

Too Many Doubts: Voters Should Vote No on Constitutional Amendment

By Russell Hilliard

Changing the Constitution in New Hampshire is difficult. Over the years, few amendments appearing on the ballot have garnered the two-thirds majority required to pass. That's the way it should be. Many cautious voters in New Hampshire say that if they aren't absolutely convinced of the necessity for an amendment, they vote against it. Voting No would be a wise choice again this year.

This November, voters are being asked to approve an amendment that would give the legislature veto power over rules of procedure and administration that the court approves for itself. The question appeared in slightly different form on the ballot two years ago and narrowly failed. This year's version is no improvement, and the New Hampshire Bar Association's Board of Governors, as it did two years ago, has voted to oppose it.

The proposal seeks to amend Part II, Article 73-a of the New Hampshire Constitution, which currently provides that the Supreme Court shall have the power to make rules to administer the courts and to govern the practices and procedures used in all of the state courts. The amendment would give the legislature the ability to negate a court-approved rule by enacting a statute, unless the rule is "otherwise contrary to the Constitution." The amendment also contains language that any statute regarding court rule or administration cannot "abridge the judiciary's necessary adjudicatory functions." Given the activist nature of the legislature in recent years, it is likely that litigation would be required to determine the meaning of the proposed amendment's cautionary language that "essential adjudicatory functions" cannot be impaired by statutes governing court rules and administration.

Proponents of this amendment claim that amending Pt II, Article 73-a is necessary because the law is unclear as to the authority of the legislative and judicial branches of government to make rules. The 2004 Voters' Guide, written at the direction of legislative leaders with no outside or impartial input, states that:

“... in recent years, decisions of the New Hampshire Supreme Court have indicated that the judicial branch may have exclusive or nearly exclusive authority over rule making”

The Voters' Guide, however, is simply wrong. The New Hampshire Supreme Court has *never* held that Part II, Article 73-a of the New Hampshire Constitution gives it a superior authority than the legislature to make rules of procedure for the courts. In fact, an unbroken line of cases has recognized the Legislature's authority to make rules which will control procedures in the court. Only in the extreme circumstance when a legislative rule would limit the ability of a court to act as a court, or violate some other constitutional guarantee, would a legislative rule be invalid. The Voter's Guide claims that if this amendment is enacted the Court will retain its right to enact rules, unless the legislature acts to the contrary, in which event the Legislative rule would control.

Then why has the legislature put forward this amendment? The Voter's Guide neglects to point out that the amendment will give new authority to the Legislature over court administration. The plain purpose of this amendment is to dilute the separation of powers guaranteed by Part 1 Article 37 of the Bill of Rights of the New Hampshire Constitution and so give the Legislature greater power over the judiciary.

A major supporter of the amendment recently stated that he believes that rules on what constitutes inappropriate judicial conduct, now made by the judiciary, could be made by the Legislature. Giving the Legislature the power to create a system to punish judges under the guise of "court administration" is flatly inconsistent with the concept of an independent and impartial judiciary. The Legislature already possesses the constitutional power to remove judges through impeachment or a bill of address. The proposed amendment is an attempt by one branch of government, the Legislature, to assert control over another branch, the judiciary, and limit judicial independence.

Supporters of this amendment have also argued that voters should pass it because it will bring New Hampshire in line with the federal system, where the Congress has the ability to approve or reject administrative rules developed by the federal courts. But NH's 424-member, part-time legislature lacks the expertise, institutional memory, support staff and other resources that Congress has at its disposal.

A two-thirds vote of the people is required to pass this amendment. This amendment is not necessary and poses a threat to the ability of the courts to act independently and decide cases fairly by introducing a new source of pressure from the legislative branch.

Vote No on this unneeded and possibly dangerous amendment.

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