Bill as Introduced

HR 13 – AS INTRODUCED

2011 SESSION

11-1113
01/09

HOUSE RESOLUTION *13*

A RESOLUTION repudiating *Opinion of the Justices*, 162 N.H. 160 (2011), and urging the senate to remove from the table and pass 2011 HB 89.

SPONSORS: Rep. Sorg, Graf 3; Rep. O'Brien, Hills 4; Rep. Bettencourt, Rock 4; Rep. Ingbretson, Graf 5; Rep. Manuse, Rock 5; Rep. Mirski, Graf 10; Rep. B. Murphy, Rock 18; Rep. Baldasaro, Rock 3

COMMITTEE: Constitutional Review and Statutory Recodification

---

ANALYSIS

This house resolution declares that the advisory opinion issued by the supreme court in response to SR 9 under New Hampshire constitution, Part II, Article 74 was incorrect and a dangerous addition to a series of decisions of the court inimical to the authority of the legislature and the right of the people to be controlled by no laws other than those to which they or their elected representatives have consented, and urging the senate to remove HB 89 of the 2011 legislative session from the table and pass it.

HR 13 – AS INTRODUCED

11-1113
01/09

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Eleven

A RESOLUTION repudiating *Opinion of the Justices*, 162 N.H. 160 (2011), and urging the senate to remove from the table and pass 2011 HB 89.

Whereas, on December 30, 2010, HB 89, requiring the attorney general no later than July 1, 2011 to move to join the state of New Hampshire in the case of *State of Florida, et. al. v. United States Department of Health and Human Services, et. al.* (3:10cv-00091-RV-EMT), challenging the constitutionality of the federal Patient Protection and Affordable Care Act, was introduced in the House of Representatives and referred to the state-federal relations and veterans affairs committee; and

Whereas, on January 20, 2011, the state-federal relations and veterans affairs committee voted 11 to 3 to recommend passage of HB 89 as amended by Amendment No. 2011-0037h under the new title "requiring the attorney general to join the lawsuit challenging the Patient Protection and Affordable Care Act;" and

Whereas, on February 9, 2011, the house passed HB 89 as amended by a vote of 267 to 103, and referred it to the constitutional review and statutory recodification committee; and

Whereas, on March 8, 2011 the constitutional review and statutory recodification committee voted 12 to 5 to recommend passage of HB 89 as so amended; and

Whereas, on March 15, 2011, the house again passed HB 89 as amended, by a vote of 259 to 107, and HB 89 was sent to the senate; and

Whereas, on April 20, 2011, HB 89 was introduced in the senate and referred to the commerce committee; and

Whereas, on April 27, 2011, the commerce committee voted 4 to 1 to recommend passage of HB 89 as amended by amendment No. 2011-1585s; and

Whereas, on May 4, 2011 the senate voted to lay HB 89 on the table and to adopt SR 9 to require, pursuant to Part II, Article 74, the opinion of the supreme court on the following questions:

"1. Does the requirement of HB 89 that the attorney general move to have the state of New Hampshire join as a plaintiff in the lawsuit violate Part I, Article 37 of the New Hampshire constitution?

2. Does the requirement of HB 89 that the attorney general move to have the state of New Hampshire join as a plaintiff in the lawsuit fall within the broad grant of authority to the general court set forth in Part II, Article 5 of the New Hampshire constitution?

3. Does HB 89 as adopted by the house of representatives and presently pending before the senate violate any other provision of the New Hampshire constitution?"; and;

Whereas, SR 9 was filed with the supreme court on May 5, 2011, and docketed as Case No. 2011-319; and

Whereas, on June 15, 2011, the supreme court issued its opinion (*Opinion of the Justices (Requiring Attorney General to Join Lawsuit)* 162 N.H. 160), in which it opined:

1. That HB 89 violates Part I, Article 37 by reason that the 1966 amendment to Part II, Article 41, which added everything after the first sentence, gave the executive branch the exclusive power to decide the state's interest in litigation;

2. That, accordingly, "[i]t is the executive, not the legislative branch, in which the constitution vests the 'supreme executive' authority to determine whether it is in the public interest to litigate a particular matter... [t]he executive branch alone [having] the power to decide the state's interest in litigation," *Opinion* at page 170; and

3. That, "[h]ow the legislature interpreted Part II, Article 41 in the 1780's and 1790's is of little help in determining its meaning in light of the 1966 constitutional amendments," *Opinion* at page 172; and

Whereas, said Opinion of the Justices reflects an incorrect understanding of the intentions of the framers of the 1966 amendment to Part II, Article 41, leading to an incorrect interpretation of Article 41 as so amended, and in support of this assertion, the house says as follows:

1. The delegate quoted by the court for the proposition that the amendment gave the executive branch the exclusive power to decide the state's interest in litigation, Opinion at page 169, actually stated that the purpose of the amendment was to protect the power of the legislature by requiring the governor to "enforce respect for legislative mandates, powers, rights and duties:"

"Now the purpose of this resolution is to protect the power of the general court. It makes explicit some statutory authority which the executive branch has already been using for many years. The Constitution says — the present one — in Article 62 — 'the governor may hold a conference for ordering or directing the affairs of the state according to the laws of the land.' Now that may seem like a broad granted power but when it was written nobody knew it would apply to an executive department with thousands of employees spending millions of dollars. The new Resolution 58 permits the governor to continue to direct the affairs of the state and now he must enforce respect for legislative mandates, powers, rights and duties."

Journal of the 1964 Constitutional Convention at page 287.

2. Other remarks from this delegate show that there can be no question that the intent of the amendment to Article 41 was not, as wrongfully asserted by the court, to vest additional authority in the governor, but the exact contrary of clarifying the supremacy of legislative control of civil officers such as the attorney general:

"Now in conclusion, I have just one more reason for passing Resolution 58. As everyone knows, state legislatures have been losing power rapidly in recent years. And this is not a theory. It is an accepted fact that progressive decline of legislative power threatens representative government. Many forces aggravate the imbalance and every time a bureaucrat overspends his budget or ignores a statute, he shows disrespect for the Legislature. Resolution 58 declares all executive departments

and agencies must respect all mandates, powers and rights of the general court and I hope as we close the 15th constitutional convention we can adopt Resolution 58 which says that whatever may happen in the other states, New Hampshire is still owned by the people and still operated by elected representatives of the people."

Journal of the 1964 Constitutional Convention at page 289.

3. The records of the constitutional convention make clear, also, that the verbiage added to Article 41 was not intended to give the governor any constitutional authority over the state's civil officers, because the convention considered and rejected express language that would have caused Resolution 58 to have amended Article 41 to read as follows:

"There shall be a supreme executive magistrate, who shall be styled the Governor of the State of New Hampshire, and whose title shall be His Excellency. The executive power of the state is vested in the governor. *Each principal executive department shall be under the supervision of the governor.* The governor shall be responsible for the faithful execution of the laws. He may, by appropriate court action or proceeding brought in the name of the state, enforce compliance with any constitutional or legislative mandate, or restrain violation of any constitutional or legislative power, duty, or right, by any officer, department or agency of the state. This authority shall not be construed to authorize any action or proceedings against the legislative or judicial branches."

Journal of the 1964 Constitutional Convention at page 287 (emphasis added).

4. The purpose of removing the italicized sentence from Resolution 58 was expressly stated to be to keep executive departments constitutionally autonomous from the governor:

"I'd like to rise in support of the amendment offered to the amendment by the delegate from Concord. The sponsor of the measure also believes this is good constitutional thinking. It was not the intent of the Committee in any way whatsoever to give the governor authority to set policy or to interfere in any way with these commissions who are properly doing their job. Our only feeling was this: in government, as in other areas, you find once in a while a 'Peck's bad boy.' All we wanted to do was give the governor the authority to straighten out such a matter. I'm in agreement with and the sponsor's in agreement and I hope the whole Committee and the members of this body are in agreement with the amendment which has been offered."

Journal of the 1964 Constitutional Convention at page 290.

5. The court's saying in the *Opinion* at page 169 that the records of the 1964 constitutional convention "reveal that the intended purpose of Part II, Article 41 is to grant the *exclusive* power to *enforce* the law." merely begs the question of whether the "power to enforce the law" was understood to encompass the power to decide the state's interest in litigation, since, if enacted, HB 89 would *itself* be law.

