PUBLIC HEARING

before

ASSEMBLY STATE GOVERNMENT COMMITTEE

ASSEMBLY CONCURRENT RESOLUTION No. 119

(Amends Constitution to permit Legislature
to veto administrative rules and regulations)

February 25, 1991
Room 368
State House Annex
Trenton, New Jersey

MEMBERS OF COMMITTEE PRESENT:

Assemblyman Thomas J. Deverin, Acting Chairman
Assemblyman Robert J. Martin
Assemblywoman Maureen B. Ogden
Assemblyman D. Bennett Mazur
Assemblyman George Hudak

ALSO PRESENT:

Donald S. Margeson
Office of Legislative Services
Aide, Assembly State Government Committee

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Hearing Recorded and Transcribed by
Office of Legislative Services
Public Information Office
Hearing Unit
State House Annex
CN 068
Trenton, New Jersey 08625

New Jersey State Legislature
ASSEMBLY STATE GOVERNMENT COMMITTEE
STATE HOUSE ANNEX, CN-068
TRENTON, NEW JERSEY 08625-0068
(609) 292-9106

COMMITTEE NOTICE

TO: MEMBERS OF THE ASSEMBLY STATE GOVERNMENT COMMITTEE

FROM: ASSEMBLYMAN BYRON M. BAER, CHAIRMAN

SUBJECT: **PUBLIC HEARING and COMMITTEE MEETING - February 25, 1991**

The public may address comments and questions to Donald S. Margeson, Committee Aide, or make bill status and scheduling inquiries to Barbara Lestician, secretary, at (609) 292-9106.

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1. PUBLIC HEARING

The Assembly State Government Committee will hold a public hearing on **Monday, February 25, 1991 at 10:00 a.m. in Room 368 of the State House Annex** concerning the following legislation:

ACR-119 Doyle/Haytaian	Amends Constitution to permit Legislature to veto administrative rules and regulations.

This public hearing has been ordered by the General Assembly under Rule 143 of the Rules of the General Assembly and in compliance with the requirements of Article IX, paragraph 1 of the State Constitution, concerning proposed constitutional amendments.

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(OVER)

Issued 2/20/91

II. COMMITTEE MEETING

Immediately following the conclusion of the public hearing announced above, the Committee will hold a meeting to consider the following bills:

A-3126 Salmon/Jacobson	Restructures the Executive Commission on Ethical Standards and amends its powers and duties.
A-3896 Jacobson /Villapiano	Establishes State Audit Commission to study and report on state operations every four years.
A-4234 Baer/Mazur	Creates a Fair Campaign Practices Commission.
A-4341 Schluter/Mazur	Requires printed election-related material which resembles a government document to indicate that the material has no such official status.
AR-221 Cimino	Memorializes Congress to enact zip code designation legislation.
S-571 Ewing	Provides that the date of the postmark shall be the date of filing for documents required to be filed with Joint Legislative Committee on Ethical Standards.

ASSEMBLY CONCURRENT RESOLUTION No. 119

STATE OF NEW JERSEY

INTRODUCED SEPTEMBER 10, 1990

By Assemblymen DOYLE, HAYTAIAN, Assemblywoman Ford
and Assemblyman Littell

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 General Assembly of the State of New Jersey (the Senate 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, from taking effect 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 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:

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.

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 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 State executive agencies are authorized to issue rules and regulations which have the force and effect of law. 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.

STATEMENT

This concurrent resolution proposes to amend the Constitution to provide the Legislature with the authority to invalidate any 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.

STATE GOVERNMENT

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

ASSEMBLY STATE GOVERNMENT COMMITTEE

STATEMENT TO

ASSEMBLY CONCURRENT RESOLUTION No. 119

STATE OF NEW JERSEY

DATED: FEBRUARY 4, 1991

The Assembly State Government Committee reports favorably Assembly Concurrent Resolution No. 119.

This concurrent resolution proposes to amend the State 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.

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ASSEMBLYMAN THOMAS J. DEVERIN (Acting Chairman): The State Government Committee will come to order, please. The first order of business is a public hearing on ACR-119, sponsored by Assemblymen Doyle and Haytaian. It amends the Constitution to permit the Legislature to veto administrative rules and regulations.

This public hearing has been ordered by the General Assembly under Rule No. 143 of the Rules of the General Assembly, and complies with the requirements of Article 9, paragraph 1 of the State Constitution concerning proposed constitutional amendments.

Mr. Byron Baer is tied up today, and Mr. Mazur is sitting in for Mr. Cimino. Will you poll the board?

MR. MARGESON (Committee aide): Yes, Mr. Chairman.

Assemblyman Mazur?

ASSEMBLYMAN MAZUR: Here.

MR. MARGESON: Assemblyman Martin?

ASSEMBLYMAN MARTIN: Here.

MR. MARGESON: Chairman Deverin?

ASSEMBLYMAN DEVERIN: Here.

The public hearing is now in order. We are honored to have as our first witness, Governor Brendan Byrne.

Governor, it's always nice to see you back in the old neighborhood.

GOVERNOR BRENDAN T. BYRNE: Actually I was never-- This neighborhood didn't exist when I was here. That's my first point. Anyway--

ASSEMBLYMAN DEVERIN: We used to have meetings in the basement, if I remember rightly.

GOVERNOR BYRNE: That's right, and that's my first point with respect to this concurrent resolution which would amend the Constitution; and that is, that the Legislature has a great deal more power today than it had, even in my day.

Frankly, my day goes back to when I first came here in 1955. All that happened with respect to legislation was that Hap Farley met with a group of Republican legislators upstairs, and when the bill came down to be voted on, Farley would stand up and say, "It's a good bill and I recommend its passage." That was it.

Now, you have a lot more power, a lot more resources, a lot more insight into what you're doing. You have hearings on bills, and when you pass them, you have every right to expect that they are in pretty good shape. Then you give them, under the Constitution, to the Governor to execute.

That's the design of our Constitution. You pass the bill, the Governor executes the bill. I'm not sure that ACR-119 adequately even addresses that problem, because it gives the Legislature a right inconsistent with the basic separation of powers. I don't know how the courts -- or you, frankly, because you still have control over this ACR -- would deal with that.

I don't know if you want to deal with a distortion of that basic concept, of you passing the laws and the executive branch executing the laws. A constitutional amendment with that kind of distortion is something that, frankly, the people didn't like in 1985, I guess, when you gave it to them, and which I don't think you really like if you look at it pretty carefully.

