

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

Executive Board Committee
February 13, 2017

[LB653]

The Executive Board of the Legislative Council met at 12:00 p.m. on Monday, February 13, 2017, in Room 2102 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB653. Senators present: Dan Watermeier, Chairperson; John Kuehn, Vice Chairperson; Kate Bolz; Ernie Chambers; Sue Crawford; Dan Hughes; Tyson Larson; John McCollister; Jim Scheer; and John Stinner. Senators absent: None.

SENATOR WATERMEIER: All right. Welcome to Exec Board committee. My name is Dan Watermeier from Syracuse, Nebraska, representing District 1. The committee will take up bills in the order posted with only one bill today. Our hearing today is your public part in the legislative process, your opportunity to express your position on the proposed legislation before us today. The committee members may come and go during the hearing. We get called away for various reasons. This is not an indication we do not want to be a part of your bill. To better facilitate today's proceedings, I ask that you abide by a couple of procedures. Please silence or turn off your cell phones. The order of the testimony will be the introducer, proponent, opponent, neutral, and then closing by the introducer. If you are testifying, please make sure you fill out a green testifier sheet. They are located in the entrance. When you come up to testify, please hand your paper to the page, Alex. Please state and spell your name for the record at the start of your testimony. If you will not be testifying but want to go on record as having a position on the bill being heard today, there is a white sign-in sheet at the entrance and you can please sign it at that time and give that to the page. Written materials may be distributed to committee members while testimony is being offered. Please hand these to the page, and we will need 12 copies. If you have written testimony but do not have 12 copies, the page can assist you. To my immediate right is legal counsel Janice Satra. To my immediate left is committee clerk Laura Olson. The committee members can introduce themselves today starting with my left, Senator McCollister.

SENATOR MCCOLLISTER: John McCollister, District 20, central Omaha.

SENATOR HUGHES: Dan Hughes, District 44, ten counties in southwest Nebraska.

SENATOR KUEHN: John Kuehn, District 38.

SENATOR CHAMBERS: Ernie Chambers, District 11

SENATOR CRAWFORD: Good afternoon. Senator Sue Crawford, District 45, which is eastern Sarpy County.

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

Executive Board Committee
February 13, 2017

SENATOR LARSON: Tyson Larson, District 40.

SENATOR WATERMEIER: Two members missing today, Senator Stinner with Appropriations and Senator Bolz are both in a Retirement Committee hearing. And the Speaker I'm assuming is detained. Our page today is Alex from Aurora, Nebraska, and we will take up the bill today. So Senator Murante, LB653. Welcome.

SENATOR MURANTE: Thank you, Chairman Watermeier. For the record, my name is John Murante, J-o-h-n M-u-r-a-n-t-e. I'm a state senator for District 49, which includes Gretna and northwest Sarpy County. And we are here today to continue our Legislature's discussion on the establishment of an independent redistricting commission. The bill as you see it before you is the identical bill that we put on the Governor's desk last year. Subsequent to that veto and the veto message, I have worked with the administration and continue working with the administration to find an avenue forward that's...and get his support and get his signature. We've made progress. We have made progress at the end of the day. By the time we got to the tenth day and the deadline to introduce bills, rather than introduce a bill that was a patchwork of the solutions that we made, we just felt that it was in the best interest of the conversation to introduce the bill that was put on the Governor's desk last year with the understanding that continued negotiations would be forthcoming. I do think that there is an avenue available to address the Governor's concerns and to establish an independent redistricting commission. And, if I may say, this issue by far has been the issue that me and my staff have studied, researched, analyzed more than any other piece of legislation in my legislative career. And I'd like to thank a couple of people. First of all, Andrew La Grone who is sitting behind me is the Government Committee legal counsel. He's been a tremendous resource. Also NCSL's redistricting standing committee which I chair has been extremely helpful on a national level providing insights as to how to properly craft an independent redistricting commission for our constitution and for the state of Nebraska. So our...as I said, our negotiations and conversations with the administration continue. It is my hope that we have an amendment for you sooner rather than later. I don't want to wait too long. I think you all at this point are aware of my passion on this subject matter, and I would like something advanced out of this committee certainly this session but before the priority bill deadline. But I will keep everyone posted as to how those negotiations go. But that's where we are in the process. And I thank you for the opportunity to open again and look forward to any questions that you may have of me. [LB653]