6. In summary, the records of the constitutional convention are clear that the purpose of the amendment to Part II, Article 41 was precisely the opposite of that found by the court in its *Opinion*; that the delegates understood the purpose to be to assure that executive agencies would comply with

and effectuate the laws passed by the legislature, to enhance rather than take from the legislature its existing power under Part II, Article 5 "to set forth the several duties, powers, and limits" of civil officers, including the long-exercised power to require the attorney general to commence a particular lawsuit or discontinue a particular lawsuit; and

Whereas, an exclusive power on the part of the governor to decide the state's interest in litigation would be an alarming, transformational power because it would change our system of government into either an executive oligarchy or an executive autocracy by giving the governor a "litigation-veto" power over the legislature such that he could decide, for example, that the "state's interest" in the next education funding lawsuit is to stipulate that the cost of an "adequate education" is twice as high as the cost set forth in the challenged law; that the "state's interest" in a lawsuit challenging the recently passed pension reform bills is to agree that all changes opposed by public employee unions are unconstitutional; and that the "state's interest" in a lawsuit challenging the recently enacted parental notification statute is to default; and the executive branch could undermine the purpose of any law enacted by the legislature by the commencement of a lawsuit challenging whatever aspect or aspects of the law the governor or any executive department head did not care for, merely by the governor's deciding that the "state's interest" runs contrary to defending these aspects of the law; and

Whereas, such a power is irreconcilable with the constitution's express delineation of powers between the executive and legislative branches, according to which the executive has no power to make law; and

Whereas, the governor's power to influence lawmaking is limited by Part II, Article 44 to preventing a law proposed by the legislature from becoming law through the veto power, and even that power is qualified by the power of the legislature to override such veto; and

Whereas, to say that the governor alone has the power to decide the state's interest in litigation is to give the governor not just the new authority of a "litigation-veto" but lawmaking powers granted exclusively to the legislature; and

Whereas, *Opinion of the Justices,* 162 N.H. 160 (2011), represents only the most recent example of the trend of constitutional adjudication over the past 30 years by which the supreme court, on the pretext of interpreting the constitution, has narrowed the prerogatives and powers of the legislature, to the detriment of the republican form of government of the state of New Hampshire guaranteed to the people of this state by Part I, Articles 7 and 8 of the New Hampshire constitution and Article 4, Section IV of the federal constitution, of which trend the following decisions are indicative, but by no means comprehensive:

1. In *State v. LaFrance*, 124 N.H. 271 (1983), the court laid claim to a sweeping power of judicial review - that is, the power not only to interpret a provision of the constitution for purposes of binding the parties to the case actually before it, but to make its interpretation final and binding upon the legislature in all future cases — a power not only unjustified by, but in actual defiance of the history,

text and structure of the constitution, the court's sole support for which claim were selective and intentionally misleadingly edited quotations from *Merrill v. Sherburne,* 1 N.H. 199 (1818) and *Deming v. Foster*, 42 N.H. 165 (1860);

2. In *State v. Martina*, 135 N.H. 111 (1991), the court reiterated its holding in *State v. Moquin*, 105 N.H. 9 (1963), asserting the unfettered authority, contrary to legislative directive, to imprison citizens for the crime of contempt, thereby extending its original usurpation in *Opinion of the Justices*, 86 N.H. 597 (1933), in which it ignored the express language of Part II, Article 5 by claiming for itself alone the authority to define that crime;

3. In *Petition of Tocci*, 137 N.H. 131 (1993), notwithstanding the express statement of Article 83, Part II declaring it as an inherent and essential right of the people to be protected against monopolies and granting to the legislature of power to prevent and control monopolies, the court upheld the monopoly status it had unilaterally conferred on the New Hampshire Bar Association on the basis of its "inherent judicial power," a power unexpressed in the constitution and one so amorphous, open-ended, and self-serving as to encompass anything over which the court decides it wants to exercise authority;

4. In *Claremont v. Governor*, 138 N.H. 183 (1993), in an opinion that did not achieve or apparently even aspire to the level of plausible judicial scholarship, the court read the public education policy preferences of 4 of its members into the constitution in complete disregard of historical practice, constitutional text, the wishes of the people expressed through countless elections, and its own precedents;

5. In *Petition of the New Hampshire Bar Association*, 142 N.H. 588 (1998), in the face of the exclusive authority given to the legislature by Part II, Article 5 to impose and levy assessments and taxes, the court, using the self-contradictory euphemism "mandatory contributions," laid claim to an unlimited arbitrary power to tax a class of citizens (lawyers) to support anything "found necessary by the court in aid of its own responsibility to see to the proper administration of justice;"

6. In *Petition of Mone*, 143 N.H. 128 (1998), the court extended the scope of the right of the individual to "an impartial interpretation of the laws" enshrined in Part I, Article 35 to encompass a limitless right of itself to spend its appropriation in any manner it sees fit respecting anything it arbitrarily chooses to designate as "an essential function of the judicial branch," in this case the right to reject reasonable and economical statutory provision for court security and to create instead its own praetorian guard;

7. In *Burling v. Chandler*, 148 N.H. 143 (2002), notwithstanding that Part II, Articles 9 and 26 confer upon the legislature exclusive, plenary authority to redistrict itself, the court, aided by a foreign "expert" of the court's selection, redistricted the House of Representatives and, again without constitutional authority to do so, purported to impose upon the legislature standards for acceptable and unacceptable deviations from the ideal district population;

8. In *Petition of the New Hampshire Bar Association*, 151 N.H. 112 (2004), in which the court declared unconstitutional a statute requiring the association to conduct and be bound by a referendum of its membership on whether it should continue as a monopoly, the present chief justice expressed disagreement with the court's claim of inherent judicial power to unify the bar but nevertheless concurred in the decision on the basis of *stare decisis*, thereby showing that, to her and to judges of the supreme court generally, solidarity and the appearance of omniscience matter more than fidelity to the constitution; and

9. In *Akins v. Secretary of State*, 154 N.H. 67 (2006), without benefit of either constitutional text to support it or neutral principles to guide it, solely on the basis of anecdotal and discredited so-called empirical evidence, the court intervened into the political process by making itself the final determinant of the proper manner of listing candidates on ballots in multi-member House districts; and

Whereas, the true holding of *Merrill v. Sherburne*, 1 N.H. 199 (1818), freed of the distortion imparted by the supreme court's disingenuous and self-serving editing in *State v. LaFrance*, 124 N.H. 271 (1983), reads as follows:

"Our confidence, also, in the liberality of the legislature is such that, when through inadvertence or mistake, they have passed an unauthorized act, we believe that, should the unpleasant task of adjudging it void devolve upon us, they would think the task is performed only from a conviction that the act is in the *clearest* manner, unconstitutional, and that our right and duty so to pronounce it are both unquestionable;"

1 N.H. at page 202 (Emphasis in original); and

Whereas, contrary to the text and spirit of *Merrill v. Sherburne*, the modern supreme court, having through observation and experience become satisfied that the public generally and the members of the legislature in particular having no understanding of the proper role of the judiciary and having been conditioned by the court into believing that whatever it says from the bench is *ipso facto* correct, final and binding, regardless of absurdity, has pursued a consistent and pernicious course of interference in political and policy matters that our system of republican self-government confers on the legislature; and

Whereas, this process of usurpation has emboldened the court and blinded it to its proper role in a system of separation of powers and checks and balances; and

Whereas, in light of the foregoing, it is clear and incontrovertible that the court's contention in *Opinion of the Justices*, 162 N.H. 160 (2011) that the policy-making authority to determine whether the state should join the Florida lawsuit has been delegated to the executive branch is incorrect; that the court's attempt to enervate further the legislative branch does enormous violence to the constitutional balancing of legislative and executive authority; that the authority that would be exercised should HB 89 become law was conferred upon the legislature in 1784 by Part II, Article 5; that the historical evidence is incontrovertible that the 1966 amendment to Part II, Article 41 did

not transfer this authority from the legislative to the executive branch; and that, to the contrary, the amendment to Part II, Article 41 was intended to ensure that the executive branch did not ignore or usurp the authority of the legislative branch "to set forth the several duties, powers, and limits" of civil officers of this state, which included the power to require the attorney general to commence or discontinue a particular lawsuit; now, therefore, be it

Resolved by the House of Representatives:

That the decision of the supreme court in *Opinion of the Justices*, 162 N.H. 160 (2011) is incorrect and a further manifestation of the court's demonstrated hostility to representative government and its propensity unconstitutionally to interfere with the political process, and should be and hereby is repudiated and utterly rejected; and

That the senate, in order to reflect the will of the people expressed in the most recent election, to uphold the authority of the legislative branch conferred by the New Hampshire constitution, and to protect the federal system established by the United States constitution, is respectfully called upon and urged to remove from the table and pass HB 89 of the 2011 legislative session.

Speakers

SIGN UP SHEET

To Register Opinion If Not Speaking

Bill # HB 13 Date September 20, 2011

Committee Constitutional Reviews and Statutory Recodification

** Please Print All Information **

Name	Address	Phone	Representing	(check one) Pro	Con
Rep Bob Ohm		Hillsborough 26		X	
Pamela Ean	Concord, N.H.			X	
Leah Wolicko	Manchester, NH				X
Rep Robert Kingsbury	Lyndeborough		Self	X	
Bill Domenico	Manchester		Self	X	
Stella Tremblay	Auburn, NH			X	

Hearing Minutes

HOUSE COMMITTEE ON
CONSTITUTION REVIEW AND STATUTORY RECODIFICATION

PUBLIC HEARING ON HR13

BILL TITLE: repudiating Opinion of the Justices, 162 N.H. 160 (2011), and urging the senate to remove from the table and pass 2011 HB 89.