Now, when I vetoed the bills that contained basically this concept, I think maybe I was a little more emotional about turf protection, you know, protecting my administration. Although the last bill I vetoed, I vetoed on the eve of my departure, and the veto was defended by the Kean administration.

I understand the frustration of the Legislature, and I have several observations to make in that regard. In other words, what the Legislature ought to do so that this frustration can be ameliorated.

One of the things I think you can do is take a look at what you enacted into law, and see what the executive branch is doing with it. If you don't like what the executive branch is doing with it, change it. I don't think that's done enough in the legislative process. I think that from time to time you have a hearing, and say, "Hey, here's a bill we gave you to execute, executive branch, and we think you're doing a lot of things that we never intended for you to do. We're going to propose to amend the legislation so that your direction is changed to concur with what the Legislature wants done on this bill." I don't see that being done enough by the Legislature, and I would urge you to do it more.

Second, I think that maybe in drafting certain pieces of critical legislation, that you should put a little more detail into that legislation, so that the direction that you want the executive branch to take is more clearly spelled out.

I remember when we passed the Casino Control Act -- which I guess everybody would concede is a critical piece of legislation -- I at first wanted all of the regulations enacted into law. I wanted a separate law pertaining to the regulations. I got talked out of that, but I wound up with a Casino Control Law which was pretty detailed and pretty specific, and you hear very little criticism that the regulations of the Casino Control Commission are inconsistent with the basic concepts of the law. So, working together in that area, I think we went in the direction that both the executive and the Legislature wanted to go.

So, I would suggest that there be in critical pieces of legislation more of a sense of what the legislative direction ought to be. By the way, looking at what the executive does do with some pieces of legislation, this would probably not cure what are perceived to be the abuses in any event.

For example, you passed the ECRA bill. For several years the Department of Environmental Protection did all kinds of things without regulations. There is such a thing as an administrative consent order, which is in no statute, which is in no regulation, which was only in the minds of somebody at DEP for a number of years. Administrative consent orders were there. No regulations, nothing-- If you had this constitutional power, there is nothing that you could have done to prevent the Department from doing what it was doing. I'm not criticizing that in terms of policy; I'm just criticizing it in terms of procedure.

So, I think you have a number of effective alternatives at your disposal which are perfectly legitimate, and which are consistent with our basic concept of separation of powers, that you ought to exercise, that you certainly ought to exercise or try, and have tried in a great many situations, without the need to destroy the basic concepts which we've valued in the Federal constitutional setup, and which we patterned the State Constitution after. You can also, through the appropriations process, control a good deal of the executive runaway, if you think that has happened.

So, I come today to reiterate what I said in several veto messages: To defend the concept that this would be more than just tinkering with the Constitution. This would be making a substantial change in the checks and balances, which we first read about probably in the fourth grade, and which we have honored throughout the history of our country and our State.

I come to sympathize with the legislative frustration, to offer alternatives to a constitutional amendment, and to suggest in the light of the history of bills -- when you had bills, and constitutional amendments, when you proposed constitutional amendments -- that you give Assembly Concurrent Resolution No. 119 a respectable burial, and that you examine

some of the alternatives, which are within your very legitimate power, to correct the perceived abuses which gave rise to the frustration which is evidenced by ACR-119.

ASSEMBLYMAN DEVERIN: Governor, you know Assemblywoman Maureen Ogden--

GOVERNOR BYRNE: Sure.

ASSEMBLYMAN DEVERIN: --and Assemblyman Martin?

GOVERNOR BYRNE: Yes, indeed.

ASSEMBLYMAN DEVERIN: Do you have any questions, Bob?

ASSEMBLYMAN MARTIN: If I could, Governor, just ask you one question-- I more or less go along with your philosophy. What happens, or how would you approach the situation, yes we could-- One of the alternatives is to pass legislation, but legislation would also entail the Governor signing it. If you had a situation where the Governor was supportive of one of the departments and the Legislature thought that the department, by virtue of its interpretation of the regs, had exceeded its authority, what would the Legislature do then if the Governor -- not in your administration, of course, but a future administration might -- if they supported their department-- The Legislature, as I see it, would be somewhat helpless to be able to deal with that situation.

GOVERNOR BYRNE: But I think that's part of the checks and balances. What you're saying is, the alternative is to give the Legislature the power to erode a statute without the presentment feature that's contained in the Constitution.

I was thinking, as I prepared to come here over the weekend, that-- And all of you know that I've said that the Pinelands Protection Act was the thing I wanted to be remembered for. If every regulation that the Pinelands Commission made was subject to legislative veto, the Pinelands would not survive, because you would have that critical issue before the Legislature without the Governor, every time a regulation was passed. To get a majority of the Legislature to

support the Pinelands every-- And you only have to lose once with respect to the Pinelands. You only have to lose once, and it's gone.

So the Pinelands would disappear in my opinion, if the Legislature, without the Governor, had a right to veto the regulations of the Legislature. So, what I'm really saying is, you've got checks and balances. You've got the presentment clause. The presentment clause makes sense. What you are really arguing, I think, is that there ought to be the opportunity for the Legislature, without a presentment clause, to legislate in an area. I think that if the Governor has really gone so far from what you had intended, that you ought to be able to muster a veto proof piece of legislation.

ASSEMBLYMAN DEVERIN: You know, I think the idea of this comes-- But sometimes a piece of legislation is passed by both Houses and the Governor signs it, and by the time the final regulations are written, they no more resemble the original piece of legislation--

GOVERNOR BYRNE: Absolutely.

ASSEMBLYMAN DEVERIN: Now, as I listen to your testimony, do you think that the preliminary regulation ought to be written into the law itself?

GOVERNOR BYRNE: No. I think that-- No, not necessarily. But I think that the law ought to be specific enough. Frankly, I saw some regulation, one time, in the last couple of years, and I said, "What's the authority for that regulation?" I looked back and somebody told me it was a piece of legislation that I had signed, and I never dreamed that what I signed would justify--

ASSEMBLYMAN DEVERIN: If you're surprised, imagine how we are sometimes.

GOVERNOR BYRNE: Yes, yes. The fault was that the piece of legislation was such a broad piece of legislation that, indeed, it let the department do anything. Now, if I

were still Governor when that happened, I would have proposed an amendment to the bill and certainly would have supported an amendment to the bill, because, believe it or not, the Governor doesn't know all the regulations and all the interpretations of regulations that are going on. And sometimes he is surprised and disappointed, or unsupportive of some of the regulations which are engendered by legislation.