SENATOR WATERMEIER: Thank you, Senator. Questions? Senator McCollister. [LB653]

SENATOR MCCOLLISTER: Yeah, thank you, Mr. Chairman. Can you give us a preview on what the settlement might be with the Governor and his staff? [LB653]

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

Executive Board Committee
February 13, 2017

SENATOR MURANTE: Sure. Well, we can start with the veto message. To be clear, I can't give you a full preview because the agreement hasn't been reached yet. So I don't know what that final outcome would look like. If I did, I'd have it here before you and would have presented it. The Governor's veto message had some reasonable concerns I think with respect to giving to the Secretary of State constitutional authority that is granted to the Attorney General. To me, that's a pretty easy remedy. That was pretty simple. There was a question of the legislative process and whether a statute can differ from the rules of the Legislature in terms of the arc of how bills get introduced and land on the Governor's desk. And that's kind of where the struggle is of meeting the balance between the philosophy, which I agree with, that legislators ultimately create policy but also creating an independent redistricting commission to depoliticize the redistricting process. So taking those two objectives and conforming them is really where the rubber is meeting the road. [LB653]

SENATOR McCOLLISTER: Thank you, Senator Murante. [LB653]

SENATOR WATERMEIER: Thank you, Senator McCollister. Further questions? Senator Crawford. [LB653]

SENATOR CRAWFORD: Thank you, Senator Watermeier, and thank you, Senator Murante. I wonder if you would care to comment on what you see as the main differences between your bill and Senator Harr's bill. [LB653]

SENATOR MURANTE: They're extraordinarily similar. I believe his bill deals with...I think he took out any reference to Opinions of the Attorney General, the Secretary of State which, candidly, the way I...the way we put the bill on the Governor's desk last year was probably not the right way to do that. But I do think it is important to get the opinions on the constitutionality and the extent to which the maps in 2021 conform to the election act because it's not just constitutional issues. We also have a whole slew of election provisions and then the redistricting of the political subdivisions that sort of follow the process. The political subdivisions all start when we finish in the Legislature. I believe he also has a six-member independent redistricting commission if memory serves...seven...oh, it's six members and then they appoint a chairman. Okay. Thank you, counsel, for...and...but candidly, I've glanced over Senator Harr's legislation, but I can't say that I've studied it in great detail. But those were the highlights that I can recall. [LB653]

SENATOR CRAWFORD: Okay. [LB653]

SENATOR WATERMEIER: Senator Crawford, go ahead. [LB653]

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

Executive Board Committee
February 13, 2017

SENATOR CRAWFORD: So what would you say...what do you expect to be the time line of conversation before you would have an amendment that you'd want us to consider? [LB653]

SENATOR MURANTE: My hope is definitely before the priority bill deadline. So that would be the latest that I would shoot for. [LB653]

SENATOR CRAWFORD: Thank you. [LB653]

SENATOR WATERMEIER: All right. Further questions? Thank you, Senator. [LB653]

SENATOR MURANTE: Thank you. [LB653]

SENATOR WATERMEIER: Further proponents on LB653. Welcome. Come on up. [LB653]

GAVIN GEIS: Senator Watermeier. [LB653]

SENATOR WATERMEIER: Yes. [LB653]

GAVIN GEIS: My name is Gavin Geis, G-a-v-i-n G-e-i-s, and I'm the executive director with Common Cause Nebraska. I just wanted to take this time to talk about some of the objections that were brought at the hearing on Senator Harr's bill regarding whether this is an unconstitutional delegation of legislative power. I disagreed that day, but I wanted to take a little more time just to dig into it here today. So first of all, I want to reiterate that there is no presumption ever that something is unconstitutional delegation of legislative power, there is no presumption. It is deep case law that has to be dug through. No one can say on the face of a bill probably is unconstitutional unless it really is horrible. This one would take a lot of arguing. First thing, I want to say this is arguable whether this is even a delegation of legislative power. It can be argued and my point being legislative power needs to include the ability to give authority to some given law, to actually give authority to the law that's created. There is no authority in this bill for the independent commission to put whatever map they create into law. You retain, the Legislature retains that authority. So we go back and forth on that, but I think at the very least it's arguable whether it's even a granting of legislative power here. Second, I want to talk about there are basically three categories when it comes to the states the courts look at in grantings of legislative authority. Let me be clear. There can be grantings of legislative authority. It's not on its face unconstitutional, but the highest priority, the most stringent which let's say that Nebraska is the most stringent. I don't think there's any clear court rulings on that matter. But if Nebraska is the most stringent, you have to have strict standards and safeguards is the general overview, strict standards and safeguards for the agency or commission or board that you're creating. And I

