

THE STATE OF NEW HAMPSHIRE
SUPREME COURT
CASE NO. 2018-0267

**REQUEST FOR OPINION OF THE JUSTICES
(Amending Definition of Domicile)
SUBMITTED MAY 16, 2018
BY GOVERNOR AND COUNCIL**

**MEMORANDUM OF LAW SUBMITTED BY
EXECUTIVE COUNCILORS
CHRISTOPHER C. PAPPAS
AND
ANDRU VOLINSKY**

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Now come Executive Councilors, Christopher C. Pappas and Andru Volinsky, in their capacities as individual members of the New Hampshire Executive Council (the “Councilors”) and respectfully submit this memorandum of law in support of a decision by the justices of the Court to respectfully decline to answer the questions referred by the Governor and Council or, in the alternative, in support of an opinion that finds that HB 1264 is unconstitutional because it interferes with the right of college students to vote in New Hampshire.

Introduction

The undersigned Councilors recognize that it is not the Court’s responsibility to determine the wisdom or practicality of legislation, or as is the case here, the wisdom of a governor’s decision whether or not to veto ill-conceived legislation. However, the Councilors would be remiss not to state at the outset their strong opposition to the legislation at issue which is nothing more than an effort to discourage college students from voting in New Hampshire. Further, the undersigned Councilors directly challenge the premise upon which the legislation is based. There is no credible evidence of widespread voter fraud by college students in New Hampshire. The Governor should veto HB 1264.

Turning directly to the referred questions, the Councilors contend that the justices of the Supreme Court must decline to answer the referred questions because the exercise of a governor’s veto is not a function of the Governor and Council. The exercise of a veto is committed to the sound discretion of the Governor alone. Pt. II, Art. 44, N.H. Const. The Executive Council constitutionally does not play a role with respect to vetoes. Id. Therefore, any legal advice offered by the Court in this instance will not meet the requirement of utility in that the advice will not be useful to the governmental body that made the request for an advisory

opinion.² Any legal advice offered by the Court will only be useful to the Governor and the Governor lacks authority to request advice from the Court solely for his own purpose.³ The request for advice in this matter, thus, does not meet the constitutional standard set out in Article 74 and , as a result, does not fall within the exception to the rule that requires the Court to refrain from issuing advisory opinions in matters that may come before the Court for decision as part of a case in controversy. See Opinion of the Justices, 150 NH 355, 356 (2003).

In the alternative, should the members of the Court choose to respond substantively to the referred questions, the Councilors request the justices advise the Governor that HB 1264 is unconstitutional.

Argument

The provision of an advisory opinion by the Supreme Court to a body of New Hampshire government is an unusual proceeding in which the justices of the Court provide their individual legal advice to the requesting body rather than the Court acting as a judicial body deciding a dispute that is properly before it. Id.

By the general rule of the common law, the statute and the constitution, the justices of the supreme court are forbidden to give advice in matters that may come before the court for decision. The constitution introduces an exception to the rule in some cases, in which the official power or official duty of the senate, the house of representatives, or the governor and council is doubtful, and in which

² A governor, of course, may exert influence on the House or the Senate to have a question referred for an advisory opinion by a legislative body.

³ The Governor and the Executive Council constitutionally share some responsibilities while others are expressly committed to the Governor alone. The general responsibility to faithfully execute the laws is committed to the Governor, Pt. II, Art. 41, and the duty to advise the Governor in the executive part of government is assigned to the Executive Council. Pt. II Art. 60. However, the Governor's veto power is the Governor's alone pursuant to Pt. II., Art. 44. The role of commander-in-chief is also committed solely to the Governor. Pt. II, Art. 51. The role of the Executive Council is expressly stated with respect to adjourning or proroguing the Legislature, Pt. II, Art. 43, appointing officers of government and judges, Pt. II, Art. 46, and calling special sessions of the Legislature. Pt. II., Art 50.

the opinions of the justices are desired by one of those bodies upon an important question of law necessary to be determined by the body requiring the opinions.

