Public Hearing

before

SENATE STATE GOVERNMENT COMMITTEE

SENATE COMMITTEE SUBSTITUTE FOR SENATE CONCURRENT RESOLUTION NO. 31

(Proposes an amendment to the Constitution to permit the Legislature to review administrative rules and regulations)

LOCATION: Committee Room 12
Legislative Office Building
Trenton, New Jersey

DATE: April 2, 1992
10:00 a.m.

MEMBERS OF COMMITTEE PRESENT:

Senator Joseph L. Bubba, Chairman
Senator Peter Inverso, Vice-Chairman
Senator Gerald Cardinale
Senator Wynona M. Lipman
Senator William E. Schluter
Senator Robert Menendez

ALSO PRESENT:

Joseph P. Capalbo
Office of Legislative Services
Aide, Senate State Government Committee

Hearing Recorded and Transcribed by
The Office of Legislative Services, Public Information Office,
Hearing Unit, 162 W. State St., CN 068, Trenton, New Jersey 08625-0068

New Jersey State Legislature

SENATE STATE GOVERNMENT COMMITTEE

Legislative Office Building, CN-068
TRENTON, NEW JERSEY 08625-0068
(609) 292-9106

COMMITTEE NOTICE

TO: MEMBERS OF THE SENATE STATE GOVERNMENT COMMITTEE

FROM: SENATOR JOSEPH L. BUBBA, CHAIRMAN

SUBJECT: **COMMITTEE MEETING - April 2, 1992**

The public may address comments and questions to Joseph P. Capalbo, Committee Aide, or make bill status or scheduling inquiries to Deborah Del Vecchio, Secretary, at (609) 292-9106.

The Senate State Government Committee will meet on **Thursday, April 2, 1992 at 10:00 A.M. in Committee Room 12 in the Legislative Office Building, Trenton, New Jersey** to consider the following bills:

S-70 L.Brown	Gives ELEC fiscal self-sufficiency by dedicating to it certain filing fees and certain penalties for violations of campaign finance reporting and lobbyist disclosure laws.
S-455 Palaia	Provides paid health benefits for certain educational employees enrolled in PERS and the alternate benefit program.
SCR-27 Ciesla	Proposes amendment to State Constitution providing that, during "lame duck" period in each two-year legislative term, legislation shall require three-fifths vote in each House for passage and no new bill or resolution shall be introduced.

In addition, the Committee will hold a Public Hearing on:

SCR-31SCS Dorsey	Proposes an amendment to the Constitution to permit the Legislature to review administrative rules and regulations.

Issued 3/27/92

SENATE COMMITTEE SUBSTITUTE FOR

SENATE CONCURRENT RESOLUTION No. 31

STATE OF NEW JERSEY

ADOPTED MARCH 9, 1992

Sponsored by Senator DORSEY

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 of the State of New Jersey is agreed to:

PROPOSED AMENDMENT

Amend Article V, Section IV, paragraph 6 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. The Legislature may review any rule or regulation to determine if the rule or regulation is consistent with the intent of the Legislature as expressed in the language of the statute which the rule or regulation is intended to implement. Upon a finding that an existing or proposed rule or regulation is not consistent with legislative intent, the Legislature shall transmit this finding in the form of a concurrent resolution to the Governor and the head of the Executive Branch agency which promulgated, or plans to promulgate, the rule or regulation. The agency shall have 30 days to amend or withdraw the existing or proposed rule or regulation. If the agency does not amend or withdraw the existing or proposed rule or regulation, the Legislature may invalidate that rule or regulation, in whole or in part, or may prohibit that proposed rule or regulation, in whole or in part, from taking effect by a vote of a majority of the authorized membership of each House in favor of a concurrent resolution providing for invalidation or prohibition, as the case may be, of the rule or regulation. This vote shall not take place until at least 20 calendar days after the placing on the desks of the members of each House of the Legislature in open meeting of the transcript of a public hearing held by either House on the invalidation or prohibition of the rule or regulation.

(cf: Art.V, Sec.IV, par.6)

2. When this proposed amendment to the Constitution is finally agreed to, pursuant to Article IX, paragraph 1 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.

