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M E M O R A N D U M

TO: William L. O'Brien, Speaker of the House  
FROM: Edward C. Mosca, House Legal Counsel  
DATE: March 25, 2012  
RE: Veto

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**QUESTION:**

Is it permissible for the Speaker to bring up a vetoed bill for an override vote at a House session if the veto message has not been published in the House Calendar prior to that House session or if there has not been any other formal notice of the override vote prior to that House session?

**BRIEF ANSWER:**

Yes. The Rules of the House specifically provide that messages from the Governor shall be brought up during the early session prior to the consent calendar. However, the Rules also provide that the House has the authority, by majority vote, to change the order of business during a House session. Therefore, although it is permissible for the Speaker to bring up a vetoed bill for an override vote if the veto message has not been published in the House Calendar prior to that House session or if there has not been any other formal notice of the override vote prior to that House session, the House may vote to not take up the veto.

## DISCUSSION:

- I. UNDER THE NEW HAMPSHIRE CONSTITUTION, THE HOUSE HAS PLENARY POWER TO DETERMINE ITS PROCEDURES, BUT IT CANNOT USE THIS POWER TO BYPASS OR TRANSGRESS OTHER PROVISIONS OF THE CONSTITUTION.

Part II, Article 22 of the New Hampshire Constitution gives the House the constitutional authority to adopt its own “rules of proceedings.” *See Hughes v. Speaker of the New Hampshire House of Representatives*, 152 N.H. 276, 284 (2005) (citing *Baines v. N.H. Senate President*, 152 N.H. 124, 130-31 (2005)). This rulemaking authority is “a continuous power absolute,” which means that each successive House is free to set its own rules and is not bound by the actions taken by the prior House. *Hughes, supra* (internal quotations and citations omitted). The House has “complete control and discretion [over] whether it shall observe, enforce, waive, suspend, or disregard its own rules of procedure.” *Id.*

However, the House’s constitutional authority to adopt its own rules of proceedings cannot be used to bypass or transgress other provisions of the Constitution. For example, in *Hughes* the New Hampshire Supreme Court found that claims brought against the Legislature under Part I, Article 8<sup>1</sup> were justiciable. “While the constitution vests the legislature with the authority to create its own rules of procedure, no provision of the constitution commits to the legislature the determination of whether the public’s right of access to governmental proceedings has been unreasonably restricted.” *Hughes*,

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<sup>1</sup> All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them. Government, therefore, should be open, accessible, accountable and responsive. To that end, the public’s right of access to governmental proceedings and records shall not be unreasonably restricted.

*supra*, 152 N.H. at 288 (citing *Baines, supra*, 152 N.H. at 131-32); *see also Opinion of the Justices*, 102 N.H. 320 (1959) (House not singly authorized to determine mileage allowances to its members by constitutional provision that house may settle “rules of proceedings in their own house” because determination of mileage allowances in reimbursement for costs of travel concerns members of both branches of legislature.)

The House Rules themselves specifically recognize the primacy of constitutional provisions:

64. Sources of Authority. The procedures of the New Hampshire House shall be derived from the following sources in the order of precedence listed:
  - (a) Constitutional provisions.
  - (b) Rules of the New Hampshire House.
  - (c) Adopted parliamentary manual (Mason’s Manual of Legislative Procedure, 2000 edition).
  - (d) Custom, usage and precedent.
  - (e) Statutory provisions.

Accordingly, consideration begins with Part II, Article 44, which provides for a gubernatorial veto and legislative override.

- II. PART II, ARTICLE 44 DOES NOT REQUIRE THAT THE GOVERNOR’S VETO MESSAGE BE PUBLISHED IN THE HOUSE CALENDAR OR SOME OTHER TYPE OF FORMAL NOTICE BE PROVIDED PRIOR TO THE HOUSE SESSION WHERE THE HOUSE TAKES THE OVERRIDE VOTE.

Part II, Article 44 provides as follows:

Every bill which shall have passed both houses of the general court, shall, before it becomes a law, be presented to the governor, if he approves, he shall sign it, but if not, he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it; if after such reconsideration, two-thirds of that house shall agree to pass the bill, it shall be sent, together with such objections, to the other house, by which it shall likewise be reconsidered, and, if approved by two-thirds of that house, it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of persons, voting for or against the bill, shall be entered on the journal of each house respectively. If any bill shall not be returned by the governor within five days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had

signed it unless the legislature, by their adjournment, prevent its return, in which case it shall not be a law.

In relevant part, then, Part II, Article 44 requires that when the Governor vetoes a bill that has originated in the House, the House “shall enter the objections at large on their journal, and proceed to reconsider it.”