So, I don't say write all the regulations in. I do say, write the legislation to be specific enough so that the executive branch can't go on a frolic of its own -- as we used to say in law school -- in interpreting the basic bill that they are called on to interpret. I think with the staffs you have here, you can anticipate what might happen. You can make the legislation specific enough, and you have the amendment process if you fail in the first instance.

ASSEMBLYMAN DEVERIN: Maureen?

ASSEMBLYWOMAN OGDEN: Yes. Governor, I have a problem in reverse with the wetlands, that you anticipate with the Pinelands. We did try and make it specific enough so that it was, you know, very clear guidance to the Department, but Tom Kean, as Governor, unfortunately vetoed those particular sections, feeling that was encroachment upon his executive power.

We have, for instance, in the month of March coming up, proposed new rules and regulations in the wetlands. One is for low- and moderate-income housing. Now, while that's a very worthy objective, I don't believe that there is anything in the statute that gives them the authority to propose that. In fact, they admit that. So, when we have an issue like this in which the Department has gone off on its own, totally without any basis whatsoever in the law, how are you to deal with that?

GOVERNOR BYRNE: Well, the courts have dealt with that in several instances, and said, specifically with regard to the Department of Environmental Protection, that what they did was

not authorized and the court has struck down certain regulations by the Department. So I think you deal with it-- I'm not familiar with Tom Kean's reasoning in vetoing regulations, but I don't think there is anything wrong with proposing legislation which is fairly specific in what you want done and what you do not want done.

ASSEMBLYMAN DEVERIN: Governor, we passed this type of legislation -- as a bill itself, not as a constitutional amendment -- and it was vetoed by you, I think.

GOVERNOR BYRNE: I think four or five times.

ASSEMBLYMAN DEVERIN: Yes, I think you almost had a record. (laughter) But didn't we override the veto once?

GOVERNOR BYRNE: Unanimously.

ASSEMBLYMAN DEVERIN: And then you took it to court, and had it killed.

GOVERNOR BYRNE: No, you took it to court.

ASSEMBLYMAN DEVERIN: Okay.

GOVERNOR BYRNE: What happened -- just for the record -- was that you gave me the legislation, and I vetoed it and told you it was in violation of the Constitution. You overrode the veto. I then got an Attorney General's opinion, signed by Judy Yaskin by the way--

ASSEMBLYMAN DEVERIN: She used to work here.

GOVERNOR BYRNE: --saying that it was unconstitutional. I then instructed the executive branch to disregard the legislation. You then brought an action in Superior Court for an interpretation as to the constitutionality of the bill. The Supreme Court unanimously held it was unconstitutional.

It's the only, I think, veto you ever overrode on me, Tom.

ASSEMBLYMAN DEVERIN: Yes, and we apologize for that. (laughter)

Mr. Mazur?

ASSEMBLYMAN MAZUR: I guess everybody has one little horror story with an administration. Of course, I was never an Assemblyman while you were the Governor, but I had one case where, after much struggle and effort, we passed a law banning the use of steel-jaw, leg-hold traps, okay? I was startled to see that shortly after that, in forming the Fish and Game Code for the coming year, that the Fish and Game Council, made up of sportsmen -- or, they call themselves sportsmen -- promulgated that it was authorized to use steel-jaw, leg-hold traps.

I attended the hearing and I tried to speak up against it, but I was told to get the hell out of there; I had no business there. Eventually we had to go to court to reinforce that law, because Tom Kean did nothing about it. It cost us all some money to set that aside.

Now, I understand that the Fish and Game Council are not State employees, and I know that there are a number of other similar panels, or whatever they are -- professional groups -- who establish regulations, which, of course, the Commissioner signs off on, but nevertheless, they are making the decisions and they are neither elected, nor in any governmental role other than this advisory rule-making power. I think that that is something that really has to be addressed.

GOVERNOR BYRNE: But I don't think that this resolution would have helped you in that situation.

ASSEMBLYMAN MAZUR: Well, we would have had the ability--

GOVERNOR BYRNE: Because they were doing something which was clearly unauthorized by the statute. You went to court and you ended it, which is what you would have to do if they are clearly violating anything.

ASSEMBLYMAN MAZUR: Well, I would like to be able to tell those rules and regulations, that Fish and Game Code. I'm sure all the members of the Legislature would.

GOVERNOR BYRNE: Oh, there's no question. As a matter of fact-- And it's not a surprise, every member of the Legislature would also like to be Governor. And yet we--

ASSEMBLYMAN DEVERIN: Well, maybe. (laughter)

ASSEMBLYMAN MAZUR: I don't think there is a governor in this country who wouldn't take the same stance and argument that you are advancing. You know, I mentioned to this Committee before, there is a professor named Redford -- Emmett Redford -- of the University of Texas, who has a very fine book out -- it has been out for about 20 years -- on the dominance of the administration over the Legislature; that it is not separate and equal, not in any sense of the word, and that the administration holds all the "Keys to the Kingdom." They have all the information, and the intelligence that is gathered. They have an enormous staff at their disposal. They have clientele that they can muster to press the Legislature to do the things that the administration wants done, and appropriate the amounts of money that the administration wants appropriated. There is no equity here between the branches of government at all.

GOVERNOR BYRNE: Well, it would be interesting then to read John Kennedy's different positions when he was a Senator and when he was President. When he was a Senator, all the power he thought the President had, and when he was President, all the power he thought the Congress had.

ASSEMBLYMAN DEVERIN: The stand you take is where you're sitting, sometimes.

GOVERNOR BYRNE: That's right.

ASSEMBLYMAN DEVERIN: Anybody else? (no response)

Governor, thank you for coming down. You bring back some great memories.

GOVERNOR BYRNE: Thank you. It's a pleasure to be here. Thank you.

ASSEMBLYMAN DEVERIN: Mr. Doyle, the sponsor, is waiting to say hello to you this morning.

GOVERNOR BYRNE: Oh, my God. It's good to see you. How are you doing?

A S S E M B L Y M A N J O H N P A U L D O Y L E: I don't know if there is, as there is in courts, an off-the-record or a sidebar, but sitting behind the Governor I couldn't help but recall the day in about April of 1977, we were down in Deepwater. There was an important bill with respect to oil spill compensation. Tommy, you were one of the few Democrats who voted against it, coming from the Meyner era, but we got it passed, and now it's in and you and George--

The Governor was signing it and he was flanked by Russo and Newman, and the third member of the team, Doyle, was behind him. The Governor was then going through what some, not he, thought was going to be a tough primary. He was, as any good politician, counting his friends, and perhaps those who weren't as close to him, though I was, in any event.