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

Executive Board Committee
February 13, 2017

think that both of these bills could be argued that there are strict standards and safeguards. First of all, let's talk about safeguards and safeguards are the Legislature. They are public oversight, transparency. There are safeguards in this process. Let's talk about standards. The bills that we have lay out the actual makeup of these commissions. They lay out the procedures that the commission would have to follow, the actual listings of what is most important in drawing the maps, where their power will come from, who will help them, where they get their resources from, and what information they'll have access to and not have access to. So if we go under the most strict standard, which is strict standards and safeguards, I think we can meet that standard. We don't even know if Nebraska fits that bill. Additionally, courts, both at the federal level, at a state level, show a general reluctance to overturn a legislature's granting of power. There is not, like I said, a presumption that grantings of legislative power are wrong and courts hold back. They give legislatures a great deal of responsibility and authority to do that. They hold back and rarely overturn. I wanted to point out a couple of cases actually that deal with this directly, Nebraska case law so we have...I won't give you the whole quotations. I will gladly give them, but University of Nebraska v. County of Lancaster. Okay, quotation here: The courts are not inclined to interfere with rules established by legislative direction where they bear a reasonable relation to the subject of the legislation and constitute a reasonable exercise of the power conferred. Here we have the reasonable conference of power is giving this board, this commission the ability to draw and recommend maps, not to (inaudible) power but to recommend, to draw under the standards that were laid out. And they would have to abide by the powers conferred to them only to draw the maps, not to give any authority to the maps, but only to make recommendations to the Legislature. So the courts, that saying, the courts are not going to step on the toes of the Legislature when the commission sticks to the powers conferred, which are not legislative in nature. Okay. Another one here, Smithberger v. Banning: The Legislature does have power to authorize administrative or executive departments to make rules and regulations to carry out an expressed legislative purpose. So here our legislative purpose, Senator Murante has said multiple times, it is on the record, the legislative purpose here is to take partisanship out of the process to create a clearer, more defined public process and to create more trust in the maps that are created. So that's your legislative purpose here. So the Legislature has the power to delegate authority when it's within clearly defined legislative purposes and the commission sticks to that. One last thing, I'll give you--and I may go over just a moment--but I'll give you an example of a clearly unconstitutional system in Nebraska law. The Legislature created a milk board in years past. The milk board was given the ability to create criminal laws or to criminalize certain actions under the statute they were given to enforce. The court found that illegal because they were creating additional penalties outside of the statute they were given by the Legislature. They were able to create penalties above and beyond and put them into force of law without any legislative oversight on what criminal penalties they created. They could do that of their own authority. That is a clearly unconstitutional finding. I don't think that bears any relationship to the laws we have in front of us. I'd be happy to answer any questions. [LB653]

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

Executive Board Committee
February 13, 2017

SENATOR WATERMEIER: Finish up your point there, but...thank you for your testimony. Are there questions? All right, thank you, Mr. Geis. [LB653]

GAVIN GEIS: Thank you. [LB653]

SENATOR WATERMEIER: Is that correct, Mr. Geis? [LB653]

GAVIN GEIS: Correct. [LB653]

SENATOR WATERMEIER: All right, thank you. Further proponents. Welcome. [LB653]

BRI McLARTY HUPPERT: (Exhibit 1) Thank you. Good afternoon, members of the Executive Board. My name is Bri McLarty Huppert. That's spelled B-r-i M-c-L-a-r-t-y H-u-p-p-e-r-t, and I'll be brief. I came and testified on Senator Harr's LB216, and the components that are in both bills are similar. Actually, they're exactly the same, specifically the public Web site that would allow some transparency and some ability for the public to see the differences of the maps as well as what data is being used. The second is the public hearings requiring four as opposed to the current three. And then finally the guiding principles that are listed that include compliance with the Voting Rights Act of 1965. So testimonies are similar to what I testified on before so I'll just keep it very brief, but there's a letter of our support. There's the three components that we are specifically in support of. [LB653]