Opinion of the Justices, 67 NH 600 (1892) (Selection of Moderators)(emphasis supplied).⁴ “It is well settled that only the bodies named in the article are entitled to such advice. Opinion of the Justices, 62 N.H. 706. It has also long been settled that the authority of the court to render advisory opinions is limited to advice upon ‘important legal questions pending in the body entitled to the advice, and awaiting the consideration and action of that body in the course of its legislative or executive duty.’ In re School Law Manual, 63 N.H. 574, 576, 4 A. 878, 880 [(1886)].” Opinion of the Justices, 96 N.H. 513, 516 (1949) (Duncan, J. dissenting). HB 1264 is not pending before the Governor and Council. HB 1264 has not yet been enrolled, although it has passed the House and Senate. After enrollment, HB 1264 will be conveyed to the Governor alone for his decision to allow the bill to become law or to issue a gubernatorial veto.

1. The Issuance of Advisory Opinions is a Carefully Limited Power of the Court that Requires the Advice to be Useful to the Body that Requested It.

Pt. II, Art. 74 allows for the justices to issue advisory opinions in exceptional circumstances. Article 74 provides: “Each branch of the legislature as well as the governor and council shall have authority to require the opinions of the justices of the supreme court upon important questions of law and solemn occasions.” By its very terms, the Constitution requires the action of the Governor and Council to request an advisory opinion of the justices. Neither the Governor, nor the Council, alone may

⁴ The Executive Council was advised by the Attorney General before voting upon the Governor’s proposed referral that the Court has issued only 203 advisory opinions in its history and the undersigned Councilors have no reason to doubt that the issuance of advisory opinions has been and should remain a rarity.

request an advisory opinion. Id.⁵ It stands to reason then that the body that may request the Court's advice is the Governor and Council and the advice sought, considering the exceptional nature of an advisory opinion, must be useful to the Governor and the Council.⁶ Here, however, the Governor and Council have requested advice pertinent only to the Governor's exercise of his power to veto improvident legislation pursuant to Pt. II, Art. 44. The veto power belongs to the Governor alone. Vetoes may be executed at the discretion of the Governor. The Constitution does not require the Governor to seek the Council's advice when issuing a veto. Id.

In light of the exceptional nature of an advisory opinion, the Court has developed three rules relevant to the instant decision of whether or not to issue an advisory opinion. First, the duty to provide advice is not mandatory. Although the language of Article 74 appears to be mandatory (e.g., "shall have authority to require...."), the members of the Court have, on occasion, asked to be excused from providing a response and no such request appears to have been dishonored by the referring body. See e.g., Opinion of the Justices, 150 NH 355 (2003) (Appointment of the Chief Justice).

⁵ Although New Hampshire and Massachusetts were both part of the Massachusetts Bay Colony and their constitutions are similar, see Claremont Sch. Dist. v. Governor, 138 N.H. 183, 188-89 (1993), it is important to note the important difference that exists between the New Hampshire and Massachusetts advisory opinion clauses. Pt. II, Art. 74, N.H. Const. provides that the "governor and council shall have authority...." The corresponding clause of the Massachusetts Constitution uses the disjunctive, "Each branch of the legislature, as well as the governor or the council, shall have authority to require the opinions of the justices of the supreme judicial court, upon important questions of law, and upon solemn occasions." Mass. Const. Pt. 2, C. 3, art. II

⁶ "'When [the Court's] inquiry requires us to interpret a provision of the constitution, we must look to its purpose and intent.' Bd. Of Trustees, N.H. Judicial Ret. Plan v. Sec'y of State, 161 N.H. 49, 53, 7 A.3d 1166 (2010). 'The first resort is the natural significance of the words used by the framers.' Id. 'The simplest and most obvious interpretation of a constitution, if in itself sensible, is most likely to be that meant by the people in its adoption.' Id." Duncan v. State, 166 N.H. 630, 640 (2014).