He looked and saw Russo and Newman, and he said, "Where's Doyle?" So I piped up in the back, "I'm behind you, Governor." He said, "That's not what I hear." (laughter)

I was then, but not today.

ASSEMBLYMAN DEVERIN: Governor, thank you very much. It's always nice seeing you.

GOVERNOR BYRNE: Thank you. It's good to be here.

ASSEMBLYMAN DOYLE: It may well be said--

ASSEMBLYMAN DEVERIN: Did you hear all of the Governor's testimony?

ASSEMBLYMAN DOYLE: I heard most of it, and what I did not hear, I was filled in on. It's, I think, appropriate to say that the importance of a piece of legislation can best be seen by the quality of the opposition it draws. Evidently this must be an important one to draw somebody as distinguished as Governor Brendan Byrne.

I think to see such an excellent spokesperson for the executive at a legislative body indicates the test that is presented by this question. It was presented once before, and the Governor rightly recounted the history of it; that is, a

unanimous vote by the Legislature, a veto, a unanimous override, and what happened, respectfully, is that we got ganged up on.

The Supreme Court found, seven to nothing, that the executive was right, and we were -- as Assemblyman Mazur pointed out in quoting the book -- once again ascribed to a less equal position. Now, what's happened since then it seems, is not only the steel-trap, leg-hold horror story, but horror stories that each one of us can see.

I know that many of them seem to concentrate in the area of the DEP, but the past two Governors since Governor Byrne have said they want a Coastal Commission, when they haven't been able to find the law, have adopted rules and regulations, and twice the Appellate Courts of this State -- once the Supreme Court and the next time the Appellate Division -- struck down that regulation as being past the authority of the Governor. It is clear that governors will continue to do that unless there is some brake, some leash, some hold, that this branch of government has on them.

Now, we can do some things. We can, whenever we pass a bill, not put in those critical words that say, "The appropriate department may adopt and enforce rules and regulations pursuant to the Administration Procedures Act consistent with the spirit and meaning of this law." What they deemed to be consistent in the past has not always been consistent.

Or, we can pass laws, as the Governor said. Both of those procedures are unwieldy and inappropriate. All that this resolution, if adopted, would do, is give the public a chance to speak. To those who would say they had that chance -- oh, I think six years ago-- We've put questions on the ballot. we put the casino question on twice. We've put sheriffs' terms on the ballot several times. I think these are different times. I think we've seen a revolution over the last several

years, and I think the public should have the opportunity, and we should give them the chance, and they have the right, to vote on it again.

I just remind you of the story with the Environmental Protection Agency, and I'll give you one other, more recent horror story, that I might have favored the Committee with at the time of its first consideration and before this public hearing:

A situation where a rule and regulation were adopted by the DEP -- in my judgment clearly past their authority -- with respect to something called treatment works approvals, and how they apply. A court of law said the regulation was wrong. "It's past your authority and you have no right to enforce it."

A constituent of mine had the same exact situation as was presented before the court. The DEP determined, and the Attorney General agreed, "Oh, that was only in that case. It's not in any other case. The rule still stands."

That kind of arrogance -- administrative arrogance -- has to be responded to in some way. If we were to pass this resolution in the Legislature, all we would do is to put the question before the public. If the public were to pass it -- as I hope and pray they would -- then it comes back to us. Then we adopt a law consistent with the Constitution. Now, that law does not have to give us a veto; it might just give us a cooling period. It might provide for some way where we could properly take our equal position among the three branches in the adoption of rules and regulations.

Now, that law, pursuant to the constitutional amendment if passed by the public, would itself be subject to the gubernatorial veto. So it's a long posture to get to the point where we could even think that we're semi-equal, but we ought to at least walk that first step, Mr. Chairman, as we did several years ago.

We took a different position than Governor Byrne did. We'll continue to take, in the future, different positions, as I know some members of this Committee did with Governor Kean, as some of us have and will with Governor Florio. It is not a matter of the partisan issue; it is a matter of our constitutional right to equality as legislators. That's what I and the Minority Leader want to strike a blow for in this resolution, and I hope it will be adopted.

Thank you.

ASSEMBLYMAN DEVERIN: Thank you. Any questions? (no response)

Thank you.

ASSEMBLYMAN MAZUR: What is the--

ASSEMBLYMAN DEVERIN: The Attorney General's Office--

I'm sorry. Did you want to ask something, Ben?

ASSEMBLYMAN MAZUR: No, I was just asking you a question of what the procedure-- Do we have to vote at this meeting?

ASSEMBLYMAN DEVERIN: No, no.

E D W A R D J. D A U B E R: Good morning.

ASSEMBLYMAN DEVERIN: Would you do me a favor? For the record, please identify yourself.

MR. DAUBER: My name is Edward Dauber. I'm the Director of the Division of Law at the Attorney General's Office.

D E N N I S P. C R O W L E Y: I'm Dennis Crowley, from the Office of the Attorney General, as well.

MR. DAUBER: I appreciate the opportunity to express to you this morning the views of the administration -- the Governor and the Attorney General -- on Assembly Concurrent Resolution No. 119.

We will be submitting to you a written statement, but I would like to make some remarks at this time.

As has been said here this morning, this resolution is the latest in a series of attempts over the past decade to enact some form of legislative veto. This legislative veto is aimed -- as examples have been given -- at various administrative agency rules and regulations. In 1981, as was said, an attempt was made by statute to enact a Legislative Oversight Act. That was vetoed by Governor Byrne, and the Supreme Court of this State unanimously struck it down. Eventually, the Legislature was able to get the votes in order to put this forward as a constitutional amendment, and in 1985 the voters of this State, by 340,000 votes, defeated that proposal. Not one county found it favorable enough to carry the day in any one of the 21 counties.

Now an attempt is being made to resurrect a proposal that both the courts and the people have found wanting.

ASSEMBLYMAN MARTIN: May I just ask one question?

ASSEMBLYMAN DEVERIN: Sure.

MR. DAUBER: Sure.

ASSEMBLYMAN MARTIN: The courts, in their opinion -- I didn't read this opinion-- I assume they were simply saying that you could not do this statutorily. It doesn't suggest that the courts, necessarily, would be expressing an opinion one way or another as to whether the Legislature should have this authority.

