# P U B L I C  H E A R I N G

before

## SENATE STATE GOVERNMENT, FEDERAL AND INTERSTATE RELATIONS AND VETERANS' AFFAIRS COMMITTEE

**SENATE CONCURRENT RESOLUTION NO. 112 (1R)**
(Amends the Consititution to permit the Legislature to veto adminstrative rules and regulations)

June 22, 1989
Room 410
State House Annex
Trenton, New Jersey

**MEMBERS OF COMMITTEE PRESENT:**

Senator Catherine A. Costa, Acting Chairman
Senator Gerald Cardinale
Senator Richard A. Zimmer

**ALSO PRESENT:**

Joseph P. Capalbo
Office of Legislative Services
Aide, Senate State Goverenment, Federal
and Interstate Relations and Veterans'
Affairs Committee

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Hearing Recorded and Transcribed by
Office of Legislative Services
Public Information Office
Hearing Unit
State House Annex
CN 068
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WYNONA M. LIPMAN
*CHAIRMAN*
GERALD R. STOCKMAN
*VICE-CHAIRMAN*
CATHERINE A. COSTA
GERALD CARDINALE
RICHARD A. ZIMMER

New Jersey State Legislature

SENATE STATE GOVERNMENT, FEDERAL
AND INTERSTATE RELATIONS AND
VETERANS' AFFAIRS COMMITTEE
STATE HOUSE ANNEX, CN-068
TRENTON, NEW JERSEY 08625
(609) 292-9106

# COMMITTEE NOTICE

TO: MEMBERS OF THE SENATE STATE GOVERNMENT COMMITTEE

FROM: SENATOR WYNONA M. LIPMAN, CHAIRMAN

SUBJECT: **PUBLIC HEARING and COMMITTEE MEETING - JUNE 22, 1989**

Address comments and questions to Joseph P. Capalbo, Committee Aide, at (609) 292-9106.

The Senate State Government, Federal and Interstate Relations and Veterans' Affairs Committee will hold a public hearing on SCR-112 (1R) on **Thursday, June 22, 1989, at 10:00 a.m. in Room 410 of the State House Annex.** SCR-112 (1R), sponsored by Senator Zane, amends the Constitution to permit the Legislature to veto administrative rules and regulations.

The public hearing will be followed by a committee meeting to consider the following bills:

| | |
|---|---|
| **S-982** Lipman | Permits a person eligible to vote to register on election day. |
| **S-3395** D'Amico | Establishes demonstration centers to provide certain services to Hispanic women; appropriates $400,000. |
| **S-3516** Ambrosio | Revises the "Open Public Meetings Act;" increases penalties. |

issued 6/8/89

[SECOND REPRINT]

# SENATE CONCURRENT RESOLUTION No. 112

## STATE OF NEW JERSEY

INTRODUCED MAY 19, 1988

By Senators ZANE, LYNCH, HURLEY, O'CONNOR, CONTILLO, COSTA, PALLONE, GRAVES, VAN WAGNER, AMBROSIO, HAINES, DUMONT, PATERNITI, DiFRANCESCO, CARDINALE, BASSANO, McNAMARA, LIPMAN, WEISS, DALTON, RICE, McMANIMON, COWAN, CODEY, FELDMAN and ORECHIO

*A CONCURRENT RESOLUTION* proposing to amend Article V, Section IV, paragraph 6 of the Constitution of the State of New Jersey.

BE IT RESOLVED *by the Senate of the State of New Jersey (the General Assembly concurring):*

1. The following proposed amendment to the Constitution is agreed to:

PROPOSED AMENDMENT

Amend Article V, Section IV, paragraph 6 of the Constitution to read as follows:

6. No rule or regulation made by any department, officer, agency or authority of this state, except such as relates to the organization or internal management of the State government or a part thereof, shall take effect until it is filed either with the Secretary of State or in such other manner as may be provided by law. The Legislature shall provide for the prompt publication of such rules and regulations. In accordance with such rules as it may adopt, the Legislature may invalidate any rule or regulation, in whole or part, and may prohibit any proposed rule or regulation, in whole or part, [1]from taking effect[1] by a majority of the authorized membership of each House.

(cf: N.J. Const.Art.V, sec.IV, para.6.)

2. When this proposed amendment to the Constitution is finally agreed to, pursuant to Article IX, paragraph 1 of the Constitution, it shall be submitted to the people at the next general election occurring more than three months after the final agreement and shall be published at least once in at least one newspaper of each county designated by the President of the

EXPLANATION--Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.

Matter underlined thus is new matter.
Matter enclosed in superscript numerals has been adopted as follows:
[1] Senate SSG committee amendments adopted May 22, 1989.
[2] Senate floor amendments adopted June 19, 1989.

Senate, the Speaker of the General Assembly and the Secretary of State, not less than three months prior to the general election.

