

15 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 judicial nominees—about their positions on civil liberties issues. Given the important role that the Chief 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, in this instance Attorney General Gordon MacDonald, 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 justice system, including in how 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 woman to obtain an abortion, just as such a right exists under the Federal Constitution as explained in *Roe*?
3. **Recusals:** As a Supreme Court Justice, would you agree to recuse yourself in *all* civil and criminal cases in which, while you were Attorney General, your office was a party or counsel? This includes the following:
 - *Contoocook Valley School District et al. v. State of New Hampshire*, Cheshire Superior Court No. 213-2019-cv-00069;
 - *N.H. Center for Public Interest Journalism, et al. v. N.H. Department of Justice*, No. 2019-0279 (“Laurie List Chapter 91-A Lawsuit”);
 - *League of Women Voters of New Hampshire, et al. v. Gardner*, No. 226-2017-cv00433 (“Senate Bill 3 Litigation”);
 - *Jones v. State*, No. 2019-0057 (search and seizure case addressing race);
 - *John Doe v. State of New Hampshire*, No. 1:18-cv-01039-JD (emergency room involuntary boarding due process case); and
 - Recent cases filed by your office against the chemical companies that manufacture PFAS chemicals.

Also, what will be your policy with respect to recusing yourself from cases in which the law firm Nixon Peabody LLP is counsel?

4. **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.
5. **Immigration Enforcement in Courthouses:** As the Chief Justice of the N.H. Supreme Court—where you would be the chief administrator of the New Hampshire courts—would you implement a policy that protects immigrants and communities of color from being detained or arrested inside

New Hampshire state courts?*

6. **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*?*
7. **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.
8. **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.
9. **Police Accountability:** Do you believe that the N.H. Supreme Court's decision in *Union Leader Corp. v. Fenniman* was correctly decided? Should this decision be reconsidered in light of the consequences of this decision?*
10. **Advisory Opinions:** Do you believe that the N.H. Supreme Court should give advisory decisions to the N.H. legislature or Governor on important constitutional questions without a factual record? If so, under what circumstances and why?*
11. **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?*
12. **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?*
13. **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.
14. **Public Funds to Religious Education:** Was SB193, as proposed in the 2017-18 legislative session, constitutional under the N.H. Constitution? If so, what is the basis for this opinion?*
15. **Immunity of Government Officials for Constitutional Violations:** Do you believe that the doctrine of qualified immunity should be revisited by the courts?*

Background Information

Question 5 – Immigration Enforcement in Courthouses

- There is a growing presence of federal Immigration and Customs Enforcement (ICE) officers in state courthouses, including at the Nashua Circuit Court here in New Hampshire. The presence of these officers and increased immigration arrests create deep insecurity and fear among immigrant communities, stopping many from coming to court or even calling police in the first place. In response, many courts across the country have taken action. For example, the Bernalillo County Metropolitan Court in New Mexico issued a policy in September 2018 stating that law enforcement officers should not detain, arrest, or question any person in the courthouse unless it is required by on-site law enforcement, public safety, or a judicial warrant. The Seattle Municipal Court similarly has a policy, effective April 7, 2017, stating that “warrants for the arrest of individuals based on their immigration status should not be executed within any of the Seattle Municipal Court courtrooms unless directly ordered by the Presiding Judge or assigned Judicial Officer and shall be discouraged in the Seattle Municipal Courthouse unless the public’s safety is at immediate risk.”

Question 6 – 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 8 – 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 9 – Police Accountability

- In *Union Leader Corp. v. Fenniman*, 136 N.H. 624 (1993), the N.H. Supreme Court ruled that the “internal personnel practices” exemption under RSA 91-A:5, IV should be treated as a categorical exemption that permits the government to withhold from the public investigation and discipline records concerning dishonest or abusive police officers. Under this decision that has devastated the public’s ability to hold the police accountable, the Court concluded that the government can withhold “internal personnel practice” records even if there was a compelling public interest in disclosure and even

where the misconduct related to the officer’s performance of his official duties. In *Reid v. N.H. AG*, 169 N.H. 509, 522 (2016), the N.H. Supreme Court suggested that *Fenniman* may have been wrongly decided and declined to extend this decision.

Question 10 – **Advisory Opinions**

- Compare *Opinion of the Justices (Domicile for Voting Purposes)*, 167 N.H. 539 (2015) (declining to opine on the constitutionality of a voting law without a factual record) with *Opinion of the Justices (Definition of Resident and Residence)*, 171 N.H. 128 (2018) (in 3-2 decision, opining on the constitutionality of a similar proposed law, HB1264, without a factual record; dissent noting that deciding a voting question where “material facts are sharply disputed ... undermines our credibility”).

Question 11 – **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 12 – **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 13 – **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 14 – **Public Funds to Religious Education**

- Senate Bill 193, which was proposed in the New Hampshire legislature during the 2017-18 session, would have created education savings accounts that could funnel public funds to private religious education. However, Part I, Article 6 of the N.H. Constitution states, “[N]o person shall ever be compelled to pay towards the support of the schools of any

sect or denomination.” Part II, Article 83 also states in part, “[N]o money raised by taxation shall ever be granted or applied for the use of the schools of institutions of any religious sect or denomination.” The N.H. Supreme Court has interpreted these provisions as strictly prohibiting any diversion of tax funds that could be used to support religious activities of religious educational institutions. *See, e.g., Opinion of the Justices (Choice in Education)*, 136 N.H. 357 (1992) (school voucher program was unconstitutional because “[n]o safeguards exist[ed] to prevent the application of public funds to sectarian uses”); *Opinion of the Justices*, 109 N.H. 578 (1969) (\$50.00 per year property tax credit for any person having at least one child attending a nonpublic school was unconstitutional because “[i]t would make available to the parents funds which they could contribute directly to the nonpublic school, including parochial schools, without restricting the aid to secular education”).

Question 15 – **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.