MR. DAUBER: The Court was dealing with a statutory proposal in 1982. However, the language of the Court, as I will indicate and I will quote from Justice Pashman's language, went to the whole concept of legislative veto and the idea of its effect on the system that Governor Byrne referred to, of checks and balances and separation of powers.

I think the reasoning of the Court would apply equally to the issue of constitutional amendment as it would to one of statutory provision for legislative veto.

ASSEMBLYMAN MARTIN: Although the Court would have no authority, if this were passed as a constitutional amendment, to make that determination.

MR. DAUBER: Well, the State Court would only have the authority if there was a balancing factor that it had to apply to other constitutional provisions. Then it would have some role. The Federal courts, of course, would have some role with regard to the issue of a republican form of government, and whether or not such a State constitutional provision violated Federal constitutional rights.

ASSEMBLYMAN MARTIN: With respect to the balancing, wouldn't the expression of the most recent amendment have some weight in that balancing process?

MR. DAUBER: It would definitely have weight, and that's why it would be a balancing test. The court would have to look at that compared to the effect it would have on other constitutional provisions, and would have to look at exactly how it came out. The provision, as it is now proposed, is one that would permit the Legislature to invalidate any rule or regulation, to prohibit any rule or regulation, or any part of any rule or regulation. That is how it is presently constituted.

So it is very broad and would provide a wide ranging discretion without any follow-up input from the executive branch, or from the Governor.

I think that in considering this proposition, we have to look at what the evil is that the Legislature here would be trying to correct. We've had numerous examples already this morning of the problems that exist. But I think -- as Governor Byrne pointed out -- that there already exist several methods for dealing with this, and which maybe can be used more effectively.

No one is approving of whatever abuses there have been, but the methods do exist. They may be cumbersome. They may not be as facile as this amendment provides.

ASSEMBLYMAN DEVERIN: They're also not as-- With all due respect to the good Governor, they're also not as easy as it sounds, because the Governor still has the conditional veto power, or the veto power. So even if we did write into a piece of legislation specifically what we expected, and it didn't meet the approval of the administration, it would either be vetoed out, or conditionally vetoed out. We'd be back in the same position that we are talking about now.

If it's an evil to do this-- If it's evil for us to do this, where is the evil, really, for us to be able to say, "Wait a minute. This is not what the Legislature meant. We meant this, and you interpreted it entirely differently than we did." We ought to have some kind of compromise or some kind of understanding as to why these regulations are wrong.

That's all, I think, this legislation really asks for, and I think that's all this Legislature ever asked for -- the right to say, "When we were talking about leg traps, we meant this," and, "When we were talking about wetlands, we meant this," and, "When we were talking about the Pinelands, we meant this."

What is the terrible evil in us doing this, if there is such an evil?

MR. DAUBER: Okay. First of all, I think that this proposed amendment does not only permit that, but I think it goes much further than that. I think that what you are saying-- There is an ability to do that in a number of ways under existing law right now. Two examples were given by Governor Byrne. One is, in drafting the initial legislation, the Legislature can be more precise to define the content and scope of what can be done. The second one is, though that was not mentioned, the Legislature now has the right to participate in the rule-making process. Under the Administrative Procedure Act, notice is given to the Legislature of any proposed rule.

There is an opportunity to submit data and views, and there is the right to require an agency to hold a public hearing on any proposed rule.

It seems to me under the current system, that is the best place for the input of the Legislature to be felt in this type of a compromising process that you are suggesting. Indeed, the sponsor just mentioned a cooling off period. There is indeed a 60-day period right now, before a rule takes place, in which this kind of input can be obtained. In addition, if the Legislature finds that those procedures are not sufficient, they could amend the Administrative Procedure Act, so that the Act itself would contain other procedures that would allow for more effective Legislature input into the rule-making process than there is now.

But, that wouldn't tamper -- this is the evil -- that wouldn't tamper with the system of checks and balances and separation of powers that for 200 years has been at the cornerstone of all of our government.

You know, we had people giving examples here of the problems that they have had with the carrying out of the administrative process. I believe every example that was given-- Eventually it was remedied through judicial action. That's also part of the system. You can't forget that the judiciary is part of that.

To take the Legislature and say that the Legislature should be able to check everything by itself, is just not our system of government. I think that is the main problem with this bill. It tries to cure-- The cure for the disease, I think, is worse than the disease itself, because what it leads to-- It leads to the fact that this kind of piecemeal vetoing and invalidating of a particular rule and particular regulation would leave a vacuum in there. The rules, as you all know, are comprehensive systems designed to deal with each particular problem. Far from perfect, far from correct in every

situation, and of course, the Attorney General's Office, as the one who has to play these things out in the courts, knows full well the difficulties with the system of rules that are adopted in any particular situation.

That is a far better situation than allowing one to pick and choose at a particular time. It would also lead to the importuning of legislators by special interest groups on any particular matter on which they would like one particular rule or regulation, or piece of rules or regulations, to be invalidated.

I think, as I have said, that our system gives to the executive branch the responsibility of putting together whatever implementing factors the Legislature leaves to them. I question whether the Legislature would have the time or the resources to develop the expertise in each and every area to take over that function. Nor do I believe that under our system should it.

I mentioned before, in answer to the Assemblyman's question about the case of General Assembly v. Byrne, that Justice Pashman, in ruling in that, did use rather broad language. I would just like to quote to you one small piece from that opinion which I think applies as well to this constitutional proposal:

"Broad legislative veto power," he said, "deters executive agencies in the performance of this 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 their responsibilities."

This is an important point that has also been noted by many commentators on the issue of legislative veto. It is not only what is done by the Legislature, but what the executive branch fears might be done, that is feared will lead to paralysis in the executive branch.

Our Constitution does provide for the separation of powers. Our Founding Fathers in the Federal Constitution provided for separation of powers. James Madison, in 1789, said, "If there is a principle in our Constitution, indeed in any free constitution, more sacred than any other, it is that which separates the legislative, executive, and judicial powers."

The administration calls upon the Legislature to listen to the voice of the judiciary, the voice of the people as expressed in 1985, and to the views of the commentators who have spoken on this, and to reject this proposal.

Thank you.

ASSEMBLYMAN DEVERIN: Amen. Any more questions?

ASSEMBLYMAN MARTIN: Mr. Chairman, if I may?

ASSEMBLYMAN DEVERIN: Mr. Martin.

ASSEMBLYMAN MARTIN: I think James Madison would have a heart attack if he saw the way the bureaucracy has been created since 1789.