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 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.	LEGISLATIVE REVIEW OF ADMINISTRATIVE RULES AND REGULATIONS Shall the amendment to Article V, Section IV, paragraph 6 of the State Constitution, agreed to by the Legislature, authorizing the Legislature to review existing and proposed administrative rules and regulations and to invalidate them or prohibit them from taking effect when those rules and regulations have been found to be contrary to legislative intent, be adopted?
	NO.	INTERPRETIVE STATEMENT This proposed amendment modifies the New Jersey Constitution to allow the Legislature to review existing and proposed administrative rules and regulations and to invalidate them or prohibit them from taking effect when those rules and regulations have been found to be contrary to legislative intent. To do so, either House must hold a public hearing on the invalidation or prohibition of the rule or regulation and a majority of the authorized membership of each House must vote in favor of a concurrent resolution providing for invalidation or prohibition, as the case may be, of the rule or regulation. A concurrent resolution would not be subject to a gubernatorial veto.

Proposes an amendment to the Constitution to permit the Legislature to review administrative rules and regulations.

SENATE STATE GOVERNMENT COMMITTEE

STATEMENT TO

SENATE COMMITTEE SUBSTITUTE FOR

SENATE CONCURRENT RESOLUTION No. 31

STATE OF NEW JERSEY

DATED: MARCH 9, 1992

The Senate State Government Committee reports favorably a Senate Committee Substitute for Senate Concurrent Resolution No. 31.

This proposed amendment modifies the New Jersey Constitution to allow the Legislature to review existing and proposed administrative rules and regulations and to invalidate them or prohibit them from taking effect when those rules and regulations have been found to be contrary to legislative intent. To do so, either House must hold a public hearing on the invalidation or prohibition of the rule or regulation and a majority of the authorized membership of each House must vote in favor of a concurrent resolution providing for invalidation or prohibition, as the case may be, of the rule or regulation. A concurrent resolution would not be subject to a gubernatorial veto.

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SENATOR JOSEPH L. BUBBA (Chairman): May I have everyone's attention, please? We are going to do the hearing first, and then move on to the bills. The hearing was called for 10:00. I would like to make some opening remarks.

Good morning. I would like to call this public hearing to order. The purpose of this public hearing is to take testimony on the Senate Committee Substitute for Senate Concurrent Resolution No. 31, sponsored by Senator Dorsey.

Article IX, paragraph 1 of the State Constitution mandates that a public hearing be held on all concurrent resolutions such as this one, which proposes an amendment to the State Constitution.

SCR No. 31 was reported favorably from the Senate State Government Committee as a Senate Committee Substitute on March 9, 1992. As is required by the Constitution, copies of SCR No. 31 SCS were placed on the desks of the members of both Houses following the release of this bill by the Committee. The resolution must lie on the desks of the members of each House in the form in which it is to be voted on for 20 days, before the vote can be taken.

The public hearing being held today is the next step in the process required by the State Constitution. When SCR No. 31 passes in both Houses by a three-fifths vote and is published in one or more newspapers in each county at least 60 days before the election, it may be submitted to the voters on the ballot for their approval.

Senate Concurrent Resolution No. 31 proposes an amendment to Article V, Section IV, paragraph 6 of the New Jersey Constitution. The amendment would provide that: "The Legislature may review any rule or regulation to determine if the rule or regulation is consistent with the intent of the Legislature as expressed in the language of the statute which the rule or regulation is intended to implement."

Upon a finding that a proposed or an existing rule or regulation is not consistent with legislative intent, the Legislature shall transmit this finding in the form of a concurrent resolution to the Governor and the Commissioner of the Department of the Executive Branch which promulgated, or plans to promulgate, such rule or regulation.

The department which is the source of the rule or regulation shall have 30 days to amend or withdraw the proposed or existing rule or regulation. If the department does not amend or withdraw the proposed or existing rule or regulation, the Legislature may invalidate that rule or regulation, in whole or in part, or may prohibit that proposed rule or regulation from taking effect by a majority vote of the authorized membership of each House in favor of a concurrent resolution providing for invalidation or prohibition. Concurrent resolutions are not subject to veto by the Governor.