DATE: 09/20/2011

LOB ROOM: 308 **Time Public Hearing Called to Order:** 1:05 pm

Time Adjourned:

(please circle if present)

Committee Members: Reps. Bates, Scala, Drisko, Jasper, Hoelzel, Doherty, Eaton, Birdsell, Byrnes, DeJong, DeLemus, Erickson, Reilly, Thomas, Cote, Pierce, Perry, Gimas and Leishman.

Bill Sponsors: Reps. Itse, Cebrowski, Cartwright, Cohn, Davenport, P. Brown, Krasucki, Luther, Peckham, Reichard, Weeden, Serlin, Katsiantonis, Richardson, Coulombe, DeLemus, Porter, Jones and A. Schmidt.

TESTIMONY

* Use asterisk if written testimony and/or amendments are submitted.

Public Hearing: Open at 1:05 pm.

1. Intro (A) Rep. Gregory M. Sorg, Graf. 3

Art. 74, Part 2 – Ask opinion of court.
- When written legislatures were authorities
- Legislature can consult

Since 1983
- Court has final authority over Legislature & Executive
- Court – 3rd Chamber of Legislature
  Has gathered power into their hands
- Court ruled on HB 89 & granted executive veto by law suit

66 convention info brought forward. Court denied 2nd review
- Resolution fights back to reclaim turf

- Rep. Cohn thought and purpose to the amendment in historical review – Do we have the recourse?

Rep. Sorg – This is our recourse.

Rep. Cebrowski eyed upon discussion of written response

Rep. Sorg – Saw only written response. Denied

Rep. Krasucki – who would be final decider. Constitution of crisis

Rep. Itse – This is how process works

Rep. Serlin – Head Butting – what would be outcome?
Rep. Sorg – Beyond scope of resolution
Rep. Cebrowski – What sre sources of the bill?
Rep Sorg - He drafted mostly
Rep Itse – Jim counts opinion. Did they quote constitutional convention recodification?
How much included in decision?
Rep. Sorg – In public opinion
Rep. Itse - Include paragraphs.
Rep. Sorg - Don't remember – response was not "full" Reconsideration to get context.
Rep. Itse – Power originates in the people
- Where did "Inherent Power" come from?
Rep. Sorg – Disturbing court has claimed uneventful power

(B.) Rep. Kingsbury – Legislature does the telling.
Executive does what told
Lincoln used only power available – so used it –
Emancipation proclamation
Lincoln on Ded Scott Decision
Decision declares 2 points
Two uses – President and authority
Executive Branch can ignore the Judiciary

(C.) Rep. O'Brien – Co-Sponsor
Constitution defines balance between brands
Executive participates in legislative process to the extent that veto
Is not overridden
Ruling grants an effective veto power(by Maubertone or intent)
Filed motions for reconsideration
They denied motion without analysis
The executive should be able to have veto power beyond
Constitution
Resolution allows legislative branch to say we disagree with this opinion
It would be a disservice to ignore
Like Claremont
Now, we must go forward with a CACR to prevent a judicial
Restricting of our government
Pass this – executive has duty to execute laws – it is their obligation

4. Rep. Reichard – Senate was waiting for judicial review to come back – why are we telling Senate to take off the table

Rep. O'Brien - Point is to get on record the substantial issues with their opinion
Language to Senate is gentle

Rep. Cohn - Litigation veto – would that shield executive branch from
Impeachment in the future

Rep. O'Brien - Don't think so – But, messes up balance of power and things get

Weird. Other then veto, executive should have no power to nullify Law

Rep. Krasucki – Makes to Governor. He vetos and we override that would have Governor sign

Rep. O'Brien - Govenor can ignore if you follow the trail out. Court is acting In an extra legal manner

Rep. Itse - Possible there is confusion between Rep. O'Brien.

Rep. O'Brien - Policy setting - Branch & Executive is not policy setting branch – Court confusing these

Rep. Itse - Is this intended to weaken Legislature

Rep. O'Brien - Intended to strengthen Legislature and its role. Left feeling Court has done 180 on what was intended

Rep. Itse - Does there ruly set precessed

Rep. O'Brien - Shouldn't – just advisement – But, they seem to want it, too (Cited by court often)

5. (D.) Patriot Pastor Garrett Lear

No other king. But, by Jesus
Rise in affirmation of resolution
Challenge we face is that of Divine Right Kings
Judiciary is part of that process
We are done with Divine Right Kings
The law is king
Lex rex not rex lex

Declaration – Individuals against Divine Right Kings (George)

Lot of friction against this – do it anyway
Must restore republic
Judges should not make laws
Motions for reconsideration are almost always ignored/denied
Court does not even follow it Own rules of court

Rep. Cohn – Moral delima – should executive be forced to enforce an immoral law

Pastor Garrett Lear – Tough question – Governor can argue his immoral Imperative – There is a balance and it's out of whack

6. Rep. Itse – Issue of Inherent Authority claimed by Judiciary – Power comes From people
- Where does inherit authority come from?

Pator Garrett Lear – Good question – There is no source that is legitimate They are claiming power from God Divine Power

Easier to be Tyrant: But, not just.
Power are granted to states by the people

(E.) David Johnson – Judicial branch as overstepped boards
(See attachment)
Usually injects itself in political issues
Hill vs Hinckle – Individual may stand on rights
- What's gone wrong with executive & judicial?
- Citizen has a right to not contract with a
Company – and has right that executive & judicial
Branch should defend him against federal overreach
Merrill vs Shuburn – Court tried to weasel out of
Oversite

Government must stay within proper bounds
Court is out of control

Rep. Itse - Rules of evidence of NH Judiciary state they supersede
Rules of court & state

Rules of Evidence - Intent was to keep leash on Judiciary

Rep. Reichard - What's your background? How do you know this?
Spent time in fraud investigation. Has been
Victimized by court. Court is making itself
Above the law. They won't follow Constitution/Law/
Own Rules/VS Supreme Court Rule.s

7. Rep. Krasucki - You recommended impeachment
Two methods – reason & force
Force doesn't occur for incremental violations
Activation energy is too high
What "reason" could we use?

David Johnson - 1) Resolution
2) Override veto
3) Force dies in Senate – Force is necessary to hear
- Judiciary is not forced to follow the law

Rep. Krasucki – What about funding as force?

David Johnson - Take it out of their hide
Some court cases are being traded on open market

(F.) Rep. Manuse – Ride of government. Why constitute government at all?
They protect the inherent rights of the people

Here the state is trying to protect rights of people against
Federal overreach

Supporter of power. Judicial power is defined in constitution
They are violating it

Senate asked opinion of court – Opinion

Full power & authority to make laws are granted to
General Court. General Court can set limits & duties
Of Attorney General, Supreme Court & Executive are
Attempting to use up legislative power.

8. Rep. Manuse - Art 41 – Says authority of Executive shall not be construed
To mean it can take action against legislative and bypass
Its authority

Resolution is awesome – pass it.

Justice – Quality under the law
- That is fundamental of government
- Argument alert expense
- Saying that justice is too expensive

It is our duty to impeach the AG if he won't perform his duties.

Rep. Cohn - Quandary – Moral rights of executive to refuse to enforce unjust law.
- Impeachment should be response – right?

Rep. Manuse - Yes
But, AG doesn't have power to ignore.
Legislature – Must – Unlike Federal level.
Impeachment – Yes, we should impeach.
This is appropriate use of impeachment.

Rep. Itse - People are final arbiters of constitution.
If people disagree with us, they have recourse.
That is normal judgment.

Rep. Manuse - Election will determine whether our behavior is appropriate.
Legislature is supreme body in NH.
More balance on Federal level.

HOUSE COMMITTEE ON
CONSTITUTION REVIEW AND STATUTORY RECODIFICATION

PUBLIC HEARING ON HR 13

BILL TITLE: repudiating Opinion of the Justices, 162 N.H. 160 (2011), and urging the senate to remove from the table and pass 2011 HB 89.

DATE: September 20, 2011

LOB ROOM: 206 **Time Public Hearing Called to Order:** 1:00 p.m.

Time Adjourned:

(please circle if present)

Committee Members: Reps. Itse, Cebrowski, Cartwright, Cohn, Davenport, P. Brown, Krasucki, Luther, Peckham, Reichard, Weeden, Serlin, Katsiantonis, Richardson, Coulombe and A. Schmidt.
Porter Delcamus Jones

Bill Sponsors: Rep. Sorg, Graf 3; Rep. O'Brien, Hills 4; Rep. Bettencourt, Rock 4; Rep. Ingbretson, Graf 5; Rep. Manuse, Rock 5; Rep. Mirski, Graf 10; Rep. B. Murphy, Rock 18; Rep. Baldasaro, Rock 3

TESTIMONY

* Use asterisk if written testimony and/or amendments are submitted.