I just have one question, or point, and maybe you could comment on it: I don't think it's the intent of this legislation to interfere with the separation of powers with respect to enforcement. I think the real question here is, who should be able to interpret legislative intent, the Legislature or the bureaucracy?

With respect to your point about a comprehensive plan, the only-- I'm not familiar with any comprehensive plan when rules and regs are set out. Many times they deal, it seems to me, piecemeal, with a problem as it comes up. I've seen comprehensive plans when people talk about a master plan that a municipality will enact. That's the language the court uses, but if you're familiar with some comprehensive plan that the DEP uses every time they adopt a regulation, and it's pursuant to some comprehensive plan, please fill me in. Because I think that would be news to me.

MR. DAUBER: Well, I think on your first point of who should interpret legislative intent, I think really our system, traditionally, has two answers to that: One is that if there is dispute, it is for the courts -- for the judicial branch -- to interpret legislative intent. If the Legislature feels that there is a problem of such magnitude or breadth that it requires change to the legislation, than the Legislature enacts new legislation.

ASSEMBLYMAN MARTIN: With the Governor's signature on it.

MR. DAUBER: And as Governor Byrne said, if it's not of the magnitude that it's important enough to require legislative amendment, then the Legislature will not be able tc muster the votes to override the Governor's veto. But I think that in terms of that, you have to weigh that again against tampering with the separation of powers, and the checks and balances.

ASSEMBLYMAN MARTIN: Accept its okay to have separation of powers with the Governor's veto of the Legislature, but it's not okay to have separation of powers with the Legislature vetoing the Governor and his departments when they, in the Legislature's opinion, have clearly exceeded the bounds of legislation originally adopted by the Legislature. To me, somehow that doesn't make sense.

MR. DAUBER: Because the executive branch's responsibility is to carry out the legislation. And if it hasn't, the remedy for that is our third branch, the judiciary. And that's the other check on that.

MR. CROWLEY: And the Legislature may override the veto.

MR. DAUBER: Yes. And the Legislature may override the veto.

ASSEMBLYMAN DEVERIN: It's never the veto that gives us a problem. It's when the legislation is signed and the

administration changes the intent of the legislation. If it was just the veto, we could handle that. But it's when the administration changes the whole thrust of a piece of legislation, and that's a very good example. We have nowhere to go after that, unless we take you to court, which would be something way out, and few and far between.

MR. DAUBER: Well.

ASSEMBLYMAN DEVERIN: But if we had an opportunity to say, "Wait a minute. We never intended it to be this way. We recommend to you that you change it, or we are going to override it," or, "We're going to change it--" Unless I'm wrong, that's basically what we're talking about.

MR. DAUBER: You do have the opportunity to control that to some degree in the drafting process with regard to the legislation itself, and also in the input process that the Legislature can have with regard to the rule making process itself.

Again, I'm not saying even doing that, that the system will work perfectly. We all know that it will not work perfectly. The executive branch itself, as Governor Byrne says, has problems sometimes -- many times -- in effectuating what it is trying to accomplish, even consistent with the Legislature's views.

However, again, we have to weigh all that against the proposed solution here. The proposed solution here is a very drastic one, a very broad one, that would create many more problems than our present system, and would totally undermine fundamental constitutional principles.

ASSEMBLYMAN DEVERIN: Thank you very much.

MR. DAUBER: Thank you.

ASSEMBLYMAN DEVERIN: Anybody else? (no response)

Thank you. Thank you, Dennis.

MR. CROWLEY: Thank you.

ASSEMBLYMAN DEVERIN: Vince Trivelli?

V I N C E N T M. T R I V E L L I: Thank you, Mr. Chairman. I'll be brief. I realize this is a public hearing after the bill was voted out, and I did testify last week on the bill.

I just wanted to reiterate that we are opposed to this. We are opposed to it because we believe that what it will lead to will be micromanaging of the State by the Legislature.

When you have a bill that gets passed like a VDT regulation, calling on VDTs to be regulated, and the Legislature makes a tough decision about it, it will be back here again with every instance of how high the chairs should be, how dark the screen should be, and whatever.

All those issues will be brought back here, because you're not only talking about those cases where the executive branch goes beyond the mandate of the Legislature. You're talking about all cases of regulation. You'll be back here, and you'll be micromanaging State government. You'll give industry and others second and third shots at things.

If you look, there was a short time where there was an attempt to do some of this in Washington before it was vetoed -- before it was found unconstitutional. Congress was spending its time on regulations about used cars, and what sort of labeling should be on the side or the front or the back of used cars, and how big it should be, and, you know-- It was ridiculous for Congress to spend its time on that sort of thing. That's why you create regulation, and if regulation goes beyond the mandate of the legislation, you can go to court.

If the Legislature has the power to do oversight, if it is concerned about its intent, I would urge you to then increase the amount of areas where you create legislative history. You would have committee reports and other things which would direct the courts and the executive branch more directly on what we would like to see.

When I worked for Congress, every time there was a bill there would be a report, and it would be the legislature's view on what each of the important words and phrases meant. Rather than leaving that totally up to the executive branch, the report would go along with it, and that would control if there was any confusion.

So, we would very much urge the Legislature not to adopt this. All it would do would be to micromanage, and we would have issues back and back and back before you. Because when you veto a reg, and then there is a change -- a little change -- they will be back again with the reg again, and it will be before you again.

ASSEMBLYMAN DEVERIN: Thank you.

Any questions? (no response)

Thank you.

Mr. Stapleton?

C H A R L E S E. S T A P L E T O N: Good morning, Mr. Chairman. I appear here today on behalf of myself in the sense of a student and an employee of the government, and a former staff individual. I know that at not many public hearings do current staff members come to talk about what they think about legislation like this. I would simply like to have this opportunity, and I appreciate you giving it to me, to speak as the former Executive Director of the Senate Republicans, because I think that there is a staff component here, or perhaps there is some history here that may shed some light on the subject.

The Legislature, over the last 20 years, has really come a long way in its degree of professionalism. There is no question that the laws that have been signed, and the bills that have been put forward by the Legislature, have increased dramatically in their sensitivity and their sophistication. There is no question that the services of the Legislature, with

the computerization and the enlargement of the staffs, have made the Legislature a lot more important in the framework of New Jersey State government.

However, the Constitution in 1949, 1948, really was aimed at a very, very strong executive branch with a part-time Legislature -- 1947, I'm sorry -- with a part-time Legislature which was going to be able to give input to a Governor, etc. etc. That has changed, and although the sophistication has increased, I believe that the part-time component of the Legislature has not changed. That means that, try as we would like to, it has been impossible to put the type of specific information into our legislation that has been needed.