The vote on the concurrent resolution invalidating or prohibiting a rule or regulation will not take place until at least 20 calendar days after the placing on the desks of the members of both Houses in open meeting of the transcript of a public hearing held by either House on the invalidation or prohibition of the rule or regulation.

I now ask if there is anyone here who would like to speak? I see we have Alexander -- is it Waugh?

A L E X A N D E R P. W A U G H, JR., ESQ.: Waugh.

SENATOR BUBBA: And you are from the Attorney General's Office. Go right ahead.

MR. WAUGH: Good morning. I am Alexander P. Waugh, Jr., Counsel to the Attorney General. Thank you for allowing me the opportunity this morning to express the Attorney General's views regarding Senate Concurrent Resolution No. 31. I speak not only as a representative of the Attorney General, but as one who has exercised rule-making authority as a member of the Election Law Enforcement Commission, and as Acting

Director of the Division of Alcoholic Beverage Control in the past, and as a member of the New Jersey 911 Commission in the present.

This resolution is the latest in a series of attempts by the Legislature over the past decade to permit a legislative veto of administrative agency rules and regulations. In 1981, an attempt was made by statute to implement such a veto power. The statute was passed over Governor Byrne's veto, and the Supreme Court struck it down without dissent. Thereafter, over two successive legislative sessions, the Legislature was able to attain sufficient votes to put a proposed constitutional amendment attempting to effectuate such a veto on the general election ballot in November of 1985. It was opposed by all living Governors of New Jersey, and the voters soundly defeated it by 340,000 votes. It failed to carry any of New Jersey's 21 counties.

With some important changes, the Senate is now considering another proposed amendment to our Constitution which would permit the Legislature to veto existing or proposed administrative rules through passage of a concurrent resolution, but only after a public hearing is held by one of the Houses and after the Governor and the proposing agency have been given an opportunity to comment.

There would be no role in this process for the Governor, the head of the executive branch of State government, in exercising what would ordinarily be his veto power for the Legislature to act through legislation.

We believe that this proposal attempts to shift the allocation of responsibilities between the executive and legislative branches in a manner which is neither desirable nor necessary.

What is the evil that this amendment seeks to cure? It has been said that the Legislature needs this power to guarantee that laws are not adopted by faceless, tenured,

unelected bureaucrats who have adopted regulations which are inconsistent with the intent of the legislation being implemented.

We believe this proposed amendment is unnecessary because there are already several methods for achieving these objectives under existing law. In the first place, by drafting more specific legislation setting forth the parameters of regulatory activity, the Legislature can more precisely define the content and scope of any rules or regulations to be adopted.

Secondly, the Legislature already has the right to participate extensively in the rule-making process. The Administrative Procedures Act provides for notice to the Legislature of a proposed rule, opportunity to submit data and views, and the right to require an agency to hold a public hearing on any proposed rule. And, once a rule has been adopted, the Legislature, or any one of its members, can petition the administrative agency for change. We are not aware that these procedures have been tried extensively and found to be so unfruitful as to warrant an amendment to our Constitution.

Third, the Legislature can always overturn a regulation by amending the enabling statute. We see no need for a shift in the separation of powers traditional in our system of government.

Finally, the third coequal branch of government, the judiciary -- is available to determine whether regulations are inconsistent with, or violative of the intent of the legislation. Not only are these remedies already available, but the proposed cure of SCR No. 31 would be much worse than the disease. The legislative veto mechanism which can take away from a regulation, but not add to it, could leave a vacuum in the regulatory structure each time it is invoked. The regulatory process would then have to begin all over, with attendant delays and uncertainty for those affected by the

regulations. This piecemeal approach could leave the State with a Swiss cheese regulatory scheme riddled with holes, and would expose legislators to the constant importuning of special interest groups seeking to have a particular disfavored rule or regulation invalidated.

This amendment, if adopted, would unnecessarily tamper with two cardinal principles of our democracy that have stood us well for over 200 years: our system of checks and balances, and the separation of powers. These two tenets of our system would be undermined by this proposal, which seeks to bypass both the check or the Governor's veto power over legislative activity, and to exclude the Governor from an important governmental activity which is largely entrusted to the executive branch, which he heads.