Second, the members of the Court have refrained from offering constitutional advice when determination of the referred question at issue would benefit from the factual development that occurs during an adversarial process. See e.g., Opinion of the Justices, 167 N.H. 539 (2015). Indeed, the members of the Court have declined to provide advice to the Senate in the context of its consideration of legislation very similar to HB 1264 for lack of sufficient factual development. Id. The below signed Councilors understand that the American Civil Liberties Union of New Hampshire (“ACLU”) intends to fully brief this basis for the justices to decline to respond to the referred questions and the Councilors fully join and adopt the position of the ACLU with respect to this issue as if fully set out here.

The third common law rule requires the advisory opinion to be of utility to the governmental body that has requested the Court’s advice. As an opinion about the constitutionality of HB 1264 would not be of utility to the Governor and Council, the below-signed Councilors contend that the justices of the Court must decline to offer advice about the constitutionality of HB 1264. The pending request does not concern “an important question of law necessary to be determined by the body requiring the opinions.” 67 NH at 600. Rather, the question of law only impacts the Governor’s veto authority and that authority is not also within the prerogative of the Council. Pt. II, Art. 44. Should the Governor allow HB 1264 to become law, it may then be challenged in a private right of action by a party that is adversely affected.

There is an established history of the justices declining to provide advice upon a request from Governor and Council where that advice was not useful to the functioning of the Governor and Council as a body of government. For example, members of the Court have sought to be excused from offering constitutional advice to the Governor and Council when the advice sought would not have been useful because the legislature had completed its session and the bill at issue

had become law. Opinion of the Justices, 150 N.H. 355 (2003) (Appointment of the Chief Justice). “Where the constitutionality of existing law is...brought in question, those who may deem their rights infringed...may have recourse to our courts for the protection of their supposed privileges.” 150 N.H. at 357 citing Opinion of the Justices, 99 N.H. 525 (1955) and Sup. Ct. R. 31).

As well, justices have also declined to issue an advisory opinion when the advice sought was of a personal nature and did not concern the functioning of the Governor and Council as a governmental body. The request for an advisory opinion submitted by the Governor and Council regarding the removal of John King as probation director is particularly instructive here because the Court focused on the issue of whether the advice was or was not helpful to the functioning of the governor and council as a body.

In 1977, the Governor and Council were faced with the question of how to proceed with the removal of John King as the director of probation pursuant to R.S.A. 4:1. The Governor and Council submitted four questions to the members of the Court. The justices answered three of the four questions by providing specific advice. The justices declined to answer the third referred question that asked, “Is the reason advanced by Councilor Streeter for his withdrawal in his April 29th letter to Governor Meldrim Thomson, Jr. a sufficient basis to withdraw himself from participation in the proceeding?” 117 NH at 391. The justices responded in this way:

Your third question is whether the reason advanced by Councilor Streeter for his withdrawal is a sufficient basis to withdraw himself from participation in the hearing. This is a personal decision by the councilor and it does not appear to involve a matter which relates to action to be considered by the Governor and Council, Opinion of the Justices, 98 N.H. 537, 104 A.2d 208 (1954); see Opinion of the Justices, 102 N.H. 183, 152 A.2d 870 (1959). We respectfully request to be excused from answering the question because it ‘[is] not within the spirit or letter of the constitutional provision for advisory opinions. N.H. Const. pt. II, art. 74.” Opinion of the Justices, 116 NH 358.

117 NH at 392.

In the following instances the justices concluded that their advice had utility and so responded substantively.

