8, replace "Administrative" with "Review of administrative" and replace "called up for review" with "reopened"

Page 5, line 9, replace "call" with "reopen review of" and remove "up for review"

Page 5, line 11, after "reason" insert "review of" and replace "called up for review" with "reopened"

Page 5, line 12, remove "called up", after "for" insert "which", and after "review" insert "has been reopened"

Page 5, line 15, remove "called up", after "for" insert "which", and after "review" insert "has been reopened"

Page 5, line 16, replace "1999" with "2001"

Renumber accordingly

2001 SENATE JUDICIARY

HB 1228

2001 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. 1228

Senate Judiciary Committee

☐ Conference Committee

Hearing Date March 14th, 2001

Tape Number	Side A	Side B	Meter #
1	x		23-end
1		x	0-19.8
2		x	5.9-28.8
Committee Clerk Signature			

Minutes: **Senator Traynor**, opened the hearing on HB 1228.

Rep. Grande, appeared as the prime sponsor of HB 1228. Bill relates to authority of the legislative rules committee.

Senator Traynor, under the present law can the committee void a rule?

Rep. Grande, yes.

Senator Watne, how does this change?

Rep. Grande, takes the ability of committee to look at rules on the books. Very strict on what they can and can't do.

Senator Traynor, if the rule is in effect for 5 yeas-can it be reopened?

Rep. Grande, if does not meet standards.

(Discussion)

Senator Bercler, is this and ongoing housekeeping bill.

Rep. Grande, yes it would be.

Senator Watne, why is this process better? Why can't it be changed?

Rep. Grande, that is an option. Have not been told details in the past. Now would be a chance for the committee to review.

Senator Traynor, previous sessions - how many rules are there?

Rep. Grande, Department of Public Instruction rules were over.

LeRoy Burnstein, Speaker of the House, district 45 Fargo. Rules committee in past has not had much authority. Reason committee needs authority are the agencies in the rules. That were defeated in the previous legislative session. Received 1200 pages from 1 agency 1 time. Sometimes we don't catch all rules. Rules committee accused of acting as a mini-legislature. In a way we are.. Committee is no good unless have a little authority. Administrative rules are about 1/2 again as big as century code. I strongly support the bill.

Senator Traynor, the agencies get authority from legislature.

Rep. Burnstein, yes they do. Some rules have been on the books for years.

Senator Traynor, serves in an oversight committee.

Rep. Burnstein, yes they do.

Senator Dever, do the agencies sometimes remove rules?

Rep. Burnstein, this would give agencies the ability to remove their own rules.

Senator Bercier, will his be an ongoing house changing rule? Will you look at all outdated rules?

Rep. Burnstein, Maybe used only 1 or 2 times in the interim.

Senator Watne, if HB 1030 does not become law. Every part was removed.

Rep. Burnstein,, not it does not.

Rep. Grande, no it does not affect this bill as is.

Bob Harns, council for Governor Hoeven, the administrative rules committee has authority to review rules. Governor opposes the bill for four reasons. Governor Hoeven requests a do not pass.

Senator Traynor, existing authority, is that sound constitutionally?

Senator Wa[illegible], agencies make rules that have nothing to do with the interest of the law. How do we handle this?

Bob Harns, all of us are sympathetic to your concern. Century Code is still with rules and guidance. There are also judicial reasons.

End of side A

Senator Traynor, you express interest of Governor, is the Attorney General going to appear. So when we pass this bill, the Governor will veto it.

Bob Harns, I have not spoken with the Governor , but that will be my recommendation. Do not pass and Governor to veto.

Illone Jeffcoat-Sacco, (testimony attached) director of the Public Utilities Division. Opposed to the bill.

Senator, is the process to repeal rule as complex as to make rule?

Illone Jeffcoat, yes. A lot of procedural hoops that all gave them.

Doug Barr, from the office of the Attorney General. How do we make rules to follow what the legislature wants? Provide enough directive in law. Legislative committee makes accommodations to the whole body.

Senator Trenbeath, has the attorney general analyzed this?

Doug Barr, we have researched it. We think if challenged the law could be declared unconstitutional.

Senator Bercier, a regular session would be appropriate.

Senator Watne, do they go to record of the committee, minutes etc... Do they research all of these?

Doug Barr, I don't know if they do. If unclear they may check legislative history. I don't know what each does though.

Rep Koppelman, appeared in favor of the bill. District 13 Fargo. Legislature still has power to void a rule.

Senator Nelson, if rule is passed, what point do we have to have to reopen or void?

Rep. Koppelman, only in existence since the '95 session. I sponsored the bill in '95. The authority is being used judiciously.