9/20/11

Public Hearing
repudiatory Opinion

Open - 1:05

① Intro (A) Greg Sorg:

Art 74 Nt 2 - Ask opion of court. - final
- when written - legislatures were authorities
- legislature can consult.
Since 1983 - Court has said is has final authority over leg & Exec.
- Court ⇒ 3rd chamber of legislature:
→
Have gathered power into their hands
- Court Ruled on 1B89 & granted executive vetoe by law suit.
(B) convention info brought forward.
Cort denied ~~review~~ 2nd review
- Resolution fights back to reclaim terf.

Cohn → Thought and purpose to the amendment in historical review - do we have othe recourse.

Sorg → This is our recourse

Cebiowski → Expand upon discussion & written response

Sorg → Saw only written response
→ denied

(2) Krasuski → who would be final decider
→ constitutional crisis

Itse → This is how process works.

Serlin → Assuming Senate Agrees, what is ultimate goal.
Sorg → Jan Florida litigation
Serlin → Head butting → what would be outcome
Sorg → beyond scope of resolution

Cebrowski → what are sources of bill
Sorg → He drafted mostly.

Itse → In Courts opinion, did they quote Const. Conv. Referenced? How much included in decision
Sorg – in published opinion
Itse → include paragraphs
Sorg → don't remember → response was not "Full" reconsideration to get context.
Itse → Power originates in the people.
→ where did "Inherent Power" come from? judiciary
Sorg → Disturbing court has claimed unenumerated Power.

(3) (B) Kingsbury → legislature does the telling
Executive does what told.
Lincoln used only power available → so used it →
Emancipation proclamation
Lincoln on Dred Scott Decision
→ Decision declares ~~illegal~~ 2 points
→ Two uses Precedent & Authority.

Executive Branch can ignore the judiciary

~~You better~~ Summarize this R.

(C) OBrien — Co-sponsor
Constitution defines balance between branches —
→ Executive participates ~~to extent~~ in legislative process to the extent that veto is not overridden.
→ Ruly speaks on effective veto power (by inadvertance or intent)
→ filed motions for reconsideration
→ They denied motion without analysis
→ this is aquiescence that executive ~~can~~ should be able to have veto power ~~by~~ beyond constitution
→ Resolution allows legislative branch to say we disagree with this opinion.
→ It would be a disservice to ignore →
like Clairemont,
Now we must go forward with a CACR to prevent a judicial restructuring of our government
→ Pass This → executive has duty to execute laws - it is their obligation

④ Reichert → Senate was waiting for judicial review to come back — why are we telling Senate to take off table

Obrien → point is to get on record the substantive issues with their opinion. language to senate is gentle

Cohn → Fitzsimon veto → would that shield executive branch from impeachment in the future

Obrien → don't think so → but messes up balance of power and things get weird. Other than veto, executive should have no power to nullify law

Krasucki → ~~If cases of table~~ & Assume makes to SOV ~~table~~ & he vetoes & we override → that would send signal

Obrien → Governor can ignore if you follow the trail out. Court is acting in an extra legal manner.

Ilse → Possible there is confusion between: Obrien Policy setting branch - legislature } Court confuses these
Executive is not policy setting branch }

Ilse → Is this intended to weaken legislature

Obrien → Intended to strengthen legislature & its role. Left feeling court has done 180 on what was intended

Ilse → Does their ruling set precesed?

obrien → shouldn't - just advisement - but they seem to want it to (cited by court often)

(5)

(D) Patriot Pastor Garrett Lear
⇒ No other king but king Jesus
Rise in Affirmation of resolution
~~Jews first~~
Challenge we face is that of divine right kings.
Judiciary is part of that process.

We are done with Divine Right Kings.
The law is king
lex rex not rex lex.

Declaration → indictments against divine right kings (George)

Lot of friction against this → do it anyway.
Must restore republic.
Judges should not make laws.
Motions for reconsideration are almost always ignored/denied.
Court does not even follow it own rules of court.

Cohn → Moral delima → ~~use litigation tobacco case~~.
~~would immoral should executive not be able~~
~~to exercise its ability~~ to
should executive be forced to enforce
an immoral law?

Lear ⇒ Tough question → governor can argue his immoral
imperative → ~~BS~~ there is a balance, and
its out of ~~whack~~ whack.

(6)

Ifse: Issue of Inherent Authority claimed by judiciary — power comes from people → where does inherent authority come from.

Dean: Good question → there is no source ~~of~~ that is legitimate. They are claiming power from God. Divine power.

Easier to be Tyrant: But not just.

Power are granted to states by the people:

(E) David Johnson — judicial branch has overstepped bounds previously
- see attachment
- usually injects itself in political issues.

Hill vs Hinckle → individual may stand on rights.

- Whats gone wrong with Executive & Judicial → Citizen has a right to not contract with a company → and has right that Executive & judicial branch should defend him against federal overreach.

Merrill vs Shibum → court tried to weasel out of oversite.

~~Must be way~~ Government must stay within proper bounds.

Court is out of control - ~~RS~~

Ifse — Rules of evidence of AH judiciary state they supercede rules of court & State.

Rules of Evidence → Intent was to keep leash on judiciary.

Reichard — Whats your background? How do you know this?

Spent time in fraud investigation

Has been victimized by court.

Court is making itself above the law.

They won't follow Const. / Law / Own Rules / vs. supreme Court rules

(7)

Krasucki → impeachment (now recommended)
→ two methods — reason & force
Force doesn't occur for incremental violations
Activation energy is too high.
What "reason" could we use?

Johnson
1) Resolution
2) override veto
3) force does in Senate — Force is necessary bear
— Judiciary is not forced to follow the law.

Krasucki → What about funding as force
Johnson → Take it out of there hide
→ Some Supreme Court cases are being traded on open market.

(6) Maneuse → Role of government → why constitute government at all?
To protect the inherent rights of the people.

→ Here the state is trying to protect rights of people against federal overreach.

Separation of power → Judicial power is defined in Constitution → they are violating it.

Senate asked OPINION of Court → opinion
→ Full power & authority ~~was granted to~~ to make laws are granted to general court.
Can Court can set limits & duties of AG.
Supreme Court & Executive are attempting to usurp Legislative power.

Maneuse → Art. 41 – says authority of executive shall not be construed to mean it can take action against legislature and by pass its authority.

Reselection is awesome – pass it.

Justice → equality under the law
– that is fundamental role of government.
– Argument about expense ~~to defy~~
– Saying that justice is too expensive.

It is our DUTY to impeach the AG if he won't perform his duties.

Cohn → quandry → moral rights of executive to refuse to enforce unjust law.

→ Impeachment should be response - right?

Maneuse → ~~AG must~~ Yes
But AG doesn't have power to ignore legislature – Must – unlike Federal level.

Impeachment → Yes, we should impeach.
This is appropriate use of impeachment.

Itse → People are final arbiters of constitution.
If people disagree with us, they have recourse.
That is normal judgement.

Maneuse → Election will determine whether whether our behavior is appropriate.

Legislature is supreme body in NH.
More balance on Federal level.
– It is their judgement that obamacare is unconstitutional.

Testimony

Bob Kingsbury
PO Box 1099
Laconia, NH 03247
603-528-5541

(B)

September 19, 2011

Chairman Dan Itse and the Members of the Committee on Constitutional Review and Statutory Recodification

On Lincoln and the Supreme Court

Dear Committee Member:

Today the Committee is meeting to respond to an opinion, not a decision, issued by the Supreme Court. Note: this is an opinion and not a decision.

Lincoln wrote that Judicial Decisions have greater or lesser authority according to circumstances. Therefore what Lincoln wrote about is an authority to the present issue under consideration buy this Committee.
The substance of Lincoln's position follows:

1. When Lincoln became President he immediately freed the slaves in Washington DC, Washington DC being the only place where the Federal Government had any such authority (per Article I, Section 8, item 17, "to exercise exclusive Legislation in all Cases whatsoever over such District"

2. Slavery was Constitutionally legal in all the rest of the Nation at that time.

3. The Dred Scott Decision of the Supreme Court held that slavery was Constitutionally legal in every Territory of the Nation and even in the Northern States.

4. The then Northern Congress had twice refused Lincoln's request that they introduce an amendment to the Constitution freeing the slaves the same as Lincoln had already done in Washington DC.

5. The only place where Lincoln had the slightest authority to free the slaves was in the areas in the South that were in Rebellion and where the people of those States had set the US Constitution aside..

Since it applies to the issue under consideration today, and can be used as an "authority" see the following quote from the speech Lincoln made on the Dred Scott Decision

Very truly yours

Robert Kingsbury

Robert Kingsbury
Representative, Belknap District 4

Encl: As stated

"I, having been appointed a Second Lieutenant, Army of the United States, do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same, that I take this obligation freely without any mental reservations or purpose of evasion; and that I will well and faithfully discharge the duties of the office upon which I am about to enter; so help me God."

ROBERT P KINGSBURY
PO BOX 1099
LACONIA, NH 03247-1099

that the law will be fairly and impartially executed, so as to insure to every *bona fide* inhabitant the free and quiet exercise of the elective franchise."