This is particularly so since the resolution has been amended to permit the Legislature to act by a simple majority in each House, without the participation of the Governor in terms of the veto process. This would be to ignore, or underestimate the important constitutional interchange which takes place when the Governor exercises an absolute veto, or perhaps more importantly for our purposes, a conditional veto.

I have no doubt that the members of the Legislature exercise their authority with an important additional measure of care when considering whether to override a veto, especially if that override is also a rejection of a compromise or alternative offered by the Governor in a conditional veto. This unique constitutional event would be foreclosed by the proposal before you.

The Attorney General calls upon the Legislature to recognize that existing statutory and constitutional law allows it ample opportunity to influence the regulatory process, and to have the final word when it speaks with the voice of two-thirds of its members in each House. The present proposal is, therefore, unnecessary. It is also undesirable because it

would tinker with the Constitution without good cause, and would exclude the Governor from participation in a process of government left largely to the executive branch.

For these reasons, the Attorney General urges this Committee not to approve SCR No. 31.

I would be happy to answer any questions. Thank you.

SENATOR BUBBA: Senator Cardinale?

SENATOR CARDINALE: Thank you. Mr. Waugh, is it your impression that the rule makers consult legislators with respect to legislative intent where they have any doubt as to what that intent might have been?

MR. WAUGH: I don't know that I can answer that question. I, in my recent capacity as the Chair of the 911 Commission, had the pleasure of serving with members of the Legislature on the Commission, so we were able to discuss that in the process. I know -- or I would expect, and be confident that if legislators, or a committee of the Legislature, took the opportunity to comment on a proposed rule, that that comment would be given serious consideration.

SENATOR CARDINALE: I would like to just share with you two facts: One, for as long as I have been in the Legislature, no rule maker has ever consulted me, nor has anyone I know mentioned to me that they have been consulted with respect to what our intent was. In fact, we have had experiences with members of the administration -- not this administration, but the prior one -- which have indicated to us -- and I think I gave the specific incident at our last meeting -- that legislative intent was of absolutely no concern to people serving in the executive branch.

Secondly, I had occasion, because of a constituent who came to me and said there was a proposed rule, to call the rule maker body, and I was told that they were not interested in what I had to say; if I had to say something, I should come to the public hearing and say it.

I did go to the public hearing and say it, and I was chastised by the committee -- the group -- because I should have been able to just speak to the staff member. When I relayed to them that the staff member had told me he wasn't interested, they were somewhat embarrassed. But I think that both of these circumstances point out the fact that the present system is not working well. It is perhaps working well from the perspective of the rule makers, who can operate in sort of a vacuum, when no one has an effective way to challenge whatever it is that they might do.

Certainly you point out that we could, if we don't like something, as members of the public, or as members of the Legislature, go to the courts. That is a bulky process. I think the Legislature knows what it intends when it passes a bill. Had the administration been coming to us during all of the past years if they had any doubt about what we intended, this would not be before us. But it is because the opposite has been the case, from the observations of so many of us, that this is very much needed.

MR. WAUGH: Well, I would like to reply to that, to some extent. It has been my experience in government -- and I have been in and out of government over the past 14 years, I guess -- that we do look for legislative intent. But I think I would have to say that there are two components, really, to legislative intent, a bill as passed by the Legislature and signed into law by the Governor, unless it becomes law through the overriding of a veto. So I think there is legislative, and perhaps executive intent, or executive understanding of what is becoming law.

I know that as an attorney in the Attorney General's Office, whenever we are called upon to look at a statute and try to understand what it means, the polestar of that process is to figure out what the legislative intent was. We try to do that. There are times when we have to give an agency that is

looking for advice an answer that they do not want, because they want to do one thing, when we have looked at the law and we have looked at the legislative history, and we have concluded that the legislative intent is something else. We take that very seriously.

I would not, to the extent that I have been a proposer, or an adopter of regulations, display the attitude that you describe was displayed to you on occasion, but I think that-- I am not aware that that is something that happens on a regular, everyday basis. I certainly would hope it is not. I think it is something that should be brought to the attention of the Commissioner or the Governor or whoever is in charge of the agency that is acting like that, because that is not an appropriate way to act.