Senator Nelson, is there a procedure for an automatic review of codes?

Rep. Koppelman, good question. There is a sunset clause.

Senator Watne, are you familiar with section 7?

Rep. Koppelman, another good question. Legislative council did a good job of researching. Not unique to this bill ruling.

Senator Dever, any action of agency is it appealable?

Rep. Koppelman, absolutely.

Senator Traynor, closed the hearing on HB 1228.

DISCUSSION

SENATOR TRENBEATH MOTIONED TO DO PASS, SECONDED BY SENATOR WATNE. VOTE INDICATED 4 YEAS, 3 NAYS AND 0 ABSENT AND NOT VOTING. SENATOR TRENBEATH VOLUNTEERED TO CARRY THE BILL.

Date: 3/14/01
Roll Call Vote #: 1

2001 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO.

Senate Judiciary Committee

☐ Subcommittee on

or

☐ Conference Committee

Legislative Council Amendment Number HB 1228

Action Taken Do Pass

Motion Made By Trenbeath Seconded By Watne

Senators	Yes	No	Senators	Yes	No
Traynor, J. Chairman	[redacted]	✓	Bercier, D.		✓
Watne, D. Vice Chairman	✓		Nelson, C.		✓
Dever, D.	✓				
Lyson, S.	✓				
Trenbeath, T.	✓				

Total (Yes) 4 No 3

Absent

Floor Assignment Trenbeath

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

REPORT OF STANDING COMMITTEE

HB 1228, as engrossed: Judiciary Committee (Sen. Traynor, Chairman) recommends **DO PASS** (4 YEAS, 3 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1228 was placed on the Fourteenth order on the calendar.

2001 TESTIMONY

HB 1228

H.B. 1228

Presented by: **Illona A. Jeffcoat-Sacco**

Before: **House Judiciary Committee**
Honorable Duane L. DeKrey, Chairman

Date: **24 January 2001**

TESTIMONY

Chairman DeKrey and members of the House Judiciary Committee, I am Illona A. Jeffcoat-Sacco, director of the Public Utilities Division of the Public Service Commission. The Commission asked me to appear here today in opposition to H.B. 1228.

H.B. 1228 would authorize the Legislature's Administrative Rules Committee to call up for review any current, effective, administrative rule, which the Administrative Rules Committee can then void for any of the reasons mentioned in Sections One or Two of the bill. We have substantial concerns with this bill and appreciate an opportunity to share them with you.

Administrative rules have the force and effect of law because those rules are promulgated by following very stringent procedural requirements that include notice and opportunity for all affected or interested persons to participate. The procedural hoops ensure that these "laws" conform strictly to the authority and parameters provided the agency by statute, and that participants have been afforded all constitutional and statutory protections before their government takes any action affecting them. On the other side of the balance, rules which have the force and effect of law allow all those affected by a rule to rely on the content of that rule and act accordingly. Without that

stability in the effectiveness of a rule, those affected could not rely on that rule in choosing a course of action. H.B. 1228 upsets that balance by allowing previously effective rules to be called into question, and perhaps voided, by a committee meeting between legislative sessions, with notice to the agency but not to those affected by the rule.

We know the legislature is concerned with the impact of administrative rules on North Dakotans. This is the reason for both the takings assessment requirement and the regulatory analysis requirement in current law, among other provisions. H.B. 1228 could negatively impact all North Dakotans who have relied on the existence of an effective rule and acted on that reliance. Certainty is a very important consideration in both business and personal decisions. H.B. 1228 calls the certainty of long standing administrative rules into question, without any of the protections offered citizens by either the traditional legislative or administrative processes.

This completes my testimony. I would be happy to answer any questions you might have.

Chairman DeKrey and members of the House Judiciary Committee

For the record, I am representative Bill Devlin, District 23, Finley. Also for the record, I served as chairman of the administrative rules committee during the interim.

HB 1228 grew out of frustrations many on the committee has felt over the past few years I have served on it about rules that we felt did not comply with the intent of the legislature.

Many of you have or will have people in your district complain about rules. After my first session, I had a number of complaints about things we had passed in Bismarck. When I couldn't find any record of such a law, I started searching a little deeper and found many of those complaints arose from rules and not laws.

We have gotten a handle on the new rules being promulgated. They do appear for review in a timely fashion. We review them in a non-partisan manner and agree or disagree with the agency on whether they had the authority under state law to issue the rule. If we find that they didn't have the authority needed we can void their rule.

I say non-partisan because I believe that every decision we made was supported by all members of the committee from both parties.

Where we run into problems is with older rules. We get complaints or questions about rules that had been passed earlier but we can't do anything about it because the legal deadlines for reviewing the matter has passed.