In Opinion of the Justices, 74 NH 606 (1907), the Governor and Council sought advice regarding the state's payment of money. The authorization of the payment of state funds is a function of Governor and Council pursuant to Pt. II, Art. 55. In Opinion of the Justices, 102 NH 183 (1959), the power of the Governor and Council at issue was their constitutional authority to supervise the conduct of the commissioner of the department of motor vehicles and to issue executive orders for this purpose. See Pt. II, Art. 49. In Opinion of the Justices, 88 N.H. 484 (1937) the advice sought concerned the Governor and Council's pledge of the state's credit to allow a state agency to construct a dam in Pittsburg, New Hampshire. In this Opinion of the Justices, the justices clarified the questions submitted to them because the advice "should not go beyond assistance to [the Governor and Council] in the performance of your executive duties." The original questions had asked for advice about the overall constitutionality of a statute. The justices limited their responsive advice to consideration of the statute as applied to the Pittsburg project and ultimately concluded the legislation as applied was constitutional.

In Opinion of Justices, 75 N.H. 613 (1909), the power of the Governor and Council at issue concerned the appointment of the railway commissioner despite a conflict of interest. The power of the Governor and Council to appoint a commissioner is contained in Pt. II, Art. 46. In this instance, Article 74's utility requirement caused the justices to hesitate. The basis for the complaint against the railway commissioner, and for a potential removal petition, was that the commissioner was not impartial when appointed because he owned stock in a bank that itself owned stock in a railroad corporation. The bank, however, had divested itself of the stock by the

time the complaint was filed. The Court concluded that it should broaden the questions presented so that the justices may offer advice relevant to a proper topic. “But while the argument [for declining to provide advice] is not without technical merit, in view of the peculiar phraseology of the questions, we are inclined to the belief that under the circumstances disclosed the questions should be given a somewhat broader scope, so that our response may not be entirely useless.” 75 N.H. at 613. In taking a broader perspective, the justices focused upon whether the commissioner’s then current service was proper regardless of the propriety of his appointment. The justices concluded, “Our advice, therefore, is, in brief, that it does not appear that [the railway commissioner] was, as a legal proposition, incapable of appointment; and it follows, in answer to the second question propounded, that his past and present occupancy has not been and is not necessarily in conflict with the statute.” Id.

The justices of the Court declined to provide advice to the Governor and Council in instances where the advice sought concerned the selection of town moderators, Opinion of the Justices, 67 N.H. 600 (1892) and where the advice sought concerned the taxation of farm tractors under existing legislations, Opinion of the Justices, 93 N.H. 477 (1944), because neither of these requests would have been useful to the function of the governors and councilors who made the requests. The Governor and Council does not select town moderators and the taxation of farm tractors was a matter of existing legislation which could be challenged in court. Finally, the justices declined to provide advice when the Governor and Council in 2003 requested an opinion about the constitutionality of enacted legislation that changed the manner in which the chief justice of the Supreme Court was appointed. The justices asked to be excused from responding.

There are occasions where the Governor and Council are entitled to advisory opinions as to their official duty and authority under existing law... This is not such an occasion because there are limitations in the operation of Part II, Article 74... To express our views about the constitutionality of RSA 490:1 (Supp.

2002) would be expressing our views upon questions involving private rights...It would also place us in the position of giving advice in matters that may come before the court for decision....

150 N.H. at 356 (internal citations omitted).⁷

In many ways, the Court has made clear that it will provide advice when that advice will be useful to the body of government that requests it and refrain from providing advice when the advice will not be useful. In the request now pending, the advice of the justices will not be useful to the Governor and Council. The Court should, thus, respectfully decline to provide an advisory opinion in this matter.

2. The Decision to Veto Legislation is Committed to the Sound Discretion of the Governor Alone and is Not a Power Exercised by Governor and Council

HB 1264 has passed the House and the Senate, but has not yet been enrolled by the Secretary of State. After enrollment, the bill will be conveyed to the Governor for his signature or veto (or inaction). The authority to allow a bill to be enacted or to veto it is a power that is solely committed to the Governor's discretion pursuant to Pt. II, Art. 44. Article 44 provides:

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

⁷ By contrast, the justices did not ask to be excused from responding and did respond when the referred questions concerned the issue of whether the Governor, with the advice of the Council, should call the Legislature back into session. The authority to call the Legislature into special session lies with the Governor, with the advice of Council. See Opinion of the Justices, 110 NH 117 (1970) (net profits tax); Opinion of the Justices, 101 N.H. 549 (1958) (financial concerns resulting from PSNH tax abatement); and Opinion of the Justices, 96 N.H. 577 (1950) (re-organization of state government).

