

Civil Liberties Questions That Should Be Asked To Any N.H. Supreme Court Nominee

The ACLU of New Hampshire is a non-partisan organization and does not support or oppose any candidate for elected or appointed office, including N.H. Supreme Court nominees.

However, it is within the mission of our organization to ask questions of any public official—including a judicial nominee—about their positions on civil liberties issues. Given the important role that a Justice of the N.H. Supreme Court serves in whether and how constitutional rights are protected in New Hampshire, we believe that it is important for any nominee for this office to be asked certain civil liberties questions.

- 1. Implicit Racial Bias and White Supremacy:** Do you believe that implicit racial bias that favors white people and minimizes the lives and experiences of people of color exists in the criminal legal system, including in how law enforcement, judges, and juries make decisions?
- 2. Reproductive Rights:** Do you believe that *Roe v. Wade* was correctly decided? Do you believe that the N.H. Constitution independently protects the right of a person to obtain an abortion, just as such a right exists under the Federal Constitution as explained in *Roe*?
- 3. Right to Privacy:** Do you interpret the 2018 N.H. constitutional amendment protecting privacy—which states that an “individual’s right to live free from governmental intrusion in private or personal information is natural, essential, and inherent”—as being purely aspirational, or do you interpret it to be an enforceable privacy right that extends protections to individuals against state and local governments? Please explain your understanding of the legal significance of the amendment, which more than 81 percent of Granite State voters supported at the ballot box.
- 4. LGBTQ+ Equality:** Setting aside existing New Hampshire statutes, do you believe that the N.H. Constitution independently protects the right of same-sex couples to marry, just as such a right exists under the Federal Constitution as explained in *Obergefell v. Hodges*?*
- 5. Gender Equality:** Do you believe that the Equal Rights Amendment in Part I, Article 2 of the N.H. Constitution provides a right to gender equality that is more expansive than the Federal Constitution? If more expansive, please describe the expanded protections provided by the N.H. Constitution.
- 6. Government Transparency:** Do you believe that the government transparency provisions in Part I, Article 8 of the N.H. Constitution are merely parallel with Chapter 91-A, or should they be interpreted as being more expansive than Chapter 91-A?* If more expansive, please describe the expanded government transparency protections provided by the N.H. Constitution.
- 7. Police Accountability:** Last summer, the Governor created the Commission on Law Enforcement Accountability, Community, and Transparency (LEACT). During LEACT’s deliberations, there has been heightened attention to the fact that law enforcement disciplinary records are often treated as private by government entities. Do you believe that, by accepting a public position as a police officer, an officer “has, to a large extent, relinquished his right to keep confidential activities directly relating to his employment as a public law enforcement official?*

8. **The Right to Vote:** Do you believe that Part I, Article 11 of the N.H. Constitution provides a right to vote that is more expansive than the Federal Constitution, given that the N.H. Constitution explicitly protects the right to vote, whereas the Federal Constitution only implies it? If not, what is the legal significance of the explicit protections in Article 11 of the N.H. Constitution?*
9. **Free Speech:** Do you believe that Part I, Article 22 of the N.H. Constitution provides a right to free speech that is more expansive than the First Amendment in the Federal Constitution? If not, what do you believe is the legal significance of the N.H. Constitution making free speech an affirmative right in Article 22?*
10. **Search and Seizure:** Do you believe that Part I, Article 19 of the N.H. Constitution provides a right against searches and seizures that is more expansive than the Fourth Amendment in the Federal Constitution? * If more expansive, please describe the additional expanded protections provided by the N.H. Constitution.
11. **Immunity of Government Officials for Constitutional Violations:** Do you believe that the doctrine of qualified immunity, which often prevents victims of constitutional violations on the part of police from obtaining a remedy, should be revisited by the courts? *
12. **COVID-19 and Criminal Justice:** As a result of COVID-19, jury trials have been considerably delayed and, as a result, many individuals who have not yet been convicted have been waiting for months in jail to get their day in court. In addition, there have been COVID-19 outbreaks in several correctional facilities, including the State Prison, Valley Street Jail, Merrimack County Jail, and the Strafford County Jail. Incarcerated individuals are uniquely at risk of COVID-19 given that they are in congregate settings and given the inherent inability to social distance in this setting. What do you think the role is of the courts in general to respond to and address these serious problems?
13. **Partisan Gerrymandering:** In *League of Women Voters of Pennsylvania v. Commonwealth*, the Pennsylvania Supreme Court held in 2018 that partisan gerrymandering can violate the Pennsylvania Constitution. Does the New Hampshire Constitution protect against partisan gerrymandering?