I readily agree that if all had a chance to vote, they ought to have voted. If, on the contrary, as they allege, and Judge Douglas ventures not to particularly contradict, few only of the free State men had a chance to vote, they were perfectly right in staying from the polls in a body.

By the way since the Judge spoke, the Kansas election has come off. The Judge expressed his confidence that all the Democrats in Kansas would do their duty—including "free state Democrats" of course. The returns received here as yet are very incomplete; but so far as they go, they indicate that only about one sixth of the registered voters, have really voted; and this too, when not more, perhaps, than one half of the rightful voters have been registered, thus showing the thing to have been altogether the most exquisite farce ever enacted. I am watching with considerable interest, to ascertain what figure "the free-state Democrats" cut in the concern. Of course they voted—all democrats do their duty—and of course they did not vote for slave-state candidates. We soon shall know how many delegates *they* elected, how many candidates they had pledged for a free state; and how many votes

whisper my suspicion that there were no
s "free state Democrats"—that they were
ood only to figure in newspapers and
tes. If there should prove to be one real
it in Kansas, I suggest that it might be well
and preserve his skin, as an interesting
-be-extinct variety of the genus, Democrat.

And now as to the Dred Scott decision. That decision declares two propositions—first, that a negro cannot sue in the U. S. Courts; and secondly, that Congress cannot prohibit slavery in the Territories. It was made by a divided court—dividing differently on the different points. Judge Douglas does not discuss the merits of the decision; and, in that respect, I shall follow his example, believing I could no more improve on McLean and Curtis, than he could on Taney.

He denounces all who question the correctness of that decision, as offering violent resistance to it. But who resists it? Who has, in spite of the decision, declared Dred Scott free, and resisted the authority of his master over him?

Judicial decisions have two uses—first, to absolutely determine the case decided; and secondly, to indicate to the public how other similar cases will be decided when they arise. For the latter use, they are called "precedents" and "authorities."

We believe, as much as Judge Douglas, (perhaps more) in obedience to, and respect for, the judicial department of government. We think its decisions on Constitutional questions, when fully settled, should control, not only the particular cases decided, but the general policy of the country, subject to be disturbed only by amendments of the Constitution as provided in that instrument itself. More than this would be revolution. But we think the Dred Scott decision is erroneous. We know the court that made it, has often overruled its own decisions, and we shall do what we can to have it to over rule this. We offer no *resistance* to it.

Judicial decisions are of greater or less authority as precedents, according to circumstances. That this should be so, accords both with common sense, and the customary understanding of the legal profession.

If this important decision had been made by the unanimous concurrence of the judges, and without any apparent partisan bias, and in accordance with legal public expectation, and with the steady practice of the departments throughout our history, and had been in no part, based on assumed historical facts which are not really true; or, if wanting in some of these, it had been before the court more than once, and had there been affirmed and re-affirmed through a course of years, it then might be, perhaps would be, factious, nay, even revolutionary, not to acquiesce in it as a precedent.

But when, as it is true we find it wanting in all these claims to the public confidence, it is not resistance, it is not factious, it is not even disrespectful, to treat it as not having yet quite established a settled doctrine for the country. But Judge Douglas considers this view awful. Hear him:

"The courts are the tribunals prescribed by the Constitution

and created by the authority of the people to determine, expound and enforce the law. Hence, whoever resists the final decision of the highest judicial tribunal, aims a deadly blow to our whole Republican system of government—a blow, which if successful would place all our rights and liberties at the mercy of passion, anarchy and violence. I repeat, therefore, that if resistance to the decisions of the Supreme Court of the United States, in a matter like the points decided in the Dred Scott case, clearly within their jurisdiction as defined by the Constitution, shall be forced upon the country as a political issue, it will become a distinct and naked issue between the friends and enemies of the Constitution —the friends and the enemies of the supremacy of the laws."

Why, this same Supreme court once decided a national bank to be constitutional; but Gen. Jackson, as President of the United States, disregarded the decision, and voted a bill for a re-charter, partly on constitutional ground, declaring that each public functionary must support the Constitution, *"as he understands it."* But hear the General's own words. Here they are, taken from his veto message:

"It is maintained by the advocates of the bank, that its constitutionality, in all its features, ought to be considered as settled by precedent, and by the decision of the Supreme Court. To this conclusion I cannot assent. Mere precedent is a dangerous source of authority, and should not be regarded as deciding questions of constitutional power, except where the acquiescence of the people and the States can be considered as well settled. So far from this being the case on this subject, an argument against the bank might be based on precedent. One Congress in 1791, decided in favor of a bank; another in 1811, decided against it. One Congress in 1815 decided against a bank; another in 1816 decided in its favor. Prior to the present Congress, therefore, the precedents drawn from that source were equal. If we resort to the States, the expressions of legislative, judicial and executive opinions against the bank have been probably to those in its favor as four to one. There is nothing in precedent, therefore, which if its authority were admitted, ought to weigh in favor of the act before me."

I drop the quotations merely to remark that all there ever was, in the way of precedent up to the Dred Scott decision, on the

points therein decided, had been against that decision. But hear Gen. Jackson further—

"If the opinion of the Supreme Court covered the whole ground of this act, it ought not to control the co-ordinate authorities of this Government. The Congress, the executive and the court must each for itself be guided by its own opinion of the Constitution. Each public officer, who takes an oath to support the Constitution, swears that he will support it as he understands it, and not as it is understood by others."

Again and again have I heard Judge Douglas denounce that bank decision, and applaud Gen. Jackson for disregarding it. It would be interesting for him to look over his recent speech, and see how exactly his fierce philippics against us for resisting Supreme Court decisions, fall upon his own head. It will call to his mind a long and fierce political war in this country, upon an issue which, in his own language, and, of course, in his own changeless estimation, was "a distinct and naked issue between the friends and the enemies of the Constitution," and in which war he fought in the ranks of the enemies of the Constitution.

I have said, in substance, that the Dred Scott decision was, in part, based on assumed historical facts which were not really true; and I ought not to leave the subject without giving some reasons for saying this; I therefore give an instance or two, which I think fully sustain me. Chief Justice Taney, in delivering the opinion of the majority of the Court, insists at great length that negroes were no part of the people who made, or for whom was made, the Declaration of Independence, or the Constitution of the United States.

On the contrary, Judge Curtis, in his dissenting opinion, shows that in five of the then thirteen States, to wit, New Hampshire, Massachusetts, New York, New Jersey and North Carolina, free negroes were voters, and, in proportion to their numbers, had the same part in making the Constitution that the white people had. He shows this with so much particularity as to leave no doubt of its truth; and, as a sort of conclusion on that point, holds the following language:

"The Constitution was ordained and established by the people of the United States, through the action, in each State, of those



Meserve No. 82. A photograph made by Mathew B. Brady on February 9, 1864. Victor D. Brenner used this photograph in making his design for the Lincoln penny. The original glass negative is in the Meserve Collection.

ABRAHAM LINCOLN:

His Speeches and Writings

EDITED WITH CRITICAL AND ANALYTICAL NOTES

BY Roy P. Basler, AUTHOR OF "THE LINCOLN LEGEND"

PREFACE BY Carl Sandburg

THE WORLD PUBLISHING COMPANY

Cleveland and New York

THE GOVENEE'S MAIN JOB IS TO DO AS HE IS TOLD

AS IT IS WITH THE GOVERNOR, THE ATTORNEY GENERAL'S MAIN JOB IS TO DO AS HE IS TOLD

B

Bob Kingsbury
PO Box 1099
Laconia, NH 03247
603-528-5541

EXECUTIVE POWER

GOVERNOR

[Art.] 41. [Governor, Supreme Executive Magistrate.] There shall be a supreme executive magistrate, who shall be styled the Governor of the State of New Hampshire, and whose title shall be His Excellency. The executive power of the state is vested in the governor. The governor shall be responsible for the faithful execution of the laws.

(1) ENFORCE LAW & PREPARE BUDGET

He may, by appropriate court action or proceeding brought in the name of the state, enforce compliance with any constitutional or legislative mandate, or restrain violation of any constitutional or legislative power, duty, or right, by any officer, department or agency of the state. This authority shall not be construed to authorize any action or proceedings against the legislative or judicial branches.

(2) ENFORCE CONSTITUTION

[Art.] 43. [In Cases of Disagreement Governor to Adjourn or Prorogue Legislature; If Causes Exist, May Convene Them Elsewhere.] In cases of disagreement between the two houses, with regard to the time or place of adjournment or prorogation, the governor, with advice of council, shall have a right to adiourn or prorogue the general court, not exceeding ninety days

(3) PROROGUE LEGISLATURE

[Art.] 44. [Veto to Bills.] 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

(4) VETO

[Art.] 45. [Resolves to Be Treated Like Bills.] Every resolve shall be presented to the governor, and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by the senate and house of representatives, according to the rules and limitations prescribed in the case of a bill.

(5) ENFORCE RESOLUTIONS

[Art.] 46. [Nomination and Appointment of Officers.] All judicial officers, the attorney general, and all officers of the navy, and general and field officers of the militia, shall be nominated and appointed by the governor and council; and every such nomination shall be made at least three days prior to such appointment; and no appointment shall take place, unless a majority of the council agree thereto.