3. This proposed amendment to the Constitution shall be submitted to the people at that election in the following manner and form:

There shall be printed on each official ballot to be used at the general election, the following:

a. In every municipality in which voting machines are not used, a legend which shall immediately precede the question, as follows:

If you favor the proposition printed below make a cross (X), plus (+) or check (✓) in the square opposite the word "Yes." If you are opposed thereto make a cross (X), plus (+) or check (✓) in the square opposite the word "No."

b. In every municipality the following question:

| | | |
|---|---|---|
| | YES. | CONSTITUTIONAL AMENDMENT LEGISLATIVE DISAPPROVAL OF RULES AND REGULATIONS<br><br>Shall the amendment to Article V, Section IV, paragraph 6 of the Constitution, agreed to by the Legislature, authorizing the Legislature to prohibit proposed administrative rules and regulations from taking effect and to invalidate existing rules and regulations, be adopted? |
| | NO. | INTERPRETIVE STATEMENT<br><br>State executive agencies are authorized [2][by law][2] to issue rules and regulations which have the force and effect of law. [2][The Legislature has the duty to review those rules and regulations to see if they carry out the intention of the Legislature as contained in law and if they are efficient and effective. This amendment provides a constitutional recognition of this oversight role by permitting the Legislature to prohibit proposed rules from taking effect and to invalidate existing rules.] The Legislature may review those rules and regulations from time to time in order to determine whether they conform with the intent of the statutes. The Supreme Court of New Jersey has ruled that under the New Jersey Constitution in general the Legislature may not invalidate an executive rule or regulation except by adopting legislation subject to the Governor's veto. This amendment addresses that Supreme Court ruling by modifying the New Jersey Constitution to allow the Legislature to invalidate by resolution executive rules and regulations by a majority of the authorized membership of both the Senate and General Assembly and without presenting the resolution to the Governor for his approval. Its enactment would constitute a fundamental change in the relationship between the co-equal branches of government.[2] |

STATE GOVERNMENT

Legislature

Amends Constitution to permit Legislature to veto administrative rules and regulations.

TABLE OF CONTENTS



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vf: 1-8

**SENATOR CATHERINE A. COSTA (Acting Chairman):** I'd like to call this meeting to order, please. Senator Lipman will be a little late, so will Senator Stockman.

We're going to go ahead with the public hearing on Senate Concurrent Resolution No. 112, and we're going to take input from those who wish to testify. We have a recorder here with us. We do have a quorum with Senator Zimmer, Senator Cardinale and myself, Senator Costa.

Do we have a list of people who would like to speak? Come forward, please.

**D E N N I S P. C R O W L E Y:** Dennis Crowley, Director of Legislative Policy for the Department of Law and Public Safety, Office of the Attorney General.

I'd like to read a statement concerning SCR-112. This administration has historically and consistently spoken out against the proposition embodies in SCR-112, as have former Governors Hughes, Byrne, and Cahill. In addition, in the general election of November, 1985, the citizens of New Jersey decisively spoke against this proposition. This proposal, if adopted, we feel would fundamentally alter in New Jersey the system of balanced separation of powers, which has served this country and State so well for over 200 years.

On behalf of the executive branch, this Department is in the process of preparing a statement which will present and explain once again the rationale for our opposition to this proposed amendment to the New Jersey State Constitution.

SENATOR COSTA: I think it's only proper to say what this is all about. Senate Concurrent Resolution No. 112 proposes to amend the Constitution to provide the Legislature with the authority to invalidate any administrative rule or regulation in whole or in part and to prohibit any proposed rule or regulation in whole or in part from taking effect. Such actions would require a majority of the authorized membership of each house-- This concurrent resolution was

amended by the Senate to revise the interpretive statement in order to comply with a decision of a Superior Court, Appellate Division in Kimmelman v. Burgio, 204 N.J. Super 44, App. Div., 1985, regarding appropriate language for a previous concurrent resolution which permitted the Legislature to veto administrative rules and regulations. Thank you. Now, you may go ahead.

MR. CROWLEY: The Department of Law and Public Safety is preparing, which we will present, and explain once again the rationale to this proposed amendment to the New Jersey State Consititution. This document will be completed in the near future and will be transmitted to this Committee at that time. Thank you.

SENATOR ZIMMER: Will it be physically possible--

SENATOR COSTA: The bill has been voted out of this Committee already.

SENATOR ZIMMER: Madame Chairman, will it be physically possible to append the comments -- the extended comments of the Attorney General's Office to the official transcript of this hearing?

MR. CROWLEY: You're referring to the full statement that is being prepared?

SENATOR COSTA: Oh, yes, definitely.

SENATOR ZIMMER: Okay.

SENATOR COSTA: Any other questions?