Background Information

Question 4 – LGBTQ+ Equality

- In *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the U.S. Supreme Court held that, under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, same-sex couples have a fundamental right to marry. Accordingly, the Court invalidated state laws that excluded same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.

Question 6 – Government Transparency

- In 1976, Part I, Article 8 of the N.H. Constitution was amended to state that government should be open, accessible, accountable and responsive. It said the public’s right of access to governmental proceedings and records “shall not be unreasonably restricted.” New Hampshire is one of the few states that explicitly enshrines the right of public access in its Constitution. See *Associated Press v. State*, 153 N.H. 120, 128 (2005). Article 8’s language was included on the recommendation of the bill of rights committee to the 1974 Constitutional Convention and adopted in 1976. While New Hampshire already had the Right-to-Know Law (Chapter 91-A) to address the right of the public and the press to access information, the committee argued that the right was “extremely important and ought to be guaranteed by a constitutional provision.” Lawrence Friedman, *The New Hampshire State Constitution* 53 (2d ed. 2015).

Question 7 – **Police Accountability**

- As one court has explained: “By accepting his public position [a police officer] has, to a large extent, relinquished his right to keep confidential activities directly relating to his employment as a public law enforcement official.” See *State ex rel. Bilder v. Township of Delavan*, 334 N.W.2d 252, 261-62 (Wis. 1983).

Question 8 – **The Right to Vote**

- Part I, Article 11 of the N.H. Constitution explicitly protects the right to vote, as compared to the Federal Constitution, where that protection is implicit. Article 11 of the N.H. Constitution states in part: “All elections are to be free, and every inhabitant of the state of 18 years of age and upwards shall have an equal right to vote in any election.” Article 11 frames the right to vote as an affirmative one that the State must guarantee.

Question 9 – **Free Speech**

- The First Amendment states that the government “shall make no law...abridging the freedom of speech.” While the First Amendment is framed in the negative, the N.H. Constitution is arguably broader and treats free speech as an affirmative right that the State has a duty to preserve. Part I, Article 22 states that “[f]ree speech and Liberty of the press are essential to the security of Freedom in a State: They ought, therefore, to be inviolably preserved.”

Question 10 – **Search and Seizure**

- Part I, Article 19 of the N.H. Constitution states that everyone has the right to be secure from all unreasonable searches and seizures of their person, house, papers, and possessions. This protection was enacted in 1784—5 years before the enactment of the Federal Constitution. As the N.H. Supreme Court has explained, it “safeguards privacy and protection from government intrusion [It] thus manifests a preference for privacy over the level of law enforcement efficiency which could be achieved if police were permitted to search without probable cause or judicial authorization.” *State v. Canelo*, 139 N.H. 376, 386 (1995). The N.H. Supreme Court has traditionally interpreted Article 19 to provide more search and seizure protections than the Fourth Amendment in various contexts, including in the context of automobile searches and seizures (*State v. Koppel*, 127 N.H. 286 (1985)), police use of dogs to smell for contraband (*State v. Pellicci*, 133 N.H. 523 (1990)), and searching trash in a driveway (*State v. Goss*, 150 N.H. 46 (2003)).

Question 11 – **Immunity of Government Officials for Constitutional Violations**

- The doctrine of qualified immunity immunizes the government from liability from constitutional errors that have harmed people. There is a growing cross-ideological consensus that the U.S. Supreme Court’s qualified immunity doctrine under 42 U.S.C. § 1983 misunderstands this statute and its common-law back-drop, denies justice to victims of egregious constitutional violations, and fails to provide accountability for official wrongdoing.