If I may just say one more thing: There are times when one has to try to understand that the intent of a single legislator may not necessarily reflect the intent of the entire Legislature, or may not reflect the intent that is found in legislative history. That is something the courts will say on occasion; that they look to what was before and what was said by a committee or the whole Legislature, rather than just one legislator saying, "Well, that is not what I meant when I voted for the bill." But I think legislative intent is very important.

As I said in my remarks, the Legislature has the opportunity of being very specific about the parameters in which the executive branch can act when it adopts regulations. If I may just give you one example: The 911 statute specifically says that it encourages regionalization, but it says that the regulations and the actions of the Commission cannot require regionalization of public safety operations. So that is an incidence where I think the Legislature was concerned that the executive branch might say, "Well now, here

is a great opportunity to require regionalization. That's not what we want, so we are going to say you can't do that."

SENATOR BUBBA: Senator Schluter?

SENATOR SCHLUTER: Thank you, Mr. Chairman. Mr. Waugh, my comments are not directed at you personally. You have a very distinguished record and you are a citizen of that great town of Pennington, so I don't want any of my comments to be--

SENATOR BUBBA: And he is a voter.

SENATOR SCHLUTER: --construed as being personally hostile. My experience has been contrary to the statement you just made about the willingness of the administration of the executive branch of government to consider legislative intent and to be responsive with respect to other people who are saying that this was not the intent on administrative rules and regulations.

I spent eight years as a consultant dealing with DEP, mainly with the Administrative Code. A more recent example is something the Senate has passed -- and it will come up in the House; it was my bill -- where we are proposing that two legislators from each House serve on the State Health Planning Board. Now, the concept here is to provide legislative input, to provide balance, and to provide a little bit of expertise to us in reporting back of what that State health planning process is doing, so we will be better informed.

I know there has been some discussion about legislators serving on these kinds of commissions as being against the concept of separation of powers, yet it has prevailed, and I think it is healthy. At the same time, there is a proposal to have legislators serve on the Health Care Facilities Administrative Board, which I do not favor because I think that is getting too close to the regulatory function, as long as you have that kind of oversight and that kind of involvement on the Health Care Planning Board.

Now, I have a question: In any way is SCR No. 31, by Senator Dorsey, violative of any Federal constitutional provisions of equal protection, or anything like that?

MR. WAUGH: That is not an issue that I have looked at or thought about before I came here, but I would have to say that sitting here today I cannot think of any provision of the Federal Constitution that it would violate. I think that similar legislation proposed -- or enacted by the Federal Legislature, was held to violate the Federal Constitution, but that would be for the same reasons that our Supreme Court held the statute that the Legislature passed violated our Constitution. But obviously, if you amend the Constitution to permit it, it cannot violate our Constitution.

SENATOR SCHLUTER: Just to confirm and let the record show that when the Supreme Court, by unanimous decision, overturned that law, it was a law, and what is being proposed here is an amendment to the Constitution, which would, therefore, take care of that unconstitutional factor.

Mr. Waugh, you talked about the ability of the Legislature, if they want to change the intent or administrative ruling, that they can pass a law, and this is correct. But I think the record should show, of course, as we all know, that by passing a law, we have to get approval by the Governor, and if you don't get approval by the Governor, it takes two-thirds vote of both Houses to override the Governor.

Here we are talking about a three-fifths majority by both Houses to amend, or to change a regulation. So the ability to change it by passing a law is not the same as this concurrent resolution.

MR. WAUGH: I understood the resolution -- and I just saw the changed version this morning; it wasn't in my file -- to permit the regulation to be invalidated by a simple majority in each House.

SENATOR BUBBA: The regulation to be invalidated by a simple--

MR. WAUGH: By a simple majority in each House.

SENATOR BUBBA: No, I don't think that is what we talked about, a simple majority.

UNIDENTIFIED MEMBER OF COMMITTEE: Can staff enlighten us on this?

SENATOR INVERSO: Well, it says a majority of the authorized membership.

MR. WAUGH: Yes, so that would be 41 votes in the Assembly and 21 votes in the Senate.

SENATOR SCHLUTER: I'm sorry, I was reading the wrong three-fifths. Okay. I stand corrected.