SENATOR CARDINALE: Yes, I have a question. When did you become aware that we were considering this?

MR. CROWLEY: We had become aware of this actually when the Committee agenda was released for this Committee hearing.

SENATOR CARDINALE: Hasn't this Committee previously considered this legislation?

MR. CROWLEY: Yes.

SENATOR CARDINALE: Did you appear then? I don't recall.

MR. CROWLEY: No, sir.

SENATOR CARDINALE: Is there some difference between this item on the agenda now and the cite that was on the agenda previously that caused you to suddenly have an objection that you didn't previously state. We already voted, without the benefit of your input.

MR. CROWLEY: We felt since there was the opportunity for a public hearing on this issue and while the historical record is probably clear, if it were put together on the opposition that the administration and the executive branch feels, we felt it best that the record include a comprehensive statement. And so, we're taking this opportunity now to prepare that statement and offering it to you as a part of the record.

SENATOR CARDINALE: I find it a little curious that after we have voted, you're going to have a statement prepared. Normally I consider the statements that are made by people in the administration very carefully, but I'd like to consider them before I vote. And I believe we've already voted on this.

SENATOR COSTA: There's a constitutional rule that states that after it have been released from committee, and before it can be voted on the floor, that there must be a public hearing, and that's what we're doing today.

MR. CROWLEY: Fine. I would assume then at least for the floor debate on this, you would have the benefit of our statement.

SENATOR COSTA: Yes. Thank you. Ed Richardson, New Jersey Department of Education.

**E D W A R D R I C H A R D S O N:** Good morning. Thank you for the opportunity. Ed Richardson, I represent the State Department of Education. And with all due respect to the Committee, I'd like to just present a brief statement on SCR-112.

The Department cannot support the resolution. We believe it would violate the critical constitutional separation of executive and legislative powers, and that this separation is what enables each branch to do its job efficiently and productively. The Legislative Oversight Act which was passed in 1981 was ruled by the New Jersey Supreme Court as a violation of separation of powers. In that ruling the court upheld that it gave the Legislature "excessive power to impede executive in the constitutional mandate to faithfully execute the law."

We believe that the same edict applies to this particular resolution. In that case, the court also ruled that the Legislative Oversight Act violated the Constitution by allowing the Legislature to repeal laws without participation of the Governor. The Constitution already provides for legislative oversight of administrative rules by stipulating that rules -- laws passed by both houses and passed by the Governor -- superseded administrative rules. So in essence, there is already a process to amend or repeal administrative rules.

Finally, SCR-112 allows the Legislature to invalidate rules without replacing them. In education rule-making this would mean that codes that are due to expire under the sunset provision could be repealed, leaving certain services that may be vital to our children, unregulated. In essence, this would favor one proposed resolution or amendment to the Constitution while doing away with a requirement that we have to provide a thorough and efficient education under the Constitution, and for these reasons, we cannot support SCR-112.

SENATOR COSTA: Thank you. Any questions? (no response) Is there anyone else who would like to testify on this resolution?

SENATOR ZIMMER: I'd like to make a few comments for the record.

SENATOR COSTA: Yes, Senator Zimmer.

SENATOR ZIMMER: I think there's little doubt that there exists the power to amend the Constitution through a concurrent resolution and vote -- an affirmative vote of the public to overcome the Supreme Court decision invalidating the legislative veto which used to be exercised by the Legislature. I think to do so, however, would be wrong, and would significantly adversely affect the government of the State of New Jersey. I believe the separation of powers is one of the essential attributes of government at the national and State level, and it is something that has protected out liberties for 200 years.

For that reason, I think it would be a serious mistake for us to add a provision, such as the one proposed in SCR-112, to our Consititution. The public agrees, I believe, with this view, in view of the fact that the last time this proposition was submitted to them, they rejected it overwhelmingly, by a margin of more than 340,000 votes. I'd like to set the record straight as to how much money was spent in the effort to secure a negative vote.

Senator Zane, the sponsor of S-112 gave a number in the high hundreds of thousands of dollars as his estimate of what was spent. I have here a report from the Election Law Enforcement Commission, and I'd like to make the figure part of the record. The expenditure by the group "Vote No On Question Seven Committee" was exactly $44,171.74. It was spent exclusively in buying ads in newspapers -- 27 newspaper ads, to be exact. And, as a result, in part of that very modest campaign and the good sense of the electorate, this referendum failed in every single one of the 21 counties of the State of New Jersey.

When there are so many worthwhile amendments to the Constitution that we might be considering, I think it's unfortunate that we are resubmitting an amendment that's

already been rejected by the public. So, I would hope that the Legislature would not follow the lead of this Committee and would reject SCR-112.

SENATOR CARDINALE: Madame Chairman.

SENATOR COSTA: Senator Cardinale.

