

NORTH CAROLINA CONSTITUTIONAL AMENDMENTS 2018
NC POLICY WATCH “CRUCIAL CONVERSATIONS” SERIES
PRESENTATION BY GERRY COHEN

Quoting from the mission of today’s conversation “In the final harried days of the 2018 legislative session, North Carolina lawmakers took the unprecedented step of voting to place six constitutional amendments on the November ballot. The amendments deal with a wide-ranging array of subjects: the right to hunt, fish and harvest wildlife; the rights of crime victims; changes to the state board of elections and the transfer of appointment powers from the governor to the legislature; selection for judicial vacancies; a cap on the state income tax and requiring a photo ID to vote.”

The six amendments simultaneously on the ballot is the third highest ever since our 1776 state constitution, behind only 10 on the ballot in 1914 (all of which were defeated in 1914 – I was told interestingly by someone who started work at the General Assembly in 1948 that the reasons for defeat was a proposed amendment in the package that dealt with hunting and fishing, and it brought down to defeat the other nine as well), and seven on the 1970 ballot, including a revised state constitution and six proposed amendments to it. The highest number in more recent memory was in 1982 when five amendments appeared on the ballot, three of which failed at the polls. The 1914 amendments that went down at the polls even included a bizarre one (my all-time favorite) which amended a reference in the State Constitution to the Civil War which had called it an “insurrection and rebellion” (certainly a northern point of view) to the “War Between the States”, a distinctly southern reference. The voters were having none of it. Interestingly that amendment was put on the ballot by NCGA action less than 90 days after the infamous dedication of the “Silent Sam” statue in Chapel Hill. (Also good was the repeal by the 1970 Constitution of the old provision banning duels).

So we know that when the General Assembly jams lots of amendments on the ballot all at once (other than the 1970 ballot which had been preceded by a study commission which met for two years hammering out language from 1967 through 1968 and months of discussion in the 1969 session), the track record of passage is NOT good.

Since the 1982 debacle, the General Assembly made two major changes: In 1983 it created the “Constitutional Amendments Publication Commission” composed of the Secretary of State, Attorney General, and the Legislative Services Officer, and tasks them with writing factual summaries of proposed amendments. There had been little information for the public on the 1982 amendments. That commission had worked quietly for the last 35 years on the next 15 or so constitutional amendments that went on the ballot. The General Assembly began to consistently pass implementing legislation prior to the referendum so that voters would have a lot more information on what the amendments would do. Other than one self-executing amendment that did not need legislation, 13 of the last 14 amendments had enacted implementing legislation prior to the referendum and all but two were approved by the voters. This year, none of the five amendments that require implementing legislation had it enacted. For example, on the

highly contentious Voter Photo ID proposal, voters will have NO idea on what types of photo ID will suffice. Even in the 1969-1982 period, a majority of the amendments had implementing legislation passed before the referendum.

Then the 2016 legislative session passed a multi-page omnibus elections bill, burying in the middle of it a law mandating the Constitutional Amendments Publication Commission also write a caption for the ball to appear on the ballot above the language enacted by the General Assembly, certainly a good government measure. (By the way, a caption in legislative parlance is the same as the short title that appears at the beginning of the bill). Previous to 2018 the ballot captions on amendments I found just said “Constitutional Amendment”. The Commission solicited public comments on suggested captions and summaries, and I submitted suggested caption on a Friday evening. While writing them, my daughter-in-law messaged me that she had submitted her PhD dissertation, so I was in a positive mood. Two of my suggestions apparently set off a firestorm among legislators who said the process had been politicized. Remember, the legislative definition of a caption is a “true and accurate description”. My caption for the judicial vacancy amendment was “Limits Governor’s power to fill short-term vacancies as justice and judge”, while for the one on boards and commissions I suggested “Transfer Powers of the Governor to the General Assembly”. I believe my language more accurately reflects what the amendments do. A hurried special session was called, and the new power to write caption was repealed. Instead, the captions will all say “Constitutional Amendments” (As an aside, I believe this change makes a #NixAllSix” campaign to oppose the amendments makes messaging much easier, as “vote against all Constitutional Amendments” will match the new ballot captions.)

So we now have a campaign season with ZERO implementing legislation passed, and “true and accurate” ballot captions have been banned. We are left with the ballot language enacted by the General Assembly, which in at least the two amendments I just cited I believe to be inaccurate, misleading, and argumentative. That’s the main subject of the latest Cooper v Berger litigation which had its first court hearing Tuesday.

I won’t rehash all of the litigation, but here are some of the problems I identified on the boards and commissions amendment: 1) it states it establishes a Bi-Partisan elections board, when it already exists; 2) It calls it “bi-partisan” which is a real joke because one party rammed it down the throat of the other party; 3) it states that it affects appointments by the judicial branch, when it does not do that at all (maybe that was just a smokescreen), and 4) most importantly it greatly impacts the separation of powers doctrine, moving much power from the executive to legislative branches, reversing several Supreme Court opinions, and essentially takes us back largely to the balance prior to the 1868 constitution. There is scant mention of the enormous implications of this, which the amendment simply says it is to “clarify the appointment authority”. If the General Assembly wants to make this enormous change, why not just fairly tell the voters what it does?