(6) NOMINATE

[Art.] 47. [Governor and Council Have Negative on Each Other.] The governor and council shall have a negative on each other, both in the nominations and appointments. Every nomination and appointment shall be signed by the governor and council, and every negative shall be also signed by the governor or council who made the same.

(7) VETO THE COUNCIL

[Art.] 50. [Governor to Prorogue or Adjourn Legislature, and Call Extra Sessions.] The governor, with advice of council, shall have full power and authority, in the recess of the general court, to prorogue the same from time to time, not exceeding ninety days, in any one recess of

(8) CALL EXTRA SESSIONS

[Art.] 51. [Powers and Duties of Governor as Commander-in-Chief.] The governor of this state for the time being, shall be commander-in-chief of all the military forces of the state; and

(9) COMMANDER IN CHIEF

[Art.] 52. [Pardoning Power.] The power of pardoning offenses, except such as persons may be convicted of before the senate, by impeachment of the house, shall be in the Governor, by and with the advice of council: But no charter of pardon, granted by the Governor, with advice of the council, before conviction, shall avail the party pleading the same, notwithstanding any general or particular expressions contained therein, descriptive of the offense or offenses intended to be

(10) PARDONS

[Art.] 56. [Disbursements from Treasury.] No moneys shall be issued out of the treasury of this state, and disposed of, (except such sums as may be appropriated for the redemption of bills of credit, or treasurer's notes, or for the payment of interest arising thereon) but by warrant under the hand of the Governor for the time being, by and with the advice and consent of the council, for

(11) APPROVE PAYMENTS

THE GOVERNOR'S MAIN JOB IS TO DO AS HE IS TOLD, AS IN ART 41, ABOVE, AND ART 45

"The individual may stand upon his constitutional rights as a citizen. He is entitled to carry on his private business in his own way. His power to contract is unlimited. He owes no duty to the State, since he receives nothing there from, beyond the protection of his life and property. His rights are such as existed by the law of the land [Common Law] long antecedent to the organization of the State, and can only be taken from him by due process of law, and in accordance with the Constitution. Among his rights are a refusal to incriminate himself, and the immunity of himself and his property from arrest or seizure except under a warrant of the law. He owes nothing to the public so long as he does not trespass upon their rights." *Hale v. Henkel*, 201 U.S. 43 at 47 (1905). [Emphasis added]

Voting Sheets

HOUSE COMMITTEE ON
CONSTITUTION REVIEW AND STATUTORY RECODIFICATION

EXECUTIVE SESSION on HR 13

BILL TITLE: **repudiating Opinion of the Justices, 162 N.H. 160 (2011), and urging the senate to remove from the table and pass 2011 HB 89.**

DATE: September 20, 2011

LOB ROOM: 206

Amendments:

Sponsor: Rep. OLS Document #:

Sponsor: Rep. OLS Document #:

Sponsor: Rep. OLS Document #:

Motions: (OTP), OTP/A, ITL, Interim Study (Please circle one.)

Moved by Rep. Cebrowski

Seconded by Rep. DeLemus

Vote: 11-2 (Please attach record of roll call vote.)

Motions: OTP, OTP/A, ITL, Interim Study (Please circle one.)

Moved by Rep.

Seconded by Rep.

Vote: (Please attach record of roll call vote.)

CONSENT CALENDAR VOTE: NO

(Vote to place on Consent Calendar must be unanimous.)

Statement of Intent: Refer to Committee Report

Respectfully submitted,

Rep. Josh Davenport, Clerk

HOUSE COMMITTEE ON
CONSTITUTION REVIEW AND STATUTORY RECODIFICATION

SUBCOMMITTEE WORK SESSION ON HR 13

BILL TITLE: repudiating Opinion of the Justices, 162 N.H. 160 (2011), and urging the senate to remove from the table and pass 2011 HB 89.

DATE: 9/20/11

Subcommittee Members: Reps. ~~Rechard~~ / Celawski / Delaney 2nd. ~~to 1st~~

Comments and Recommendations:

Amendments:

Sponsor: Rep. OLS Document #:

Sponsor: Rep. OLS Document #:

Sponsor: Rep. OLS Document #:

Motions: (OTP), OTP/A, ITL, Interim Study (Please circle one.)

Moved by Rep. Celawski

Seconded by Rep. Delaney

Vote: 11/2

Motions: OTP, OTP/A, ITL, Interim Study (Please circle one.)

Moved by Rep.

Seconded by Rep.

Vote:

Respectfully submitted,

Rep. Davenport
Subcommittee Chairman/(Clerk)

Adjourn - Luther

OFFICE OF THE HOUSE CLERK 2011 SESSION

CONSTITUTIONAL REVIEW & STATUTORY RECODIFICATION

Bill #: HR 13 Title: repudiating Opinion of the Justices

PH Date: 9/20/11 Exec Session Date: 9/20/11

Motion: OTP Amendment #: —

MEMBER	YEAS	NAYS
Itse, Daniel C, Chairman	✓	
Cebrowski, John W, V Chairman	✓	
Brown, Paul E		
Cartwright, Anne S	✓	
Cohn, Seth	✓	
Davenport, Joshua C, Clerk	✓	
Krasucki, Joseph F	✓	
Luther, Robert A	✓	
Peckham, Michele S	✓	
Reichard, Kevin E	✓	
Weeden, Michael W		
Serlin, Christopher W		✓
Katsiantonis, Thomas		
Richardson, Gary B		
Coulombe, Gary M		
Schmidt, Andrew R		
Porter		✓
Delamus	✓	
Jones	✓	

11/2

TOTAL VOTE:

Printed: 4/6/2011

Committee Report

REGULAR CALENDAR

September 28, 2011

HOUSE OF REPRESENTATIVES

REPORT OF COMMITTEE

The Majority of the Committee on CONSTITUTIONAL REVIEW & STATUTORY RECODIFICATION to which was referred HR13,

AN ACT repudiating Opinion of the Justices, 162 N.H. 160 (2011), and urging the senate to remove from the table and pass 2011 HB 89. Having considered the same, report the same with the recommendation that the bill OUGHT TO PASS.

Rep. John W Cebrowski

FOR THE MAJORITY OF THE COMMITTEE

Original: House Clerk
Cc: Committee Bill File

MAJORITY
COMMITTEE REPORT

Committee:	**CONSTITUTIONAL REVIEW & STATUTORY RECODIFICATION**
Bill Number:	**HR13**
Title:	**repudiating Opinion of the Justices, 162 N.H. 160 (2011), and urging the senate to remove from the table and pass 2011 HB 89.**
Date:	**September 28, 2011**
Consent Calendar:	**NO**
Recommendation:	**OUGHT TO PASS**

STATEMENT OF INTENT

This is a resolution, a formal expression of the opinion and wishes of the House. It does not have the effect of a law. We are doing this to go on record as disagreeing and disavowing the opinion of the Supreme Court. We are also asking the Senate to take action, to take HB 89 off of the table and pass it. Those are the tow things happening here – going on the record and making a request for action. That is it; in spite of how others might want to complicate this. We must speak up for what we believe in. HB 89 was a clear repudiation of an egregious national policy; no small matter. However, HR 13 is a defense of the power of the people delegated by the Constitution of New Hampshire to their representation in the government of the State of New Hampshire, the General Court of New Hampshire. What began as an attempt to stop an unconstitutional law has become a contest to defend the manner in which the people delegated their power to their government. In the course of its deliberations, The Committee on Constitutional Review and Statutory Recodification learned that Legislature has given specific orders to specific members of the Executive on numerous occasions, including the Attorney General. On March15, 2011, the House overwhelmingly passed HB 89, a bill requiring the attorney general to move to join the state of New Hampshire in the Florida case challenging the constitutionality of the federal Patient Protection and Affordable Care Act. The Senate tabled the bill and, pursuant to Part 2, Article 74 of the New Hampshire Constitution, sought an advisory opinion from the Supreme Court as to the bill's constitutionality. On June 15, 2011, the Supreme Court issued its opinion, in which it concluded that HB 89 violates the separation of powers under Part 1, Article 37. The Court recognized that until 1966 the Legislature had, and had exercised, power of giving direct instruction to members of the Executive. However, they reasoned by a single quotation from the 1964 Constitutional Convention that the 1966 amendment to Part 2, Article 41 gave the executive branch the exclusive power to decide the state's interest in litigation. In doing so the Supreme Court ignored the following quotation by Mr. Eaton the delegate whom the Court quoted

Original: House Clerk
Cc: Committee Bill File

"Now the purpose of this resolution is to protect the power of the General Court. It makes explicit some statutory authority which the executive branch has already been using for many years." More importantly they ignored his concluding remarks, "As everyone know, state legislatures have been losing power rapidly in recent years. And this is not a theory. It is an accepted fact that progressive decline of legislative power threatens representative government. Many forces aggravate the imbalance and every time a bureaucrat overspends his budget or ignores a statute, he shows disrespect for the Legislature. Resolution 58 declares all executive departments and agencies must respect all mandates, powers and rights of the general court and I hope as we close the 15th constitutional convention we can adopt Resolution 58 which says that whatever may happen in the other states, New Hampshire is still owned by the people and still operated by elected representatives of the people". The purpose of the amendment to Part II, Article 41, proposed in resolution 58 of the 15th Constitutional Convention, and approved by the people in 1966 was to strengthen the power of the Legislature and not the Executive. HR 13 asserts, and the Committee agrees, not only that it is clear and incontrovertible that the Court's opinion is incorrect, but that if allowed to stand would do great harm to the constitutional balancing of legislative and executive authority by effectively giving the Governor a second opportunity to veto legislation with which he disagreed by simply refusing to defend it in litigation. We do a grave disservice to ourselves and to our constituents by not publicly displaying our resolve. The resolution was carefully crafted and provides a detailed rational for our disagreement with the court.