SENATOR CARDINALE: I have a great respect for Senator Zimmer and his knowledge of the law, and I accept all the assumptions with respect to the existence of the law, and I believe Senator Zimmer is perfectly correct. But there is a problem. And the problem is, that the atrocious power that is being referred to here, currently does exist and it exists on the part of the administration because an administrative rule can be made in contravention of the intent of the Legislature, and frequently we have all explained, both on the floor and other forums, that such has occurred; that we have passed a law, and that the administration has seen fit sometimes to make rules and regulations which are at 180 degrees to that law. And what is the recourse that we have in the Legislature when such an event occurs?

The recourse is to pass a new law. That takes time. It's an involved process, and there are many interests which impede that process from time to time. But, then, after we have passed it, we may very well have a Governor who will support the members of the administration in their total disregard for the intent of the Legislature. It has occurred on more than one occasion that I have had conversations with members of the administration who have said, "We don't care about legislative intent. That's of no concern to us."

As a matter of fact, the present Public Advocate said it before a whole group of us who were speaking with him, whereas he had passed a law one week earlier, and he took an action based on that law that was at a total and complete variance with our intent. We asked him why he had done that, and he said, "Well, I was new." And we said, "Well, yes, you

could have asked us what we meant." He said, "Well, I don't care what you meant. I want to do what I want to do." You see? And what recourse do we have because the Governor having appointed such individual is very likely to support that individual with a veto?

So we then need more than we need in a normal legislative process to correct such atrocious action. Perhaps Senator Zane's bill is not perfect, and I am sure it is not, but it tends to correct a problem that that atrocious power to which so many refer, currently exists in two branches of government, but does not exist in this branch of government.

If we wanted to completely restore the balance of powers as the creators of our Federal Consititution as well as our State Constitution really intended, we should have the Legislature become a coequal branch of government. That's what I believe this ascent by Senator Zane is; not an attempt to usurp any power, but, in fact, to make the Legislature coequal with the administrative and judicial branches of government.

SENATOR ZIMMER: Senator Cardinale, I agree totally that there are many instances where administrative agencies willfully and completely disregard the intent of the Legislature.

I think the Legislature has to address that problem. I think that a legislative veto is the wrong way to do it. When the legislative veto was in effect before, the State Supreme Court invalidated it. To my knowledge it was used only once. Is that correct?

SENATOR CARDINALE: It was in effect very briefly.

SENATOR ZIMMER: It was in effect for 17 months. If you use it once in 17 months it seems to me that you do not have a very useful mechanism.

SENATOR CARDINALE: Nor an atrocious abuse of power, either.

SENATOR ZIMMER: I believe there were abuses of power during that period of time, but the Legislature does not avail itself of the power that it gave itself.

SENATOR COSTA: I hate to stop you at this point, but this is a public hearing.

SENATOR ZIMMER: In my capacity as a citizen, I'd like to finish my statement. There are a number of means that we can use to address the problem that Senator Cardinale described. One of them is to rewrite the Administrative Procedures Act. My proposal to do so is embodied in S-3000, which is before this Committee, which I hope would be considered sometime soon. Thank you very much.

SENATOR COSTA: There is nothing more frustrating than to see something that you have passed with good intent in a certain direction and see that it's thwarted by inadequacy of regulations and how it's proceeded upon. Maybe this is -- we're going to the extremes in trying to correct it. But this is an attempt to correct it. And we'll have more chances. We wanted to hear from the public today, as per the constitutional rules, and we'll have more of a chance to listen to argument on the Senate floor.

At this point, I'm going to close the public portion, and ask for a ten-minute break, hoping we'll find our other legislators. Thank you.

**(HEARING CONCLUDED)**

# APPENDIX

**STATEMENT OF THE ATTORNEY GENERAL'S OFFICE REGARDING SCR-112**

This memorandum discusses SCR-112, a proposed amendment to the Constitution of the State of New Jersey. This proposed constitutional amendment would permit the legislature to veto Executive Branch rule-making upon the passage of a concurrent resolution in each house without the need for presenting such a veto to the Governor for his review. This proposal would fundamentally change the principle of separation of powers. Four years ago an identical amendment was decisively rejected by the voters of New Jersey. Since that time, no change in circumstances has emerged that could justify putting this amendment once again to electorate.

INTRODUCTION:

The Constitution of the State of New Jersey expressly provides for the separation of governmental power among three distinct branches: the Legislature, the Executive and the Judiciary. The concept of a government of separated and balanced powers is firmly engrained not only in the Constitution of New Jersey and of other states, but in the federal Constitution as well. It has been the linchpin of our constitutional framework for over 200 years.