SENATOR WATERMEIER: Thank you. Are there questions of Ms. Huppert? Thank you for your testimony. Further proponents on LB653. All right. Is there anyone here today to testify in opposition? Welcome. [LB653]

SHERRY MILLER: You probably think I'm (inaudible). [LB653]

SENATOR WATERMEIER: Come on up. [LB653]

SHERRY MILLER: (Exhibit 2) Chairman Senator Watermeier and members of the committee, I'm Sherry Miller, S-h-e-r-r-y M-i-l-l-e-r, with the League of Women Voters of Nebraska. And today I'm giving testimony written for me by John Else, a League member from Omaha who could not come down but has worked closely with Senator Mello in the past legislative session and with Senator Harr in this legislative session. And we are going to say why we feel LB216 is better than LB653 is basically why we're here. LB653 is essentially the same bill, as we found out today, that the Legislature passed last year and it doesn't address, in the League's opinion, any of the four points raised by the Governor in his veto message. The Governor said LB580

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

Executive Board Committee
February 13, 2017

would create what could become a hyperpartisan unelected advisory commission that will likely be comprised of former policy party activists and former elected officials. His second objection was in Article III, Section 5 of the constitution that requires the Legislature to conduct legislative redistricting, not anyone else. I am summarizing as we go in the interest of time. You can read the full text. His third point: LB580, according to the Governor, requires the Secretary of State to provide formal opinions regarding the constitutionality of the proposed maps. And according to the Governor, that function belongs to the Nebraska Attorney General. And then the fourth point: LB580's time line increases the likelihood of needing a special session to be called. Well, we're going to talk about these as far as we think that LB216 can answer those concerns. And I did testify in January by the way. I was down here to testify on LB216. LB216 creates a truly nonpartisan commission composed of an equal number of Republican and Democratic members appointed by the party members of each congressional caucus plus a nonpartisan chair elected by those six members. And since we have about 20 to 25 percent registered voters nonpartisan in this state, I'm sure we could find somebody to be the chair. LB216 continues to delegate the preparation of maps to the Legislative Research Bureau and the conduct of four hearings by the advisory commission. The bills are prepared by the Legislative Research Bureau, not the advisory commission. These are not unconstitutional provisions. Four public hearings specified in the bill are held in all three congressional districts, which increases the opportunities for citizen participation. The result of those hearings are contained in a report that accompanies the bills to the Legislature. The Nebraska Constitution allows delegation of process. The Legislature's vote on the bills retains the central provisions of Article III, Sections 1 and 5. It also provides that if the bills are not passed after the first two submissions, the Legislature assumes the responsibility for drawing the third set of maps. LB216 removes any provision for the Secretary of State to provide formal opinions regarding the constitutionality of the proposed maps. It leaves this function with the Nebraska Attorney General. And it avoids the time line issue by providing that if the Legislature doesn't pass either of the first two submissions of the redistricting bills the Legislature assumes the responsibility for drawing the third set of maps. We do appreciate Senator Murante's continued interest in redistricting, but because he has introduced basically the same bill that was introduced last year, we just simply want to point out the differences between the two bills and, in our opinion, state that LB216 is superior to LB653. And I do want to point out, too, that there was an editorial in the Journal Star today noting that the Iowa plan, which we adopted our position on in the League of Women Voters, it has not been adopted by other states mostly because other states are partisan in their legislatures. Because Nebraska is officially nonpartisan, it seems like it would fit perfectly in our state while forming an independent commission, carrying out the steps provided in this act, the Redistricting Reform Act, and drawing lines that will ensure that all voters, no matter where they live, are going to have an equal say in who they elect. And I don't know if I can answer any questions for you, and that is why I put John's e-mail at the bottom of his name on the second page of this testimony. And he would be more than happy to correspond with anybody if you have other questions.