Vote 11-2

Rep. John W Cebrowski
FOR THE MAJORITY

Original: House Clerk
Cc: Committee Bill File

REGULAR CALENDAR

CONSTITUTIONAL REVIEW & STATUTORY RECODIFICATION

HR13, repudiating Opinion of the Justices, 162 N.H. 160 (2011), and urging the senate to remove from the table and pass 2011 HB 89. **OUGHT TO PASS.**

Rep. John W Cebrowski for the **Majority** of CONSTITUTIONAL REVIEW & STATUTORY RECODIFICATION. This is a resolution, a formal expression of the opinion and wishes of the House. It does not have the effect of a law. We are doing this to go on record as disagreeing and disavowing the opinion of the Supreme Court. We are also asking the Senate to take action, to take HB 89 off of the table and pass it. Those are the tow things happening here – going on the record and making a request for action. That is it; in spite of how others might want to complicate this. We must speak up for what we believe in. HB 89 was a clear repudiation of an egregious national policy; no small matter. However, HR 13 is a defense of the power of the people delegated by the Constitution of New Hampshire to their representation in the government of the State of New Hampshire, the General Court of New Hampshire. What began as an attempt to stop an unconstitutional law has become a contest to defend the manner in which the people delegated their power to their government. In the course of its deliberations, The Committee on Constitutional Review and Statutory Recodification learned that Legislature has given specific orders to specific members of the Executive on numerous occasions, including the Attorney General. On March15, 2011, the House overwhelmingly passed HB 89, a bill requiring the attorney general to move to join the state of New Hampshire in the Florida case challenging the constitutionality of the federal Patient Protection and Affordable Care Act. The Senate tabled the bill and, pursuant to Part 2, Article 74 of the New Hampshire Constitution, sought an advisory opinion from the Supreme Court as to the bill's constitutionality. On June 15, 2011, the Supreme Court issued its opinion, in which it concluded that HB 89 violates the separation of powers under Part 1, Article 37. The Court recognized that until 1966 the Legislature had, and had exercised, power of giving direct instruction to members of the Executive. However, they reasoned by a single quotation from the 1964 Constitutional Convention that the 1966 amendment to Part 2, Article 41 gave the executive branch the exclusive power to decide the state's interest in litigation. In doing so the Supreme Court ignored the following quotation by Mr. Eaton the delegate whom the Court quoted "Now the purpose of this resolution is to protect the power of the General Court. It makes explicit some statutory authority which the executive branch has already been using for many years." More importantly they ignored his concluding remarks, "As everyone know, state legislatures have been losing power rapidly in recent years. And this is not a theory. It is an accepted fact that progressive decline of legislative power threatens representative government. Many forces aggravate the imbalance and every time a bureaucrat overspends his budget or ignores a statute, he shows disrespect for the Legislature. Resolution 58 declares all executive departments and agencies must respect all mandates, powers and rights of the general court and I hope as we close the 15th constitutional convention we can adopt Resolution 58 which says that whatever may happen in the other states, New Hampshire is still owned by the people and still operated by elected representatives of the people". The purpose of the amendment to Part II, Article 41, proposed in resolution 58 of the 15th Constitutional Convention, and approved by the people in 1966 was to strengthen the power of the Legislature and not the Executive. HR 13 asserts, and the Committee agrees, not only that it is clear and incontrovertible that the Court's opinion is incorrect, but that if allowed to stand would do great harm to the constitutional balancing of legislative and executive authority by effectively giving the Governor a second opportunity to veto legislation with which he disagreed by simply refusing to defend it in litigation. We do a grave disservice to ourselves and to our constituents by not publicly displaying our resolve. The resolution was carefully crafted and provides a detailed rational for our disagreement with the court. **Vote 11-2.**

Original: House Clerk
Cc: Committee Bill File

COMMITTEE REPORT

COMMITTEE: Constitutional Review & Statutory Recodification

BILL NUMBER: HR13

TITLE: Reproducing the Opinion of the Justices, 162 N.H. 160 (2011), and urging the Senate to remove from the table and pass 2011 HB389

DATE: 9/28/11 **CONSENT CALENDAR:** YES ☐ NO ☑

☑ **OUGHT TO PASS**

☐ **OUGHT TO PASS W/ AMENDMENT**

☐ **INEXPEDIENT TO LEGISLATE**

☐ **INTERIM STUDY** (Available only 2nd year of biennium)

Amendment No. _____

STATEMENT OF INTENT:

COMMITTEE VOTE: 11 to 2

- Copy to Committee Bill File
- Use Another Report for Minority Report

RESPECTFULLY SUBMITTED,

Rep. John Cebrowski
For the Committee

Rev. 02/01/07 - Yellow

HR 13 - Majority Report

OTP

This is a resolution, a formal expression of the opinion and wishes of the House. It does not have the effect of a law. We are doing this to go on record as disagreeing and disavowing the opinion of the Supreme Court. We are also asking the Senate to take action, to take HB 89 off of the table and pass it. Those are the tow things happening here – going on the record and making a request for action. That is it; in spite of how others might want to complicate this. We must speak up for what we believe in. HB 89 was a clear repudiation of an egregious national policy; no small matter. However, HR 13 is a defense of the power of the people delegated by the Constitution of New Hampshire to their representation in the government of the State of New Hampshire, the General Court of New Hampshire. What began as an attempt to stop an unconstitutional law has become a contest to defend the manner in which the people delegated their power to their government. In the course of its deliberations, The Committee on Constitutional Review and Statutory Recodification learned that Legislature has given specific orders to specific members of the Executive on numerous occasions, including the Attorney General. On March15, 2011, the House overwhelmingly passed HB 89, a bill requiring the attorney general to move to join the state of New Hampshire in the Florida case challenging the constitutionality of the federal Patient Protection and Affordable Care Act. The Senate tabled the bill and, pursuant to Part 2, Article 74 of the New Hampshire Constitution, sought an advisory opinion from the Supreme Court as to the bill's constitutionality. On June 15, 2011, the Supreme Court issued its opinion, in which it concluded that HB 89 violates the separation of powers under Part 1, Article 37. The Court recognized that until 1966 the Legislature had, and had exercised, power of giving direct instruction to members of the Executive. However, they reasoned by a single quotation from the 1964 Constitutional Convention that the 1966 amendment to Part 2, Article 41 gave the executive branch the exclusive power to decide the state's interest in litigation. In doing so the Supreme Court ignored the following quotation by Mr. Eaton the delegate whom the Court quoted "Now the purpose of this resolution is to protect the power of the General Court. It makes explicit some statutory authority which the executive branch has already been using for many years." More importantly they ignored his concluding remarks, "As everyone know, state legislatures have been losing power rapidly in recent years. And this is not a theory. It is an accepted fact that progressive decline of legislative power threatens representative government. Many forces aggravate the imbalance and every time a bureaucrat overspends his budget or ignores a statute, he shows disrespect for the Legislature. Resolution 58 declares all executive departments and agencies must respect all mandates,

powers and rights of the general court and I hope as we close the 15th constitutional convention we can adopt Resolution 58 which says that whatever may happen in the other states, New Hampshire is still owned by the people and still operated by elected representatives of the people". The purpose of the amendment to Part II, Article 41, proposed in resolution 58 of the 15th Constitutional Convention, and approved by the people in 1966 was to strengthen the power of the Legislature and not the Executive. HR 13 asserts, and the Committee agrees, not only that it is clear and incontrovertible that the Court's opinion is incorrect, but that if allowed to stand would do great harm to the constitutional balancing of legislative and executive authority by effectively giving the Governor a second opportunity to veto legislation with which he disagreed by simply refusing to defend it in litigation. We do a grave disservice to ourselves and to our constituents by not publicly displaying our resolve. The resolution was carefully crafted and provides a detailed rational for our disagreement with the court.

John Cebrowski

REGULAR CALENDAR

September 28, 2011

HOUSE OF REPRESENTATIVES

REPORT OF COMMITTEE

The Minority of the Committee on CONSTITUTIONAL REVIEW & STATUTORY RECODIFICATION to which was referred HR13,

AN ACT repudiating Opinion of the Justices, 162 N.H. 160 (2011), and urging the senate to remove from the table and pass 2011 HB 89. Having considered the same, and being unable to agree with the Majority, report with the following Resolution: RESOLVED, That it is INEXPEDIENT TO LEGISLATE.