The nature of the relationship between the legislative and executive branches of government will be profoundly altered should the constitutional amendment proposed by Senate Concurrent Resolution No. 112 be approved. The proposed amendment would allow the Legislature to invalidate any rule or regulation by any State department, officer, agency or authority by a simple majority of each House of the Legislature. The concurrent resolution proposes to amend N.J. Const. (1947), Art. V, Sec. IV, Para. 6 as follows:

> No rule or regulation made by any department, officer, agency or authority of this State, except such as relates to the organization or internal management of the State government or a part thereof, shall take effect until it is filed either with the Secretary of State or in such other manner as may be provided by law. The Legislature shall provide for the prompt publication of such rules and regulations. In accordance with such rules as it may adopt, the Legislature may invalidate and rule or regulation, in whole or in part, by a majority of the authorized membership of each House.

SCR-112 represents the third attempt by the Legislature in this decade to fundamentally restructure the balance of power between the executive and legislative branches of government in New Jersey. In 1982, the Supreme Court of New Jersey held the Legislative Oversight Act of 1981 (c.27, P.L. 1981, N.J.S. 52:19 B-4.1 et seq.), passed over the objections of Governor Byrne, unconstitutional, General Assembly v. Byrne, 90 N.J. 376 (1982).

The Legislative Oversight Act required the submission to the Legislature of virtually every rule proposed by any state agency. The President of the Senate and the Speaker of the General Assembly were required to refer each proposed rule to a standing reference committee, which had 45 days to report its recommendation on the rule to each House. A rule would have been deemed approved unless within 60 days of its receipt the Legislature were to adopt a concurrent resolution disapproving the rule. The Legislature had the option to adopt a concurrent resolution barring the rule from taking effect for an additional 60 days, during which time it could disapprove the rule through concurrent resolution.

The Court determined that a legislative veto over State agency rules violated both the Separation of Powers Clause and the Presentment Clause. Justice Pashman noted:

> Broad legislative veto power deters executive agencies in the performance of their constitutional duty to enforce existing laws. Its vice lies not only in its exercise but in its very existence. Faced with potential paralysis from repeated schemes, officials may retreat from the execution of the responsibilities. They will resort to compromises with legislative committees aimed at drafting rules that the current Legislature will find acceptable. Id. at 387.

The Court further indicated that a legislative veto over agency rules allows the Legislature "to exert a policy-making effect equivalent to amending or repealing existing legislation." Id. at 388. The Court held that the act violated the Presentment Clause because the exercise of a veto that effectively amends or repeals existing law "is tantamount to passage of a new law without the approval of the Governor." Id.

The same day this decision was rendered, 30 Senators sponsored and introduced Senate Concurrent Resolution No. 133 of 1982. This resolution, identical to SCR-112, failed to garner the three-fifths majority in each House that would have enabled the proposed amendment to be placed on the 1983 General Election ballot. It did, however, pass the Senate on June 16, 1983 (30-0) and the Assembly on July 11, 1983 (45-17). This majority vote enabled the Resolution to be referred to the Legislature for consideration in the next legislative year. The Resolution again passed the Senate on July 30, 1984 (30-4) and the Assembly on December 17, 1984 (42-29). Because this Resolution gained a majority in both Houses in two successive years, it was placed on the ballot of November 5, 1985 General Election, pursuant to N.J. Const. (1947) Art. IX, Para. 1. The proposed amendment was opposed by all living governors in New Jersey and was decisively defeated by over 340,000 votes -- an 8 to 5 margin.

1) DRAMATIC BALANCE OF POWER SHIFT

The Constitution of the State of New Jersey details a structure of government that requires the maintenance of a balance of power among the three coordinate branches of government. The doctrine of the separation of powers expresses a belief that the powers of government should be evenly divided and balanced among the various branches of government so as to preclude the concentration and exercise of arbitrary power. Article III of the Constitution of the State of New Jersey states:

> The powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution.

Article IV vests the legislative power in the General Assembly and Senate and sets forth the powers and limitations of the legislative branch. The executive power is vested in the Governor by Article V. It sets forth the powers and duties of the Governor and provides for the organization of all executive and administrative offices into principal departments under the supervision of the Governor. The Executive's power is broad, but it too is subject to a variety of checks and balances. Executive authority is clearly limited by the terms of legislative delegation and by the availability of judicial review.

The concept of a system of checks and balances ensures that statutes be based upon some form of broad consensus. This general principle is developed and reiterated throughout the Constitution. For example, the Presentment Clause, Art. V, Sec. 1, Para. 14, which details the procedures regarding the passage and approval of legislation, requires that the enactment of law in the State of New Jersey is the product of either a broad consensus expressed as the concurrence of the majority of each House with the Executive or the broad consensus that results from a two-thirds majority in each House upon reconsideration of the bill after its veto by the Governor. The proposed constitutional amendment providing for a legislative veto of rules and regulations of executive agencies profoundly alters this relationship. The Legislature would be able to veto agency rules and regulations with only a bare majority in each House and without presenting the matter to the Governor.