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.

No part of this constitutional provision provides for action by the Executive Council. Article 44 does not require the advice or consent of the Executive Council before the Governor makes a decision to allow enactment or issue a veto. Nor, has the Governor during his tenure consulted the Executive Council with respect to his veto power on any bill that was conveyed to him by the House and Senate. Indeed, were the Court to conclude that exercise of a veto is a matter on which the Executive Council must be consulted, this would set a precedent for all future governors on all future bills. If this were the case, Councilors would be able to demand an opportunity to offer their considered advice before the Governor exercises the right to veto legislation. This would be an extreme break with the practices that are currently in effect.

3. That HB 1264 Suppresses Voting Rights Does Not Allow for the Issuance of an Advisory Opinion to the Governor and Council.

HB 1264 concerns voting rights. The conduct of elections is the prerogative of the Secretary of State. The Secretary of State is the chief election officer in New Hampshire. R.S.A. 652:23. The Secretary of State is elected by the House and Legislature, not appointed by the Governor with the advice of Council. Pt. II, Art.67, N.H. Const. That the Governor and the members of the Executive Council are elected does not distinguish them from any other elected official in the state and does not convert their personal interests in the conduct of fair elections to an interest of the governmental body. Nor, does the interest of the Governor and Executive Council in fair elections give them a special role in writing or adopting election laws. The only role with respect to the passage of election laws that is assigned to the Governor or the Council is

that the Governor may issue a veto pursuant to Article 44. No role is assigned by the Constitution to the Council.

A governor's general executive branch authority to ensure that laws are faithfully executed, pursuant to Article 41, also does not save the referral from violating the utility requirement of Article 74 advisory opinions.⁸ HB 1264 is not yet a law. It is bill that has passed the House and Senate, but has not yet been enrolled. Although the House or Senate could have chosen to timely seek an advisory opinion about the constitutionality of HB 1264 while it was under consideration, neither body chose to do so. If the Governor was concerned about the constitutionality of HB 1264, he could have asked the House or Senate to seek an advisory opinion. He did not. The only prerogative remaining for the Governor is to veto the legislation or permit HB 1264 to become law and allow it to be challenged in a private right of action as happened with respect to SB 3. The SB 3 challenge remains pending before the Superior Court for Hillsborough County.

4. HB 1264 is Unconstitutional.

Finally, in the alternative, should the Court rule upon the referred questions, the Councilors submit that the Court should find that HB 1264 is unconstitutional because it denies citizens of the state of New Hampshire the equal protection of its laws and imposes a poll tax upon voters, particularly upon voters who are students at the state's colleges and universities. As the Councilors understand that the ACLU intends to extensively brief these substantive issues, the Councilors join the brief for the ACLU and adopt it as if fully set out herein.

⁸ As a matter of constitutional or statutory construction, the specific controls the general. It is a well settled rule of statutory construction, for example, "that in the case of conflicting statutory provisions, the specific statute controls over the general statute." In re Pennichuck Water Works, Inc., 160 N.H. 18, 34 (2010) (quoting Appeal of Plantier, 126 N.H. 500, 510 (1985)).

Conclusion

Wherefore, for the foregoing reasons, the below-signed Councilors respectfully request the Court decline to issue an advisory opinion or, in the alternative, advise the Governor that HB 1264 is unconstitutional, and for such other relief as is just and proper. If the Court schedules oral argument in this matter, the Councilors ask to participate.

Respectfully submitted,

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