[LB653]

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

Executive Board Committee
February 13, 2017

SENATOR WATERMEIER: All right. Thank you, Ms. Miller. Questions from the committee? [LB653]

SHERRY MILLER: All right. [LB653]

SENATOR WATERMEIER: Thank you for your testimony today. [LB653]

SHERRY MILLER: You're very welcome. [LB653]

SENATOR WATERMEIER: Further opposition testimony on LB653? Anyone here today in the neutral capacity? Come on up. [LB653]

NATHAN LEACH: Mr. Chair, members of the Executive Board of the Legislative Council, my name is Nathan Leach, that's N-a-t-h-a-n L-e-a-c-h. I reside in District 27 in Lincoln, but I grew up in Kearney and graduated from Kearney High School in 2015. That makes me a humble 20-year-old so you should probably take my suggestions with a grain of humble salt. I'll be a less humble 21-year-old in eight days so there's that. I'm speaking strictly on behalf of myself. Mr. Chair, I support the concept of LB653 but in speaking in a neutral capacity because I believe the redistricting process proposed within the bill would be better suited within the Legislature's rules rather than within state statute. In terms of relevance to this testimony, the Nebraska State Constitution provides the Legislature two powers that I believe are worth noting for the record. The first is both the power and responsibility of the Legislature to determine legislative districts by law. And the second is, of course, the constitutional power of the Legislature to quote Article III, Section 10, determine its own rules of proceedings. The most recent edition of Mason's Manual of Legislative Procedure states in Section 3.4 that the provisions of the constitution that each house shall have the power to determine the rules of its proceedings is not restricted to the proceedings of the body in ordinary legislative matters but extends to determinations of propriety and effect of any action taken by the body in the exercise of any power, in the transaction of any business, or performance of any duty conferred upon it by the constitution. Also in Mason Section 4.1 further states that rules of procedure passed by one legislature or statutory provisions governing legislative procedure are not binding on the subsequent legislature. And so what this means is the power of the legislature to determine its own powers is only limited by constitutional provisions. In other words, the Legislature has every single right to create this redistricting commission, not as a commission but as a committee of citizens within its legislative power. So the question arises, well, what does that matter, Nathan? And it does matter because there's three problems with this. First of all, this bill can be vetoed. Why are you allowing the Governor to have a say in a power that is strictly conferred to the Legislature? The Legislature has the power of redistricting. Why does the Governor have a say? The second problem with this is even if you pass this law and put it in state statute, the Legislature in 2021

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

Executive Board Committee
February 13, 2017

can completely ignore the statute and pass a separate means of redistricting by passing a legislative rule that conflicts with the statutory provision because statutory provisions are derived from constitutional power, not...or legislative procedure is derived from constitutional power, not statutory power. And the third reason is by creating this commission the Legislature is opening or this bill is opening itself up to more judicial review than it would have by placing it within the legislative rules because it's much harder to find standing against a legislative rule since the Legislature is given such enormous power of determining its own rules and proceedings. And that opens the biggest question in the room and really what I wanted to get at the reason why this can't be put into legislative rules is because this Legislature has demonstrated, with all due respect, a foolish incompetency by not passing legislative rules within even the first two months. I mean the lack of ability that this Legislature has to function as it has historically is astounding. I've watched this body since I was in high school. I've always been impressed by its ability to get things done, to be innovative. We're a state of political innovation and yet we can't even put a power that is given to us by the constitution, our redistricting power, we can't even discuss it as a part of our legislative rules because we are so ground by the foolishness, with the respectful exception of Senator Chambers, the foolishness of all 49 or 48 of these members to provide a provision within its rules. And so to sum all this up, there are a lot of things that this body can do to get things done. But right now you have allowed the partisan dysfunction of the national government to derail even the simplest of processes that are given to you from the constitution and conferred it to the Governor by trying to put it into a statutory provision. So I ask this committee or I speak in a neutral capacity on the bill. I support the underlying concept. It's a great idea. But I think that you should preserve the integrity of the body and keep this within the rules, not in statutory provisions. [LB653]

SENATOR WATERMEIER: Thank you for your testimony. Are there questions? Thank you, Mr. Leach, is it? [LB653]

NATHAN LEACH: Yes. [LB653]

SENATOR WATERMEIER: (Exhibit 3) All right. Very good. Thank you for your testimony. Further testimony in the neutral capacity? All right. Seeing none, Senator Murante, I do have one letter in opposition from Steve Grasz, senior counsel to Husch Blackwell. Come on up. Waives closing. All right. That closes our hearing on LB653. And I would ask that you leave the room. I would like to have a short Exec Session on one of the bills that was presented here today. [LB653]