A fundamental overhaul of our present constitutional system is contemplated by this amendment. The amendment involves a potentially drastic reordering and reshaping of the process of government by altering the framework that provides for separate and balanced powers of government. The regard with which the founding fathers viewed the concept of separation of powers is illustrated by James Madison's statement that "[i]f there is a principle in our constitution, indeed in any free constitution, more sacred than another, it is that which separates the legislative, executive, and judicial powers." 1 Annals

of Congress 604 (J. Gales ed. 1789), reprinted in Tribe, "The Legislative Veto Decision: A Law By Any Other Name?" 21 Harv. J. on Legis. 1, 3 n. 12 (1984).

The dangers of piecemeal alteration of a constitutional framework, particularly of fundamental constitutional principles, are apparent and should be stressed. Reasoned and careful consideration of the implications of such a change must be made. While legislators may desire increased power over the rule-making process, this grant is one the electorate of the State of New Jersey decisively rejected as recently as four years ago. In recent years such proposals have been defeated at the polls eight times in six states documented.

The federal government has no constitutionally mandated legislative veto. In general, the states rely on the general power of the Legislature to enact statutes as the sole mechanism by which the Legislature can invalidate the rules of agencies or on a variety of schemes for legislative oversight of agency rules. Many of these states require legislative oversight action to be submitted to the Governor for his approval or disapproval.

On the federal level, the most significant discussion of this issue was presented in Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983). In that case the Supreme Court of the United States addressed the issue of a one-House congressional veto statute. The Supreme Court held that the one-House legislative veto provision of the Immigration and Nationality Act (8 U.S.C. Sec. 1254, (c) (2)) was unconstitutional. The Court held that all acts by Congress that are legislative in character must follow the procedures set out in Article I of the federal Constitution. These provisions require both passage by a majority of both Houses and presentment to the President for possible veto.

Although this federal decision is more analogous to the decision of the New Jersey Supreme Court in General Assembly v. Byrne, supra, in that it dealt with a legislative veto based on statutory provisions rather than with a fundamental amendment of constitutional provisions, the Court's discussion of the separation of powers is illuminating. The Court acknowledged that a one-House statutory veto was not authorized by the "constitutional design of the powers of the Legislative Branch." Immigration and Naturalization Service v. Chadha, 462 U.S. at 956.

> The bicameral requirement, the Presentment Clauses, the President's veto, and Congress' power to override a veto were intended to erect enduring checks on each Branch and to protect the people from the improvident exercise of power by mandating certain prescribed steps. To preserve those checks, and maintain the separation of powers, the carefully defined limits on the power of each Branch must not be eroded. Id. at 957-58.

In summary, passage of this amendment would result in a dramatic shift of the balance of power to the Legislature that was not, and

could not be, accomplished by legislation. The fundamental constitutional concepts of checks and balances, designed to ensure that policy and legislation reflect a broad consensus, would be severely abrogated in the area of administrative rule making. The Executive's constitutional duty to execute the law could be frustrated and undermined.

2) AMPLE CURRENT LEGISLATIVE RULE-MAKING INFLUENCE

The Legislature currently has ample opportunity and authority to participate in, if not effectively control, rule-making procedure in the State of New Jersey: 1) the Legislature can define the content and scope of rules and regulations by drafting specific and detailed legislation; 2) the Legislature can participate in the actual rule-making process; 3) the Legislature can overturn a rule by subsequent legislation; and 4) the Legislature can amend the Administrative Procedure Act.

A rule-making entity must conform its rules and regulations to the statute upon which its rules are predicated and these rules must implement the policy and goals of the statute upon which the agency's delegated authority is based. It is, always, in the Legislature's discretion to provide a wide degree of latitude to the agencies in their rule making or, alternatively, to closely circumscribe the extent and scope of any subsequent rules by specificity of statutory detail.

The existing scheme for the making of rules and regulations in the State of New Jersey requires administrative agencies to promulgate and adopt rules and regulations after a notice and comment period. It should be emphasized that the Administrative Procedure Act, N.J.S. 52:14B-1 et seq., which governs the adoption of rules, is itself an act of the Legislature. A notice and comment period is statutorily prescribed for the adoption, amendment or repeal of any rule. Significant amendments to New Jersey's Administrative Procedure Act are presently being reviewed by both the Senate and General Assembly.