Rep. Christopher W Serlin

FOR THE MINORITY OF THE COMMITTEE

Original: House Clerk
Cc: Committee Bill File

MINORITY
COMMITTEE REPORT

Committee:	**CONSTITUTIONAL REVIEW & STATUTORY RECODIFICATION**
Bill Number:	**HR13**
Title:	**repudiating Opinion of the Justices, 162 N.H. 160 (2011), and urging the senate to remove from the table and pass 2011 HB 89.**
Date:	**September 28, 2011**
Consent Calendar:	**NO**
Recommendation:	**INEXPEDIENT TO LEGISLATE**

STATEMENT OF INTENT

The Minority believes the Part I, Article 37 of our State Constitution is quite clear about what "Separation of Powers" means, in that" ... the government of this state, the three essential powers thereof, to wit, the legislative, executive, and judicial, ought to be kept as separate from, and independent of, each other...". The Minority's position is also held by over 30 former Attorneys General and Assistant Attorneys General, Republicans and Democrats, in that as a body they too agreed on the plain meaning of Part I, Article 37 when they wrote to the State Supreme Court earlier this year urging the Court to affirm the Constitution's elegant instructions on Separation of Powers. In June of 2011, the New Hampshire Supreme court did just that, with their unanimous response to the New Hampshire Senate's request for advisory opinion on questions relating to the constitutionality of HB 89, finding against the arguments put forth by proponents, stating: "It is the executive, not the legislative branch, in which the constitution vests the power to determine the State's interest in any litigation." The Court went on to say that (they) "conclude that HB 89, which removes entirely from the executive branch the decision as to whether to join the state as a party to litigation, would usurp the executive branch's power to execute and enforce the law. Therefore, in our opinion, HB 89 as passed by the House, violates the Separation of Powers clause and is unconstitutional. That being the case, it follows that HB 89 does not "fall within the broad grant of authority to the General Court set forth in Part II, Article 5 of the New Hampshire constitution." HR 13 represents excess unbecoming of this House. It goes beyond a simple statement of disagreement by admonishing our Supreme Court, calling them "hostile" to representative government. While doing so may serve a political agenda, it can serve no useful purpose for the citizens of New Hampshire, whose business we are here to conduct in a reasonable and expedient manner. Regardless of how some members of this body may feel about the Court's findings, or the original subject matter, pressing further with HR 13 now seems more akin to tilting at windmills than it does the pursuit of sound policy.

Original: House Clerk
Cc: Committee Bill File

Urging the Honorable Senate to ignore the advisory opinion of our State's Supreme Court, and in doing so intentionally put the General Court at odds with the Executive and Judiciary knowing in advance what the outcome of any actual inter-branch lawsuit is likely to be, will only cost the taxpayers of New Hampshire time and money, having no change of any outcome save what the Court has already advised. We should not support such an effort.

Rep. Christopher W Serlin
FOR THE MINORITY

Original: House Clerk
Cc: Committee Bill File

REGULAR CALENDAR

CONSTITUTIONAL REVIEW & STATUTORY RECODIFICATION

HR13, repudiating Opinion of the Justices, 162 N.H. 160 (2011), and urging the senate to remove from the table and pass 2011 HB 89. **INEXPEDIENT TO LEGISLATE.**

Rep. Christopher W Serlin for the **Minority** of CONSTITUTIONAL REVIEW & STATUTORY RECODIFICATION. The Minority believes the Part I, Article 37 of our State Constitution is quite clear about what "Separation of Powers" means, in that" ... the government of this state, the three essential powers thereof, to wit, the legislative, executive, and judicial, ought to be kept as separate from, and independent of, each other...". The Minority's position is also held by over 30 former Attorneys General and Assistant Attorneys General, Republicans and Democrats, in that as a body they too agreed on the plain meaning of Part I, Article 37 when they wrote to the State Supreme Court earlier this year urging the Court to affirm the Constitution's elegant instructions on Separation of Powers. In June of 2011, the New Hampshire Supreme court did just that, with their unanimous response to the New Hampshire Senate's request for advisory opinion on questions relating to the constitutionality of HB 89, finding against the arguments put forth by proponents, stating: "It is the executive, not the legislative branch, in which the constitution vests the power to determine the State's interest in any litigation." The Court went on to say that (they) "conclude that HB 89, which removes entirely from the executive branch the decision as to whether to join the state as a party to litigation, would usurp the executive branch's power to execute and enforce the law. Therefore, in our opinion, HB 89 as passed by the House, violates the Separation of Powers clause and is unconstitutional. That being the case, it follows that HB 89 does not "fall within the broad grant of authority to the General Court set forth in Part II, Article 5 of the New Hampshire constitution." HR 13 represents excess unbecoming of this House. It goes beyond a simple statement of disagreement by admonishing our Supreme Court, calling them "hostile" to representative government. While doing so may serve a political agenda, it can serve no useful purpose for the citizens of New Hampshire, whose business we are here to conduct in a reasonable and expedient manner. Regardless of how some members of this body may feel about the Court's findings, or the original subject matter, pressing further with HR 13 now seems more akin to tilting at windmills than it does the pursuit of sound policy. Urging the Honorable Senate to ignore the advisory opinion of our State's Supreme Court, and in doing so intentionally put the General Court at odds with the Executive and Judiciary knowing in advance what the outcome of any actual inter-branch lawsuit is likely to be, will only cost the taxpayers of New Hampshire time and money, having no change of any outcome save what the Court has already advised. We should not support such an effort.

Original: House Clerk
Cc: Committee Bill File

The Minority believes that Part I, Article 37 of our State Constitution is quite clear about what "Separation of Powers" means, in that "... the government of this state, the three essential powers thereof, to wit, the legislative, executive, and judicial, ought to be kept as separate from, and independent of, each other...".

The Minority's position is also held by over 30 former Attorneys General and Assistant Attorneys General, Republicans and Democrats, in that as a body they too agreed on the plain meaning of Part I, Article 37 when they wrote to the State Supreme Court earlier this year urging the Court to affirm the Constitution's elegant instructions on Separation of Powers.

In June of 2011, the New Hampshire Supreme Court did just that, with their unanimous response to the NH Senate's request for advisory opinion on questions relating to the constitutionality of HB 89, finding against the arguments put forth by proponents, stating: "It is the executive, not the legislative branch, in which the constitution vests the power to determine the State's interest in any litigation."

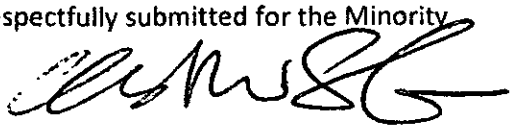
The Court went on to say that [they] "conclude that HB 89, which removes entirely from the executive branch the decision as to whether to join the State as a party to litigation, would usurp the executive branch's power to execute and enforce the law. Therefore, in our opinion, HB 89 as passed by the House, violates the Separation of Powers clause and is unconstitutional. That being the case, it follows that HB 89 does not "fall within the broad grant of authority to the General Court set forth in Part II, Article 5 of the New Hampshire constitution."

HR 13 represents excess unbecoming of this House. It goes beyond a simple statement of disagreement by admonishing our Supreme Court, calling them "hostile" to representative government. While doing so may serve a political agenda, it can serve no useful purpose for the citizens of New Hampshire, whose business we are here to conduct in a reasonable and expedient manner. Regardless of how some members of this body may feel about the Court's findings, or the original subject matter, pressing further with HR 13 now seems more akin to tilting at windmills than it does the pursuit of sound policy.

Urging the Honorable Senate to ignore the advisory opinion of our State's Supreme Court, and in doing so intentionally put the General Court at odds with the Executive and Judiciary knowing in advance what the outcome of any actual inter-branch lawsuit is likely to be, will only cost the taxpayers of New Hampshire time and money, having no chance of any outcome save what the Court has already advised.

We should not support such an effort.

Respectfully submitted for the Minority



Rep. Christopher Serlin

Portsmouth & Newington

Rockingham-16

MINORITY REPORT

COMMITTEE: Constitutional Review & Statutory Recodification

BILL NUMBER: HR13

TITLE: Repudiation of the Justices 162 N.H. 160 (2011), and Urging the Senate to Remove HB89 from the Table

DATE: _____ CONSENT CALENDAR: YES ☐ NO ☒

☐ OUGHT TO PASS

☐ OUGHT TO PASS W/ AMENDMENT

☒ INEXPEDIENT TO LEGISLATE

☐ INTERIM STUDY (Available only 2nd year of biennium)

Amendment No. _____

STATEMENT OF INTENT:

COMMITTEE VOTE: _____

RESPECTFULLY SUBMITTED,

Rep. Christopher Serlin
For the Minority

• Copy to Committee Bill File

Rev. 02/01/07 - Blue