MR. WAUGH: I'm sorry if you weren't finished. I was going to respond, but I will wait until you are finished.

SENATOR SCHLUTER: No, I have another item to bring up on this. But you go ahead.

MR. WAUGH: For something to become law, to give the executive agency the opportunity to implement it, it has to be passed by both Houses and signed by the Governor, unless the veto is overridden. And we believe it undesirably changes the balance of power in the way the responsibilities are divided between the executive and legislative branches to say that the Legislature can pass a law, and the Governor is involved in that process. And then when the Governor tries to implement it, the Legislature, acting alone, can say, "Well, that is not what we meant, so we are going to invalidate what you have done. We are not going to give you the same constitutional opportunity you had when the original law was passed, to disagree with us."

That is the problem we see with the statute, because the Legislature always has the opportunity to be very specific about what the parameters of the executive branch are. You know, sometimes a law will say something very general: "The

Commissioner shall adopt regulations implementing the law." That gives very little hint of what the real legislative intent is in detail, and gives the executive branch a lot of discretion in how to go about things.

Other times the Legislature will say, very specifically, in several pages of "The regulations shall say this," or this or this. That gives much more opportunity for the Governor to understand what the legislative intent is when he decides whether to sign or veto the bill, and it restricts the options of the executive agency in implementing it.

SENATOR SCHLUTER: I understand what you're saying. Let me just point out that the proposal says: "Upon a finding that an existing or proposed rule or regulation is not consistent--" I think it is implicit that there has to be that finding and that kind of declaration.

Let me move on: In the last session of the Legislature -- this is just by way of reciting a fact here -- the question came up about Executive Order No. 2. That is an Executive Order; it is not an administrative rule. The laws say that with Executive Orders, if both Houses within, I think it is 60 days, or 30 days, rescind an Executive Order, it shall therefore be rescinded. In the middle of 1991, the Senate, after hearing testimony on the proposed Executive Order merger of BPU with DEP, unanimously voted -- 31 to 0 -- to rescind that Executive Order.

Now, that gives the Legislature the power to do that. Unfortunately, from my standpoint, the Assembly Speaker at the time did not choose to post the bill in a timely manner, so it became moot and the Executive Order took effect. But we do have this power. I don't see that there is that much difference, philosophically and constitutionally and every other way, in the power we are asking for here.

MR. WAUGH: I see a difference.

SENATOR SCHLUTER: Okay, if you could, and then I will wrap up in a second. Why don't you respond to that?

MR. WAUGH: Under the Executive Reorganization Act, there are, if you will, three players: There is the Governor, the Senate, and the Assembly. Under the Executive Reorganization Act, each of the three players gets an opportunity to do something. The Governor does something, and if the Legislature agrees on what it wants to do, the Legislature can disapprove what the Governor has done. There is still action by both sides.

In the proposal here, there is only action by the Legislature. The Governor is left out of the process.

SENATOR SCHLUTER: I understand what you're saying, but I also believe that my leaving the Legislature out of the process of oversight, it becomes one-sided.

Let me conclude by reciting things which we all know; that is, the Governor of the State of New Jersey has been cited as being the most powerful Governor of any state in the nation because of appointed power, because of no other statewide elective office, because of conditional veto, and because of line item veto. I think this is a matter of sharing power, and I do not think it is unreasonable. These are the reasons that I support this -- enthusiastically support it.

Thank you.

SENATOR BUBBA: May we hear from Ed McCool, please?

E D M c C O O L: Thank you, Mr. Chairman. My name is Ed McCool. I am Executive Director with New Jersey Common Cause.

Common Cause agrees completely with the prepared remarks as presented by the representative from the Attorney General's Office. The last time this proposed amendment was on the ballot, we joined all of the living Governors, as they are referred to, in urging voters to not approve this amendment.

Our reasons are consistent with the same ones that the Attorney General's Office has outlined. One of the things that

strikes me about SCR No. 31 is that the first half can already be done without amending the Constitution. The Legislature can review any rule or regulation. It can determine, to its best ability, whether it is consistent with the legislative intent, and, upon the finding that it is or it is not, it can, through a concurrent resolution, communicate that finding to the executive branch. So to that extent it is not necessary, in my opinion, to have to amend the Constitution.