N.J.S. 52:14B-4 requires the agency to give at least 30 days' notice of its intent to either adopt, amend or repeal any rule that it has promulgated. The notice must include a statement of the terms or substance of the intended action as well as the time when, the place where and the manner in which interested persons may present their views. This notice must be mailed to all persons who have made timely requests of the agency for advance notice of its rule-making proceedings. The notice must be filed with the President of the Senate and the Speaker of the General Assembly. The notice additionally must be publicized in such manner as is most appropriate to inform those who are most likely to be affected by or interested in the intended actions. This notice also must be published in the New Jersey Register and be accompanied by a statement setting forth a summary of the proposed rule, a clear and concise explanation of the purpose and effect of the rule, a specific legal authority upon which its adoption is authorized and a description of the expected social

and economic impact of the rule. The agencies are also required to afford all interested persons reasonable opportunity to submit data, views or arguments and to consider fully those views.

A 1981 amendment to N.J.S. 52:14B-4 (P.L. 1981, c.27, Sec. 11) requires an agency to conduct a public hearing on the proposed rule at the request of a committee of the Legislature, or a governmental agency or subdivision, provided that such request is made to the agency within 15 days following publication of the proposed rule in the Register. The existing statutory rule-making procedures and amendments to the Act presently under legislative review clearly acknowledge a special role for Legislature as the rules are promulgated. The opportunity provided legislators to place information and arguments on the record is significant and could be expanded. It allows legislative intent to be clearly explicated and gives the agency the opportunity to respond administratively to legislative concerns.

An agency also must prepare for public distribution a report listing all parties offering written or oral submissions concerning the rule, summarizing the content of the submissions and providing the response of the agency to the data contained in the submissions. A rule that is not adopted in compliance with these procedures is not valid. In addition, it should be noted that interested persons, including legislators, may petition an agency to promulgate, amend or repeal any rule.

These procedures reflect a desire to provide for openness and public comment into the rule-making process as well as to ensure comprehensive and coherent rules and regulations. The Legislature has the opportunity as does any individual to exert significant influence in the rule-making process during the notice and comment period as well as the special statutory authority to request a public hearing. In addition, the Legislature can utilize its fact finding administrative powers to closely examine the implementation of particular rules or regulatory schemes.

It must be emphasized that the Legislature possesses legitimate constitutional means to exert authority over the rule-making process. The authority of any agency to promulgate rules and regulations is utterly dependent upon the laws drafted, proposed and passed by the Legislature. Agencies regulate only by virtue of the power delegated to them by the Legislature. At present, should the Legislature desire to exert a tight control over rule-making, it may do so by passing clear and detailed commands to the agencies in the underlying enabling statutes. In addition, not only may the Legislature itself or any individual legislator participate in the actual notice and comment process, as may any person, but a committee of the Legislature may further shape the rule or regulation by invoking a public hearing on the proposed rule. Should there be a rule or regulation the Legislature concludes is repugnant to its intention, the Legislature may repeal that regulation by means of legislation passed by a majority of each House and signed by the Executive or by means of a two-thirds majority override of an Executive veto. These procedures

are designed to guarantee full and open comment into the rule-making process while ensuring that the Executive's constitutional duty to execute the law is respected.

3) UNEXPECTED AND UNWELCOME RESULTS

A. INCOHERENT REGULATORY SCHEMES

The adoption of this constitutional amendment may lead to the development of an administrative process that lacks predictability and coherence. Legislative interference is to be feared not only because it may disrupt or distort coherent regulatory schemes, but because it may provoke undesirable reactions by regulators.

The disruption of coherent, regulatory schemes on an ad hoc basis by a partisan Legislature is a possibility the Supreme Court of New Jersey openly acknowledged in General Assembly v. Byrne:

> The chief function of executive agencies is to implement statutes through the adoption of coherent regulatory schemes. The legislative veto undermines performance of that duty by allowing the Legislature to nullify virtually every existing and future scheme of regulation or any portion of it. The veto of selected parts of a coherent regulatory scheme not only negates what is overridden; it can also render the remainder of the statute irrational or contrary to the goals it seeks to accomplish. "[L]egislative interference, constant in its potentiality, can be exercised in any given case without a chance in the general standards the Legislature has initially decreed." Moreover, the Legislature need not explain its reasons for any veto decision. Its action therefore leaves the agency with no guidance on how to enforce the law. General Assembly v. Byrne, supra at 386-87 (citation omitted).

Agencies perform a quasi-legislative role in promulgating and adopting rules and regulations. Agencies, however, also implement policy by means of administrative hearings. In their performance of this quasi-adjudicative capacity agencies have the option of defining policy by deciding individual cases on an ad hoc basis. Clearly, rule-making procedures are preferable to ad hoc individual case-by-case development of policy. Adjudicative determinations may, however, be beyond the reach of the legislative veto system. The temptation to reduce legislative interference by relying on the adjudicative aspect of agency power may be quite alluring to entrenched bureaucracies. As Professor Harold Levinson has noted: ". . .a shift from rule-making to adjudication as the means for developing policy may make the agencies' policies more difficult for the citizen to ascertain or for the courts to monitor effectively." Levinson, "Legislative and Executive Veto of Rules of Administrative Agencies: Models and Alternatives," 24 Wm. & Mary L. Rev. 79, 92 (1982). The institution of the legislative veto may in effect render

agencies' actions less accessible to constituent accountability; the very opposite effect that SCR-112 is ostensibly seeking to achieve.