I know that for 10 years legislators have tried, nad committee chairs have tried to say, "Can't we be more specific here? Can't we please do it?" There is not the time nor the staff to write the regulations in the bill, as many would like to see, to give any department strict guidance -- strict guidelines -- on what they would like to see.

Therefore, the notion of another look at legislative intent after the regulations have been promulgated, I think, is a very important one, particularly in light of the Governor's conditional veto in this State, and particularly in light of the Governor's budget line item veto.

It was mentioned earlier that the threat of review of regulations could put a chilling effect on the administration. Well, I would say no more so than the threat of a conditional veto or the threat of a red line -- line item veto in the budget. That is a mechanism, I frankly think, that serves the public well, as a matter of fact. The Legislature refrains from going further than it has to, maybe, than what they would like to in the budget area, because it knows the Governor can simply take it out.

It would not, I don't think, do any injustice to the system to have the executive branch be a lot more careful about

its interpretation of legislative intent for fear of, if not a legislative veto -- as the sponsor said, that may not be what results from this -- some sort of important legislative oversight into the specific regulations.

Once again, it is not as much-- It clearly isn't a partisan issue, but it really isn't a branch of government issue. If anything, this Legislature has improved. This Legislature has become better over the years, and deserves now, I believe, the powers to give it the level playing field that its sophistication warrants.

Once again, on behalf of those of your staff people who are going to have to do the work that would be involved with this type of constitutional amendment and legislation, I just wanted to put my two cents in.

Thank you, Mr. Chairman.

ASSEMBLYMAN DEVERIN: Thank you. Any questions? (no response)

Thank you, Mr. Stapleton.

Is there anyone else? Mr. McCool?

E D W A R D A. M c C O O L: My name is Ed McCool, Executive Director of New Jersey Common Cause.

For the record, New Jersey Common Cause has opposed this amendment to the Constitution every time it has come up, and has urged various governors to speak out against it and hopefully have it defeated, which it has been.

Our prime purpose for opposing it is that it merges the separation of powers principles in an uncomfortable way; that the Legislature is charged, obviously, with the passage of laws and the executive branch with the execution thereof, and the regulatory process is an integral part of the execution of the mandates of the Legislature.

We're concerned because if the Legislature, as an institution -- which has a very difficult job as it is -- is given the additional burden of now being responsible for any

existing regulations which it is being told need to be changed, it opens up the regulatory process to legislative lobbying, quite frankly.

We would rather see-- It goes on now, I know. The lobbying occurs in the executive branch. The various interests that wish to influence the regulatory process appeal directly to the departments and commissioners. Unfortunately, none of that is reportable, so there is absolutely no way for the public to know the degree to which the legislative intent has been twisted, or "spin," so to speak, has been put on it because of lobbying pressures within the executive branch.

I would rather the Legislature address that, and by legislation, require the disclosure of all lobbying efforts within the executive branch.

Clearly the Legislature, as an institution itself, is regularly subjected to lobbying efforts, and this would only increase the intensity. It basically could almost provide sort of a bullet approach to lobbying, in that in addition to trying to sell the concept behind the law, you would now be subject to very specific requests in terms of legislation that delt with particular wording with respect to a regulation. That just adds more pressure on to yourself, and quite frankly, it's the responsibility of the executive branch, constitutionally, to develop sufficient regulations.

That there is a need for better communication between the Legislature and the executive branch in the establishment of regulations-- There is no question about that. That the legislative intent is often twisted or nullified because of certain regulations, again, I don't deny that that happens. We're more concerned with-- The difficulty we have with this is the institutional approach, of beginning, because of some abuses of adding powers to the Legislature that, quite frankly, are beyond its capacity to handle because regulations are developed by-- The presumption is -- forgetting the bad

examples -- that the Legislature wrestles with the legal intent, and what direction it wishes to ask the executive to go, and then you have full-time people who work-- That's their job, to develop regulations.

I serve on a Citizens' Advisory Commission to the Department of Insurance. We just went through the experience of commenting on the proposed regulations for the new FAIR Act. And I know the exasperation that people encounter by, first of all, trying to understand the damned regulations. I mean, this is just a committee of citizen volunteers, and we had to translate this supposed English into understandable English, in order for us to comment intelligently on it.

I would rather see -- rather than to get into the constitutional issue -- requirements such as that; that lawyers who are esoterically removed from common understanding, and they are very intent on the exact wording -- not all lawyers, but some -- that it be required that no regulation can go out unless someone-- And there are people, quite frankly, capable of making sure that it can be understood by someone with a 12th grade reading level, or a 10th grade reading level. If you can't speak at that level, than I don't know why the regulation is in there, because in many cases only a select few would be able to understand it in the first place.

There are lots of improvements that need to be made. There is no question about that, but I'm not so sure that we're going to achieve the objectives by having the Legislature have to take on the added responsibility of now reviewing each specific regulation, or, in some cases, quite frankly, only those that get brought to them by the particular interest that is capable of commanding their attention.

That's all. Thank you.

ASSEMBLYMAN DEVERIN: Thank you. Any questions?

ASSEMBLYWOMAN OGDEN: I have a question. I'm interested in how you would make members of the executive

branch accountable in terms of lobbying activities -- being lobbied, rather?

MR. McCOOL: Simple. You just amend the Lobby Disclosure Law to include all lobbying activities within the executive branch. Right now, only the Governor's Office is required-- The Governor could do it himself, by executive order, but he has chosen not to.

ASSEMBLYWOMAN OGDEN: How would you deal, for instance, with someone who had been on the Governor's Finance Committee, who just makes telephone calls? That's not-- You know, it's not lobbying.

MR. McCOOL: It would get to the definition of a lobby, okay? That's what I would be interested in; that the departments would have to disclose, say quarterly, any contact made by a professional lobbyist, either as a legislative agent or as the person in-house with a particular interest who gets paid solely for the purpose of advancing, or more than $2500 of their salary goes for the advancing, of legislation, or the influencing of regulation.

That's all I would look-- I would be happy if we had that, to be quite honest with you.