This bill would give us the authority to call up those rules for review, if we thought it was needed. I want you to fully understand that we do not have the power to write law or to change laws that were passed by the legislature. But neither does the executive branch of government.

We have the power to void a rule for very specific reasons. If the agency appears to have written rules that were outside of the scope of authority granted by the legislature, we need to find a way to review them.

This bill will give us that authority. It is not a responsibility that we take lightly. However it is one we must have if we are going to protect the rights of the legislature to be the policy making branch of government.

I ask for your support of a do pass recommendation for HB 1228. I will be glad to try answer any questions you might have.

BLANK v DEPARTMENT OF CORRECTIONS,
No. 109477, Michigan Supreme Court, June 20, 2000.
Affirming 222 Mich. App. 385 (1997)

Held: Joint committee legislative veto is unconstitutional.

STATE OF KANSAS ex rel. NICK A. TOMASIC v.
UNIFIED GOVERNMENT OF WYANDOTTE COUNTY/KANSAS CITY,
No. 80,223, Supreme Court OF KANSAS, March 6, 1998

In this case, the legislature properly delegated the power to fill in the details of the local option (the Plan) to the Commission. Once it does so, the legislature may not reserve the power to take back such delegation by concurrent resolution if it disagrees with the Commission's Plan. If the legislature wishes to take back this delegation, it must do so by passing a statute which removes such delegation and present this statute to the Governor. It cannot do so simply by reserving the power to remove the delegation in the same act which delegates the power to the Commission. This is improper. See Stephan, 236 Kan. at 60 ("Once the legislature has delegated by a law a function to the executive, it may only revoke that authority by proper enactment of another law in accordance with the provisions of art. 2, § 14 of our state constitution.").

The opinion *Tomasic* continued:
State ex rel. Stephan v. Kansas House of Representatives, 236 Kan. 45, 687 P.2d 622 (1984), discusses the use of a legislative veto. In Stephan, the Attorney General brought an action in mandamus and quo warranto against the legislature, seeking determination of the constitutionality of a statute, K.S.A. 1983 Supp. 77-426(c) and (d). This statute provided that the legislature may adopt, modify, or revoke administrative rules and regulations by concurrent resolutions passed by the legislature without presentment to the Governor. Pursuant to this statute, the legislature adopted concurrent resolutions during the 1983 and 1984 legislative sessions. The Attorney General brought a quo warranto case to test the validity of the statute and to test the validity of actions taken by the legislature pursuant to the statute. The Attorney General claimed that the statute violated that separation of powers doctrine because it allowed the legislature to usurp the executive power of administering and enforcing laws from the executive branch. Further, the Attorney General claimed that the statute violated art. 2, § 14 of the Kansas Constitution, which requires all bills to be presented to the Governor.

In analyzing this statute, the Stephan court focused mainly on whether the concurrent resolution mechanism violated the separation of powers doctrine. However, the court also discussed whether the mechanism violated the required procedure under art. 2, § 14(a), which requires all bills to be presented to the Governor. In making its decision, the Stephan court relied on three out-of-state cases: INS v. Chadha, 462 U.S. 919, 77 L. Ed. 2d 317, 103 S. Ct. 2764 (1983); Consumer Energy, Etc. v. F.E.R.C., 673 F.2d 425 (D.C. Cir. 1982), aff'd 463 U.S. 1216, 77 L. Ed. 2d 1402, 103 S. Ct. 3556, reh. denied 463 U.S. 1250 (1983); State v. A.L.I.V.E. Voluntary, 606 P.2d 769 (Alaska 1980). Each of these cases will be discussed in turn.

In Chadha, the Court analyzed a federal act which allowed either house of Congress to veto, by resolution, a decision of the United States Attorney General to suspend an illegal alien's deportation. The I.N.S. had ruled that Chadha could remain in this country even though he was subject to deportation. Under the act at issue, the House of Representatives vetoed this decision, forcing the I.N.S. to issue an order of deportation. Chadha challenged the constitutionality of the act in federal court. The Supreme Court ruled that once the legislature properly delegated the power to the Attorney General in the executive branch to determine deportation issues, then Congress could not reverse the Attorney General's decision on such issues or reverse its own decision to delegate deportation issues to the Attorney General without bicameral passage of an act stating such reversal, followed by presentment of the act to the President. In other words, "Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked." 462 U.S. at 955. The Chadha Court concluded that the legislative action to reverse the Attorney General's deportation decision or reverse its own delegation of deportation issues to the Attorney General was subject to the procedures set out in Art. I, § 7 of the United States Constitution. This section requires that all legislative actions be passed by a majority of both houses of Congress and be presented to the President. Since the federal act allowed the legislature to undertake legislative action without such procedure, the Supreme Court found the act unconstitutional as a violation of Art. I, § 7 and of the separation of powers doctrine. 462 U.S. at 955-59.