It must be emphasized that the development of the principles of delegated power resulted from pragmatic necessity. The Legislature simply does not have the time, resources or flexibility to implement policy minutely. The legislative veto may well be used as a substitute for closely reasoned and carefully drafted legislation. When combined with the actual exercise of the legislative veto, inattentive legislation can only result in conflicting records of legislative intent.

B. GROWTH OF LEGISLATIVE BUREAUCRACY

A major policy question posed by this proposed amendment is whether to unleash and underwrite a whole new bureaucracy, which might work its substantive will instead of that of the Legislature for which it works. An electorate distressed by the growth of bureaucracy should be distressed by this amendment because it would require substantial expenditures. Legislative staff would surely grow as it attempts to monitor, influence and override decisions of the many administrative agencies in the State. The problem lies not only in the development of a new parallel bureaucracy, but in the fact that this new bureaucracy may well attempt to frustrate the efforts of the bureaucracy the taxpayer presently funds. From a management perspective such a system can only be viewed as costly, duplicative and counterproductive.

C. OPPORTUNITY FOR REDOUBLED SPECIAL INTEREST INFLUENCE IN THE ADMINISTRATIVE PROCESS

At present, the adoption, amendment or repeal of rules and regulations must be undertaken in an open manner. For example, not only must the agency give notice of its intent and provide all interested parties opportunity for comment, but the agency must also prepare for public distribution a report listing all parties offering written or oral submissions concerning the rule, summarizing the content of these submissions and providing the agency's response to the data contained in the submissions. Similarly, 15 days' notice is required to be given for public hearings on proposed rules.

These procedures clearly reflect public repugnance to secretive and off-the-record decision making. The amendment proposed by Senate Concurrent Resolution No. 112, however, flies directly in the face of such concerns. It allows special interest groups a second bite at the apple. Should any special interest be affected or aggrieved by an administrative rule or regulation, it would have the opportunity to prevail upon a bare majority of legislators in each House to override administrative determinations of legislative intent. Public policy may well be determined by a consensus considerably less than is required for the enactment of actual legislation, which is clearly an anomalous result. Moreover, a legislative veto of agency rules will not be subject to two safeguards traditionally imposed upon the administrative process: reasoned decision-making based on the record

and the opportunity for the presentation of opposing viewpoints. See General Assembly v. Byrne, supra at 387. Most importantly, however, the virtue and benefit of coherent regulatory schemes may be disrupted by special interest groups.

CONCLUSION

The adoption of a constitutional amendment providing for a legislative veto of agency rules and regulations poses major administrative, political and constitutional problems. It would result in a dramatic shift in the balance of power from the executive to the legislative branch of government. The fundamental constitutional concepts of checks and balances designed to ensure that policy and legislation reflect a broad consensus would be severely abrogated in the area of administrative rule-making.

The Executive's constitutional duty to execute the law could be frustrated and undermined by granting summary power over the rule-making process to the Legislature. It must be emphasized that at present the Legislature has significant authority over rule-making procedure in New Jersey. The Legislature can control the scope of administrative discretion by drafting careful and deliberate legislation. It may participate fully in the rule-making process and may, by special statutory provisions, even call for a special hearing on any proposed rule or regulation. Additionally, the Legislature may disapprove any existing rule or regulation by passing legislation to that effect. Legislation of course must be presented to the Governor or, should it be vetoed, muster a two-thirds majority in each House in order to be enacted.

The adoption of this constitutional amendment may not only result in a process where the development, or more accurately, the overriding of policy, is based on a consensus considerably less than is required for the enactment of legislation, but also may lead to the development of an administrative process that lacks predictability and coherence. The exercise of the veto power will not only negate that which is vetoed but render that which is not vetoed contrary and inconsistent. Agencies may retreat from the settled and well-established process of rule making for the development of policy on an ad hoc basis through their quasi-adjudicative capacity. The Legislature may be tempted to draft legislation with less precision and attention to detail because of reliance on the legislative veto. Sizable expenditures would be required to fund the new bureaucracy that would be spawned by this constitutional amendment. Special interest groups would have a unique opportunity to intervene off-the-record in the agency rule-making process.

This amendment is inconsistent with the federal Constitution and the constitutions of many other states. It is a step the electorate of New Jersey conclusively rejected in 1985. The amendment fundamentally rejects the wisdom of separation of powers and the delegation of power. It offends basic notions of checks and balances and of open-rule-making procedure.