The guts of the proposal is really in the second half, which allows for that regulation to be revoked by a majority vote. It raises some very practical questions, such as: Which Legislature? When you talk about legislative intent, if you are talking about regulations that pertain to a law, or to a piece of legislation that was adopted several sessions ago, which Legislature's intent are you going to go by? Given the fact that the Legislature keeps no minutes of its committee hearings, keeps no minutes of its floor debates, how is that intent, even historically, going to be determined?

So what we are really saying here is legislative intent, as manifested by the existing sitting Legislature, whether or not it was involved in the passage, debate, and voting on that bill. That is very problematic at the very least, even if we were to agree with the constitutional concept of allowing the Legislature to, basically, select regulations and make them subject to its own approval before they could continue to be in effect.

That places a very heavy burden, as it exists right now, on the Legislature to be careful, as it often strives to be, in the crafting of its laws, to the extent that those laws contain wording which throughout the legislative debating process have had to be passed over, or finessed, so to speak, in order for the bill to pass. If those areas prove problematic in the regulatory process, the Legislature is constitutionally free to revisit that and create a more exacting expression to amend the law.

One of our prime concerns also, is that while the regulatory process is exposed to the lobbying process-- Up until this year the public was not able to determine to what extent professional lobbying was involved in influencing the regulatory process. With the new lobby disclosure law, at the end of the year we will be able to make some determination to the extent that that is done. This constitutional amendment further exposes the regulatory process to political lobbying, insofar as the passing of benefits, even in the form of campaign contributions, is precluded by the Code of Ethics throughout the executive branch. When we throw the regulatory process into the Legislature, we throw it into the same arena where there is a great deal, an ever-increasing amount of money going back and forth between special interests and the Legislature. That, in our view, is a very hazardous exposure and, quite frankly, given all the other reasons I have outlined, one that is not necessary. It provides a whole other different framework in which the regulations are going to be basically argued.

Another thing is -- and I am respectful of the points that the Senators were making earlier about the regulatory process not working, in the sense that the legislative intent was being thwarted by the executive branch-- I wonder how comfortable we would all be seeing where the legislative intent was basically going to be thwarted by the Legislature? That legislative intent is-- I am trying to think of an example where the Federal Constitution does not apply.

SENATOR BUBBA: Any bill that the Legislature repeals does that.

MR. McCOOL: I'm sorry, I don't understand.

SENATOR BUBBA: Any bill put in to repeal another bill--

MR. McCOOL: Yes?

SENATOR BUBBA: Thwarts the legislative intent of the last Legislature.

MR. McCOOL: Of the previous one. What I was thinking was, in a civil rights bill where the executive branch implements a whole series of regulations to implement what they believed was a civil rights mandate, and then a subsequent Legislature says, "That's too far. That is not what we meant at all." In fact, by putting up the legislative veto, those regulations, it thwarts the original intent of the civil rights legislation, which is not different from what you were just describing in terms of repealing.

Those are, in essence, my remarks. Thank you.

SENATOR BUBBA: I have no one else listed on this bill. The bill has been voted out of Committee already. This was a constitutional requirement, and I would imagine we could say the constitutional requirement has been fulfilled, and now we can end this public hearing at this moment for SCR No. 31. We will move on to the agenda of bills today.

(HEARING CONCLUDED)

APPENDIX

April 2, 1992

STATEMENT OF A. WAUGH, JR. BEFORE THE
COMMITTEE ON STATE GOVERNMENT
SCR-31 SCS

Good Morning. I am Alexander P. Waugh, Jr., Counsel to the Attorney General.

Thank you for allowing me the opportunity this morning to express the Attorney General's views regarding Senate Concurrent Resolution 31. I speak not only as a representative of the Attorney General, but as one who has exercised rulemaking authority as a member of the Election Law Enforcement Commission and as Acting Director of the Division of Alcoholic Beverage Control in the past, and as a member of the New Jersey 9-1-1 Commission in the present.

This resolution is the latest in a series of attempts by the Legislature over the past decade to permit a "Legislative Veto" of administrative agency rules and regulations.