On the judicial vacancies amendments, it preposterously states that the amendment institutes a “non-partisan merit based” system, “instead of political influence”, when there is no evidence of any truth in that statements. A so-called “nonpartisan judicial merit commission” is set up to evaluate whether that nominee is qualified or not qualified. However, the qualifications for a judge are set out in the constitution and are simple: Be registered to vote

in North Carolina (in the district if in the trial division), be admitted to the practice of law in North Carolina, and be under 72 years of age. This research could be done by a paralegal and signed off on by the AOC Director. The General Assembly then sends two names for the Governor for the Governor to choose from. One can argue as to whether the Governor is has been subject to political influence in his filling of vacancies granted in 1838, but to then argue that the General Assembly is NOT subject to political influence is laughable.

I won't discuss today whether the hunting and fishing and victim's rights solve an actual problems. I also note that the ballot question on the 7% maximum tax rate starts by saying it will "reduce the income tax rate" when it does nothing of the sort, since the current rate is below the new maximum.

What about the contents of the constitutional amendments themselves?

- 1) I believe the voter Photo ID amendment is actually out there to eliminate the power of the State Supreme Court to rule on whether such a proposal enacted as a simple bill violates the state constitution as an additional qualification to vote. This was litigated in either Missouri or Arkansas, which struck it down on state constitutional grounds. The legislature then out an amendment on the ballot to require voter ID, essentially reversing the state Supreme Court opinion. I also find it interesting that we are going to mandate a 20th century technology of relying on photographs for identification, when parallel means of identifying people or out there or developing, such as retinal scans or biometrics. The use of the word "Photo" freezes this. Since the amendment would have been just as good for blocking state court review without the word "Photo", I view it as just as an appeal to voters rather than a serious view of identification.
- 2) The judicial vacancies amendment is littered with problems. Here, as in other amendments, the usual scholarly and public review of proposals as serious as a constitutional amendment was bypassed in haste. For example, the proposal to grant appointment power to the Chief Justice fails if there is a vacancy in the office of Chief Justice, which has occurred in four of the past five Chief Justices as they reached retirement age while in office. The amendment then forbids the Governor or General Assembly from making any appointments during the final year of office, or if there is a vacancy once filing opens for a new election, potentially leaving no Chief Justice for over a year as well as leaving open other judgeships for an extended period. There are a number of other inconsistencies, omissions and internal conflicts in the amendment which I'm just starting to parse out. For example (and I'm not sure whether this is a drafting error or deliberate) the previous five exemptions from veto enacted in 1995 specifically say that fir a bill to be exempt it can "contain no other matter" than the exempt purpose. The two exemptions added here (bills nominating two candidates to the Governor or appointing judges if the Governor fails to,) both FAIL to have that language, thus leading to the conclusion that if a bill nominates judges, any other matter normally subject to veto can be placed in the bill and the entire bill. The amendment sets out the four prior exemptions right above it, so it's very clear the language differs. Senator Jeff Jackson filed a bill Saturday to add those four words to the two new exemptions, but the bill was not enacted on. The language is very clear, there is no ambiguity. Post-hoc press conferences insisting the intent was to not allow this broad exemption are inadmissible and meaningless. The failure to fix the error when pointed out in a filed bill would be admissible.

- 3) The boards and commissions appointments bill cedes appointment power on the State Board of Elections to the General Assembly, which must use a list of nominations by the majority and minority leader in each house. This imposes a constitutional imprimatur to political organization in 2018. The majority and minority leaders are party caucus offices, not public offices. They did not have extra salary before 1974, and from my research it appears it was only in that year that the House and Senate journals even had reports from the party caucuses as to the caucus leaders they had elected. More importantly, there have been cases where there were no such leaders. In the evenly divided 60-60 house of last decade, there were two minority leaders and no majority leader. In the 1895-1899 period, there were three parties in the House, with about 45 Progressives, 40 Republicans, and 35 Democrats, There were three minority leaders and no majority leader. If the Green, Libertarian, or Constitution Party elects a legislator, they will have a minority leader. What about an unaffiliated member? In the 1975 session after Watergate, the Senate had 49 Democrats and one Republican. What if Don Kincaid has been defeated by a Democrat? There would have been a majority leader and no minority leader. Well, enough of that. There is also the issue of whether, given partisan conflict, if the new state board will deadlock on partisan lines, akin to the evenly divided Federal Elections Commission. The FEC is akin to the failed state of Somalia in my opinion.

Here is my quick summary of this package of constitutional amendments: “You can win the Governorship or the Supreme Court, but we will make it worthless to you.”

Questions?