A case in point is, when the Chief of Staff was Steve Perskie, unbeknownst to him, his uncle's law firm ran an ad that said they now specialized in legislative affairs with respect to the executive branch and State boards and commissions. I spoke to him about it, and he was very upset, but he also had nothing to do with the firm. But it's Cooper, Perskie/... So, there it was, and it ran in the "Law Journal" repeatedly. So, you know, he said that he would recuse himself from any matter that came before his attention that that firm was involved in. I said, "That's very good." Unfortunately, it was unenforceable, because he himself had no way of knowing -- because there is no disclosure requirement -- which proposal or which issue within the executive branch that was going

through that he was going to be asked to set up a meeting about, would have involved his uncle's own firm. So, there's a real need for that, and I think if we start to surface that, we'll begin to get a handle on the kinds of information that the Legislature needs.

The other half of it has to do with writing legislation that's more specific, and that's tough. A lot of language of legislation is compromise language in order to kind of leave it up to the executive branch to kind of work it out, and sometimes we pay the price for that. So, more precise legislative language and more precise statements of what the legislative intent is, might also go, in some cases, to achieving the objective of what this constitutional amendment is.

ASSEMBLYMAN DEVERIN: Okay. Anybody else? (no response) Thank you very much.

MR. McCOOL: Thank you.

ASSEMBLYMAN DEVERIN: Is there anyone else? That closes the public hearing on ACR-119. We'll leave the record open for anyone who wants to submit information or testimony as opposed, or in favor of this ACR.

ASSEMBLYMAN MARTIN: Mr. Chairman?

ASSEMBLYMAN DEVERIN: Yes.

ASSEMBLYMAN MARTIN: I just want to say for the record, that although I posed some questions, I abstained the first time. I have some reservations about this. I'm frustrated about what's going on, but I'm not endorsing this. I think some of my comments may have lead people to think that I feel that way. I have serious reservations about this type of amendment, despite my leaders' support of this, and others'.

ASSEMBLYMAN DEVERIN: Well, you know there is no vote necessary this morning.

ASSEMBLYMAN MARTIN: I understand that.

ASSEMBLYMAN DEVERIN: Your vote will come on the floor. You'll have a chance to do it then.

Anyone else? (no response)

The hearing for ACR-119 is now closed.

(HEARING CONCLUDED)

APPENDIX

February 25, 1991

STATEMENT OF E. DAUBER BEFORE
ASSEMBLY COMMITTEE ON STATE GOVERNMENT

Good morning. I am Edward Dauber, the Director of the Division of Law in the Attorney General's office.

Thank you for allowing me the opportunity this morning to express the views of the Administrative Attorney General regarding Assembly Concurrent Resolution 119. We will be submitting a more detailed written statement, but I would like to make a few remarks.

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. Governor Byrne opposed that effort - the Legislative Oversight Act, and the Supreme Court struck it down without dissent.

Eventually, the Legislature was able to attain sufficient votes, so that in November of 1985, a proposed constitutional amendment attempting to effectuate such a veto provision was placed on the general election ballot. It was opposed by all living governors of New Jersey and the voters soundly defeated it by 340,000 votes. It failed to carry the day in even a single one of the twenty-one counties.

Thus, the Assembly now attempts to resurrect a proposition that our Courts have found wanting and that the people of this State have recently found to be without merit. The provision sought to be adopted is virtually the same as that previously rejected. The proposed Amendment states:

> "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, from taking effect by a majority of the authorized membership of each House.

There would be no roles for the Governor, as the Chief Executive, to play as he does with all other legislation.

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 adopted not by faceless, tenured, unelected bureaucrats... (who) have adopted regulations that are inconsistent" with legislation that has been enacted.

But there already exist several methods for achieving these objectives under existing law.

1. In the first place, by initially drafting careful and specific legislation, the Legislature can more

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precisely define the conduct and scope of any rules or regulations to be adopted.

2. Secondly, the Legislature now has the right to itself participate in the rule making process. 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.

3. Third, the Legislature can always overturn a regulation by amending the enabling statute.

4. Fourth, the Legislature could amend the Administrative Procedure Act to adopt additional "safeguards".

5. Finally, there is the tried and true method - of allowing any such purported deviations to be tested through our judicial system.

Not only are these remedies already available, but the proposed cure of ACR 119 would be much worse than the disease. The Legislative veto mechanism would leave a vacuum in the regulatory structure each time that it was invoked. The process would then

have to begin all over with attendant delays and uncertainty for those affected by the regulations. This piecemeal approach would leave the State with a swiss cheese regulatory scheme, riddled with holes, and would expose our legislators to the constant importuning of special interest groups seeking to hare a particular disfavored rule or regulation invalidated. Legislators neither have the time nor the resources to develop the expertise necessary to prepare their own comprehensive set of regulations, and the administrative process is thus a critical one to the functioning of any government.

But, the greatest evil of all is that this amendment - if adopted - would fly in the face of 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 - which are learned by every school child in these United States - would be severely undermined by this proposal, which seeks to bypass both the check of the Governor's veto power and the traditional roles of the courts and which endeavors to arrogate to the Legislature those powers which are rightly those of the executive and judicial branches of our government.

As Justice Pashman noted in the case of General Assembly v. Byrne, 90 N.J. 376 (1982), which struck down the Legislative Oversight Act:

> 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 their responsibilities (At p.387).

Justice Pashman's words apply as truly to this proposed amendment as they did to the statutory veto scheme contemplated at that time.

Article III of New Jersey's Constitution provides, in part:

> "The powers of the government shall be divided among three distinct branches, the legislative, executive and judicial. No person belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others...."

In commenting on the similar provision in the Federal Constitution, one of the founding fathers, James Madison, said in 1789:

> "If 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."

The Attorney General calls upon this Legislature to recognize this sacred principle, to listen to the voice of our

judiciary and to the views of our people already expressed, and to reject this proposal.

Thank you.

STATEMENT OF THE ATTORNEY GENERAL'S OFFICE
REGARDING ACR-119

This memorandum discusses ACR-119, 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. Six years ago a proposed amendment virtually identical to ACR-119 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 ingrained 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 Assembly Concurrent

Resolution No. 119 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 of 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, from taking effect by a majority of the authorized membership of each house.

ACR-119 represents another in a long series of attempts by the Legislature in the past 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

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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, virtually identical to ACR-119, 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 then 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 are 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 1985. In recent years similar such proposals have been defeated at the polls in other states at least eight times in six states.

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.A. 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.

N.J.S.A. 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 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 and a regulatory flexibility analysis. 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.A. 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 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 possess 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, con-

> stant in its potentiality, can be exercised in any given case without a change 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 ACR-119 is ostensibly seeking to achieve.

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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 Assembly Concurrent Resolution No. 119, 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 amend-

ment 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.