March 10, 1981

DANIEL O'HERN, *Counsel to the Governor*
State House
Trenton, New Jersey 08625

FORMAL OPINION NO. 3—1981

Dear Counsel O'Hern:

You have asked for an opinion as to the constitutionality of Laws of 1981, c. 27, which authorizes the legislature through the adoption of concurrent resolutions to disapprove rules and regulations proposed by state administrative agencies and to suspend adopted agency rules. For the following reasons, it is our opinion that Laws of 1981, c. 27, is unconstitutional.

Laws of 1981, c. 27, was enacted as an amendment and supplement to the Administrative Procedure Act. It requires all state agencies to submit all proposed rules prior to their adoption to the Senate and General Assembly. The Senate and General Assembly may then within a period of 60 days through the adoption of concurrent resolutions disapprove rules in whole or in part or delay their effective date for an additional period of 60 days. Also, the act provides authority for a joint legislative committee to review any rules proposed or adopted after the effective date of the act, and upon receiving the committee's report, the Senate and General Assembly may adopt a concurrent resolution suspending the rule for a period of 60 days.

The question directly posed by this legislation is whether its provisions provide a constitutionally appropriate means for the legislature to participate in the review and oversight of the rule-making activities of state agencies. The legislature normally is authorized to exercise its substantive law-making powers through the passage of bills in a manner consistent with the State Constitution. For example, a bill must be read three times in each house; one full calendar day must intervene between the second and third reading, and the bill must be adopted by a majority of all the members of each house. Art. 4, §4, ¶6. More importantly, the State Constitution includes a "presentment" clause which requires "every bill which shall have passed both houses shall be presented to the Governor for his approval or veto." Art. 5, §1, ¶ 14(a).

It is a well established proposition that concurrent resolutions passed without executive review have no effect as general legislation. *Moran v. LaGuardia,* 1 N.E. 2d 961, 962 (N.Y. Ct. of App. 1936); Gibson, *Congressional Concurrent Resolutions: An aid to statutory interpretation?,* 37 A.B.A.J. 421 (1951); 1A *Sutherland Statutory Construction* (4th ed. 1972) §29.03. Their effect is limited to the internal administration of parliamentary business or to the expression of legislative sentiment or opinion. Myers, *Joint Resolutions are Laws,* 28 A.B.A.J. 33 (1942). *See also, State v. Atterbury,* 300 S.W. 2d 806, 817, 818 (Mo. S.Ct. 1957). This proposition was discussed by the Supreme Court of New Jersey in *In the Matter of the Application of New York, Susquehanna and Western Railroad Company,* 25 N.J. 343 (1957). The railroad applied to the Board of Public Utilities commissioners for permission to curtail service. Following protracted hear-

ings, the Senate adopted a concurrent resolution declaring the policy of the legislature against further curtailment of passenger rail service pending the final report of a Rapid Transit Commission. The Board of Public Utilities commissioners thereupon suspended all further proceedings until the submission of the report of the Commission. The Supreme Court in assessing the impact of the Senate concurrent resolution on the Board of Public Utilities declared:

> It is perfectly clear that the concurrent resolution is not an act of legislation. Art. 4, §4, ¶ 6, of the Constitution of 1947 prescribes the procedure for the passage of 'bills and joint resolutions.' The Constitution is silent with respect to concurrent resolutions. . . . The Executive Article refers only to bills in fixing the procedure for final executive action. . . . The resolution here involved is a concurrent one and of course was never submitted to the governor for his action. Except within the precincts of the legislature or perhaps where it acquires force by virtue of some specific statute, a concurrent resolution is ordinarily an expression of sentiment or opinion, without legislative quality or any coercive or operative effect. . . . [*In re Susquehanna* at 348.]

The court therefore held that the decision of the Board of Public Utilities to suspend proceedings should be reversed because the legislature may not by concurrent resolution control the functions of an administrative agency.

It is clear that under the terms of this statute the exercise of the power of disapproval over rule-making activities of state administrative agencies through the passage of concurrent resolutions is not a procedural act concerned with the internal business of the legislature or an expression of legislative opinion. It is rather a form of law-making having a direct substantive and operative effect on the rights and duties of the citizens of New Jersey without the constitutionally required opportunity for gubernatorial review and approval.

This same conclusion was reached by the court in *State v. A.L.I.V.E. Voluntary,* 606 P. 2d 769 (Alas. 1980), in reviewing legislation similar to c. 27. The court held that a statute which would permit the legislature by concurrent resolution to disapprove a regulation of a state agency was in violation of the state's constitutional means prescribed for the enactment of legislation. The court noted that when the legislature wishes to act in an advisory capacity, it may do so by resolution; but when it means to take action having a binding effect on those outside the legislature, it may do so only by following the enactment procedures in the state constitution.

Also, a recent comprehensive opinion of the United States Attorney General is directly supportive of this conclusion. In an opinion to Secretary of Education Hofstedler, dated June 6, 1980, Attorney General Civiletti concluded that §432 of the General Education Provisions Act was unconstitutional. That provision authorized Congress by concurrent resolutions that are not submitted to the President for his approval or veto to disapprove regulations promulgated by the Secretary of Education for programs administered by the Department of Education. The Attorney General pointed out that the legislative veto device found in the federal

statute was equivalent to legislation insofar as its practical effect was to allow Congress to bring a halt to substantive programs carried out at the administrative level. For that reason, the legislative veto device was found by the United States Attorney General to be inconsistent with the Presentment Clause of the United States Constitution which required all legislation to be submitted to the President for his approval or veto.

In summary, therefore, the exercise of the legislative veto as set forth in this legislation is equivalent to the enactment of legislation because it permits the legislature through the passage of concurrent resolutions to, in effect, block the execution of substantive programs by the Executive Branch. In fact, the necessary effect of a legislative veto by the passage of concurrent resolutions is to interfere with the implementation of a statutory program until the administrative agency promulgates further regulations in compliance with the policies of the legislature. For these reasons, you are advised that those provisions of Laws of 1981, c. 27, which provide for the disapproval of agency rules and regulations through the passage of concurrent resolutions by the Senate and General Assembly is inconsistent with the state constitutional means for the passage of legislation and for the presentment of the same to the governor for his review and approval.* Administrative agencies of state government should be directed that those provisions have no force and effect and state agencies should not conform their rule-making activities to the provisions of that act on its effective date.

Very truly yours,
JUDITH A. YASKIN
Acting Attorney General

* Also, there are serious constitutional questions as to whether this legislation is consistent with Art. 3 of the State Constitution providing for the separation of powers. The provisions of this legislation allow the legislature to interfere with substantive programs administered by state agencies through its rules and regulations. This is a function traditionally assigned and committed to the Executive Branch of state government.