In Consumer Energy, Etc., 673 F.2d 425, the Federal Court of Appeals analyzed a one-house legislative veto provision in the Natural Gas Policy Act of 1978. The legislative veto provision only allowed certain rulings of the Federal Energy Regulatory Commission (F.E.R.C.) to become effective if neither house in Congress adopted a resolution disapproving of such rules within 30 days of the rules being presented to Congress. Using this provision, the House of Representatives adopted a resolution which disapproved of one of the F.E.R.C.'s rulings. The Act, with this provision, was challenged as a violation of the separation of powers doctrine and as a violation of Art. I, § 7 of the United States Constitution.

Upon evaluation, the United States Court of Appeals found that the one-house legislative veto mechanism violated Art. I, § 7 because it deprived the President of his veto power and because it did not follow the bicameral requirement in that it permitted legislative action by only one house of Congress. In other words, the court held the veto of the rules effectively changed the law by altering the scope of F.E.R.C.'s discretion and preventing one otherwise valid regulation from taking effect. Accordingly, the Senate's concurrence and presentation to the President were necessary prerequisites to the effectiveness of the disapproval resolution. 673 F.2d at 465. The federal court also ruled that the veto mechanism violated the separation of powers doctrine because it allowed the legislature to usurp powers already exercised and delegated to the other two branches of government. 673 F.2d at 471. As the federal court stated:

"The fundamental problem of the one-house veto, then, is that it represents an attempt by Congress to retain direct control over delegated administrative power. Congress may

provide detailed rules of conduct to be administered without discretion by administrative officers, or it may provide broad policy guidance and leave the details to be filled in by administrative officers exercising substantial discretion. It may not, however, insert one of its houses as an effective administrative decisionmaker." 673 F.2d at 476.

See also Consumers Union of U.S., Inc. v. F.T.C., 691 F.2d 575 (D.C. Cir. 1982), aff'd 463 U.S. 1216, 77 L. Ed. 2d 1402, 103 S. Ct. 3556, reh. denied 463 U.S. 1250 (1983) (a similar legislative oversight mechanism contained in the Federal Trade Commission Improvements Act of 1980 was held to violate the separation of powers doctrine).

Finally, the Stephan court relied on State v. A.L.I.V.E. Voluntary, 606 P.2d 769. In that case, the Alaska court analyzed a statute which allowed the legislature to reject a regulation of a state agency or department by adopting a concurrent resolution in both houses. However, the Alaska Constitution, like the Kansas Constitution, includes a section which requires a bill to be passed by a majority vote in each house of the legislature and presented to the Governor. The Alaska court held that the legislative veto mechanism violated these constitutional requirements. 609 P.2d at 770. See also General Assembly of State of New Jersey v. Byrne, 90 N. J. 376, 448 A.2d 438 (1982) (an act which allowed a legislature to veto, by concurrent resolution in both houses, all rules proposed by state agencies was found unconstitutional because it violated the separation of powers doctrine and the presentment requirement of the New Jersey Constitution).

Based on these cases, the Stephan court found that the legislative veto mechanism in K.S.A. 1983 Supp. 77-426(c) and (d) violated the separation of powers doctrine and the presentment requirement in art. 2, § 14 of the Kansas Constitution. As this court stated:

"As made clear by the court in Chadha, a resolution is essentially legislative where it affects the legal rights, duties and regulations of persons outside the legislative branch and therefore must comply with the enactment provisions of the constitution. 103 S. Ct. at 2784. See also State v. A.L.I.V.E. Voluntary, 606 P.2d at 773-74. Where our legislature attempts to reject, modify or revoke administrative rules and regulations by concurrent resolution it is enacting legislation which must comply with the provisions of art. 2, § 14. A bill does not become a law until it has the final consideration of the house, senate and governor as required by art. 2, § 14. Harris v. Shanahan, 192 Kan. 183, Syl. ¶ 1, 387 P.2d 771 (1963). This was not done here.