In 1981, an attempt was made by statute to implement such a veto power. The statute was passed over Governor Byrne's veto and the Supreme Court struck it down without dissent.

Thereafter, over two successive legislative sessions, the Legislature was able to attain sufficient votes to put a proposed constitutional amendment attempting to effectuate such a veto on the general election ballot in November of 1985. It was opposed by all living governors of New Jersey and

the voters soundly defeated it by 340,000 votes. It failed to carry any of New Jersey's twenty-one counties.

With some important changes, the Senate is now considering another proposed amendment to our Constitution, which would permit the Legislature to veto existing or proposed administrative rules through passage of a concurrent resolution with a two-thirds majority in each house of the Legislature, but only after a public hearing is held by one of the houses. There would be no role in this process for the Governor, the head of the Executive Branch of State Government. While admittedly this proposal has eliminated some of the defects of the prior proposals, it still seeks to shift the allocation of responsibilities between the Executive and Legislative Branches in a manner which is neither desirable nor necessary.

What is the evil that this Amendment seeks to cure? It has been said that the Legislature needs this power to "guarantee that laws are [not] adopted by faceless, tenured, unelected bureaucrats . . (who) have adopted regulations that are inconsistent" with the intent of the legislation being implemented.

We believe this proposed Amendment is unnecessary because there already are several methods for achieving these objectives under existing law.

1. In the first place, by drafting more specific legislation setting forth the parameters of regulatory activity, the Legislature can more precisely define the content and scope of any rules

or regulations to be adopted.

2. Secondly, the Legislature already has the right to participate extensively in the rule making process. The Administrative Procedures Act (N.J.S.A. 52:14B-4) provides for notice to the Legislature of a proposed rule, opportunity to submit data and views, and the right to require an agency to hold a public hearing on any proposed rule. And, once a rule has been adopted, the Legislature or any one of its members can petition the administrative agency for change. We are not aware that these procedures have been tried extensively and found to be so unfruitful as to warrant an amendment to our Constitution.

3. Third, the Legislature can always overturn a regulation by amending the enabling statute. It The proposed Amendment excludes the Governor from the process. We see no need for such a shift in the separation of powers traditional in our system of government.

4. Finally, the third coequal branch of government -- the Judiciary -- is available to determine whether regulations are inconsistent with or violative of the intent of the legislation.

Not only are these remedies already available, but the proposed cure of SCR 31 would be much worse than the disease. The legislative veto mechanism, which can take away from a regulation but not add to it, would leave a vacuum in the regulatory structure each time it is invoked. The regulatory process would then have to begin all over with attendant delays and uncertainty for those affected by the regulations. This piecemeal approach could leave the State with a Swiss cheese regulatory scheme, riddled with holes, and would expose legislators to the constant importuning of special interest groups seeking to have a particular disfavored rule or regulation invalidated.

This amendment - if adopted - would unnecessarily tamper with two cardinal principals of our democracy that have stood us well for over two hundred years - our system of checks and balances and the separation of powers. These two tenets of our system would be undermined by this proposal, which seeks to bypass both the check of the Governor's veto power over legislative activity and to exclude the Governor from an important governmental activity which is largely entrusted to the Executive Branch which he heads. This is particularly so since the Resolution has been amended to permit the Legislature to act by a simple majority without the participation of the Governor in terms of the veto process. This would be to ignore or underestimate the important constitutional interchange which takes place when the Governor exercises an absolute veto or, perhaps more importantly for our purposes, a conditional veto. I have no doubt that the members of the Legislature exercise

their authority with an important additional measure of care when considering whether to override a veto, especially if that override is also a rejection of a compromise or alternative offered by the Governor in a conditional veto. This unique constitutional event would be foreclosed by the proposal before you.

The Attorney General calls upon the Legislature to recognize that existing statutory and constitutional law allows it ample opportunity to influence the regulatory process and to have the final word when it speaks with the voice of two-thirds of its members in each house. The present proposal is undesirable, because it would tinker with the Constitution without good cause and would exclude the Governor from participation in a process of government left largely to the Executive Branch. For these reasons, the Attorney General urges this Committee not to approve SCR 31.

Thank you.