The most reasonable meaning of the term “journal” in Part II, Article 44 is that it refers to the journal required by Part II, Article 24. Part II, Article 24 was part of the original constitution and was amended in 1792 and then again in 1966. Part II, Article 44 was added to the constitution by the 1792 amendments, so the two articles are contemporaneous. Part II, Article 24 reads as follows:

The journals of the proceedings, and all public acts of both houses, of the legislature, shall be printed and published immediately after every adjournment or prorogation; and upon motion made by any one member, duly seconded, the yeas and nays, upon any question, shall be entered, on the journal. And any member of the senate, or house of representatives, shall have a right, on motion made at the time for that purpose to have his protest, or dissent, with the reasons, against any vote, resolve, or bill passed, entered on the journal.

The words of Part II, Article 24 indicate that the constitutionally-required journal was not intended to provide notice, but rather to serve as a record – “shall be printed and published immediately after every adjournment or prorogation.” The New Hampshire Supreme Court has interpreted the journal to serve as a record. *See also Bezio v. Neville*, 113 N.H. 278, 280 (1973) (legislative journals to be accepted by the court as conclusive evidence of “the proceedings, and all public acts of both houses, of the legislature” (internal citations and quotations omitted).)

The historical records also indicate that Part II, Article 44 was not understood to require formal notice of an override vote prior to the House session where the override

vote occurred. The practice, based on reviewing records from 1792 to 1800, was to bring the Governor's message to the floor and then immediately take the override vote.

In sum, Part II, Article 44 does not require that the governor's veto message be published in the House Calendar or some other type of formal notice be provided prior to the House Session where the House takes the override vote. Accordingly, consideration turns to the Rules of the New Hampshire House.

III. THE RULES OF THE HOUSE SPECIFICALLY PROVIDE THAT MESSAGES FROM THE GOVERNOR SHALL BE BROUGHT UP DURING THE EARLY SESSION PRIOR TO THE CONSENT CALENDAR.

Rule 57 provides as follows:

57. Early/late sessions; leaves of absence.

- (a) The order of business in the early session shall be as follows:
  - 1. Prayer by the Chaplain or a substitute designated by the Speaker, pledge of allegiance and leaves of absence if received before the start of the legislative day;
  - 2. Introduction of guests;
  - 3. Petitions of members;
  - 4. Consideration of unfinished business;
  - 5. Introduction, first and second reading and referral of bills;
  - 6. Messages from the Senate, the Governor and the Secretary of State;
  - 7. Consideration of Consent Calendar items;
  - 8. Reports from standing and select committees;
  - 9. Resolutions, motions and notices;
  - 10. Adjournment from the early session.
  
- (b) The order of business in the late session shall be as follows:
  - 1. Third reading of bills, resolutions and joint resolutions;
  - 2. Resolutions and motions;
  - 3. Personal privilege.
  - 4. Adjournment to a date certain.
  
- (c) The order of business listed in this rule shall be adhered to unless otherwise ordered by a majority of those members of the House present and voting.
  
- (d) Leaves of absence may be granted by the House at any time.

Thus, the Rules of the House specifically provide that messages from the Governor shall be brought up during the early session prior to the consent calendar. However, the Rules also provide that the House has the authority, by majority vote, to change the order of business during a House session. Therefore, although it is permissible for the Speaker to bring up a vetoed bill for an override vote if the veto message was not published in the House Calendar prior to that House session or if there has not been any other formal notice of the override vote prior to that House session, the House may vote to not take up the veto.

1. Custom, Usage and Precedent

The House did not follow the order of business set forth in the Rules with respect to bills vetoed by the Governor in 2011. My recollection is that it was brought out, during a colloquy regarding the override vote on the right-to-work bill, that in past House sessions the custom, usage and precedent had been for the Speaker to determine the timing of veto override votes, and that some vetoes had not been taken up by the Speaker until the year after the veto had been issued.

While this practice appears inconsistent with the Rules, as noted above the House has the authority, by majority vote, to change the order of business during a House session. Inherent within this authority, is the authority to acquiesce to the Speaker changing the order of business. *Cf. Keefe v. Roberts*, 116 N.H. 195, 198 (1976) (“Those members of the house present in the instant action made no objection to the call of the house but acquiesced in the Speaker's action.”)

2. Mason's

Mason's indicates that "[l]egislation returned by the executive with objections is usually considered promptly but may be referred to commit or laid on the table." § 755.

**CONCLUSION:**

It is permissible for the Speaker to bring up a vetoed bill for an override vote if the veto message has not been published in the House Calendar prior to that House session or if there has not been any other formal notice of the override vote prior to that House session. However, the House may, by majority vote, decide to not take up the veto.