"The fact that K.S.A. 1983 Supp. 77-426 was passed in accordance with the provisions of art. 2, § 14 of our state constitution and the governor had the opportunity to veto it does not render subsequent acts of the legislature under the statute constitutional. The legislature cannot pass an act that allows it to violate the constitution. General Assembly of State of New Jersey v. Byrne, 90 N.J. at 391. As stated by the court in State v. A.L.I.V.E. Voluntary, 606 P.2d at 779:

'In other words, by virtue of one enactment approved by the governor, the legislature can free itself, in certain instances, of the constitutional constraints that would otherwise

govern its actions. Such an enactment would impermissibly preserve legislative power possessed at one instant in time for future periods when the legislature might otherwise be incapable of acting because of the executive veto. It would also do away with the formal safeguards of article II which are meant to accompany law-making. The requirements of the constitution may not be eliminated in this fashion.'" 236 Kan. at 64.

Under this analysis, the Stephan court held that K.S.A. 1983 Supp. 77-426(c) and (d) were unconstitutional and that the resolutions adopted by the legislature rejecting, adopting, and modifying certain administrative regulations pursuant to this statute were invalid.

In this case, the legislature properly delegated the power to fill in the details of the local option (the Plan) to the Commission. Once it does so, the legislature may not reserve the power to take back such delegation by concurrent resolution if it disagrees with the Commission's Plan. If the legislature wishes to take back this delegation, it must do so by passing a statute which removes such delegation and present this statute to the Governor. It cannot do so simply by reserving the power to remove the delegation in the same act which delegates the power to the Commission. This is improper. See Stephan, 236 Kan. at 60 ("Once the legislature has delegated by a law a function to the executive, it may only revoke that authority by proper enactment of another law in accordance with the provisions of art. 2, § 14 of our state constitution.").

"In fact, the general rule is that the use of the legislative veto to register disapproval of delegated executive action, or of administrative rulemaking, violates the separation of powers doctrine." Legislative Guide to SEPARATION OF POWERS, Iowa General Assembly -- Legislative Service Bureau (December 1996)(citing: C.J.S. Constitutional Law, §134, p. 438).

See also: Legislative Research Commission v. Brown, 664 S.W.2d 907, 918-19 (Ky. 1984)(delay power held violative of separation of powers); contra, Opinion of the Justices, 121 N.H. 552, 561-62, 431 A.2d 783, 789 (1981)(delay power not a per se violation of separation of powers).

House Judiciary Committee
House Bill 1228
Testimony of Christine Hogan
Executive Director State Bar Association of North Dakota

My name is Christine Hogan and I am the Executive Director of the State Bar Association of North Dakota, which represents all the lawyers in the state.

The State Bar Association has not taken position for or against House Bill 1228. I have been authorized to give technical assistance on this bill and I am here to attempt to answer your questions.

I wanted to bring to the committee's attention that the constitutional authority for the procedure that this bill sets forth needs to be looked at carefully. The supreme courts of several states have held that similar types of legislative veto laws are unconstitutional.

See attached memorandum.

Thank you

H. B. 1228

Presented by: **Illona A. Jeffcoat-Sacco**

Before: **Senate Judiciary Committee**
Honorable Jack Traynor, Chairman

Date: **14 March 2001**

TESTIMONY

Chairman Traynor and members of the Senate Judiciary Committee, I am Illona A. Jeffcoat-Sacco, director of the Public Utilities Division of the Public Service Commission. The Commission asked me to appear here today in opposition to H.B. 1228.

Engrossed H.B. 1228 appears to authorize the Legislature's Administrative Rules Committee to review any current, effective, administrative rule, which the Administrative Rules Committee can then void for any of the reasons mentioned in Sections One or Two of the bill. We have substantial concerns with this bill and appreciate an opportunity to share them with you.

Administrative rules have the force and effect of law because those rules are promulgated by following very stringent procedural requirements that include notice and opportunity for all affected or interested persons to participate. The procedural hoops ensure that these "laws" conform strictly to the authority and parameters provided the agency by statute, and that participants have been afforded all constitutional and statutory protections before their government takes any action affecting them. On the other side of the balance, rules which have the force and effect of law allow all those affected by a rule to rely on the content of that rule and act accordingly. Without that

stability in the effectiveness of a rule, those affected could not rely on that rule in choosing a course of action. H.B. 1228 upsets that balance by allowing previously effective rules to be called into question, and perhaps voided, by a committee meeting between legislative sessions, with notice to the agency but not to those affected by the rule.

We know the legislature is concerned with the impact of administrative rules on North Dakotans. This is the reason for both the takings assessment requirement and the regulatory analysis requirement in current law, among other provisions. H.B. 1228 could negatively impact all North Dakotans who have relied on the existence of an effective rule and acted on that reliance. Certainty is a very important consideration in both business and personal decisions. H.B. 1228 calls the certainty of long standing administrative rules into question, without any of the protections offered citizens by either the traditional legislative or administrative processes.

This completes my testimony. I would be happy to answer any questions you might have.