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Free trade deal letter stirs constitutional debate

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The pen may be mightier than the sword, but Gov. Craig Benson's pen doesn't overrule the New Hampshire Constitution.

That, in essence, is the message of a letter signed by a half-dozen New Hampshire legislators and delivered to the attorney general Sept. 9, in response to a letter the governor sent to U.S. Trade Representative Robert Zoellick 10 months ago.

In his Nov. 18, 2003, letter, Benson wrote: "The State of New Hampshire authorizes the U.S. Trade Representative to offer access to the New Hampshire State government procurement market in new trade agreements that USTR is currently negotiating."

The letter names 10 countries with whom the United States is currently conducting trade negotiations: Costa Rica; El Salvador; Guatemala; Honduras; Nicaragua; Botswana; Lesotho; Namibia; South Africa; and Swaziland. The letter also names the Free Trade Agreement of the Americas, now under negotiation, and promises: "New Hampshire will undertake the same commitment with regard to these new agreements that it has already undertaken under the WTO agreement on Government Procurement."

In their letter to Attorney General Kelly Ayotte, the legislators argued that the governor has no authority under the state Constitution to make such a broad and sweeping commitment.

"Given the powers granted to the General Court under Part 2, Article 83 of the New Hampshire Constitution regarding free and fair trade, it is our position that the power to bind New Hampshire to any such agreement rests solely with the General Court," the lawmakers wrote.

Referring specifically to CAFTA, the Central American Free Trade Agreement – which has been signed by President Bush but not yet presented to Congress for approval — the letter said, "No legislative action was taken on this issue and no public debate was held or scheduled to discuss the effects of this treaty on the state of New Hampshire."

The letter was signed by six legislators, all Democrats — Sens. Sylvia Larsen of Concord, Lou D'Allesandro, Manchester, and Joe Foster of Nashua and Reps. Peter Burling of Cornish, Ed Mears of Berlin and Chuck Weed of Keene.

An enlarged cardboard photocopy of the letter also was signed at the AFL-CIO Labor Day breakfast in Manchester by nine other members of the General Court: Sen. Iris Estabrook and Reps Jim Craig, McKim Mitchell, Barbara Hagan, Ben Barody, Gloria Seldin, John DeJoie, Jackie Pitts and Chris Pappas. All are Democrats except for Hagan, the lone Republican.

The letter asks the attorney general to determine whether the action by the governor was

constitutional and if not to advise the lawmakers what recourse they might have to nullify the commitment made by the governor “until proper public debate and appropriate legislative action can be scheduled and held.”

The attorney general said she had just received the petition and would have to look into the matter before commenting on it.

Senator Larsen, who hand-delivered the letter to Deputy Attorney General Michael Delaney, said that in addition to the constitutional issue, the legislators are concerned that the commitment made by the governor could eventually prevent the Legislature from establishing policies that might benefit New Hampshire companies and workers.

A matter of sovereignty

“We don’t think the governor has the authority, by the stroke of a pen, to make big policy decisions like this,” said New Hampshire AFL-CIO President Mark MacKenzie. The people and their legislature have the authority to make decisions about what we want to do in this state.”

“I think, for instance, if we wanted to give preferential treatment to the paper mills in Berlin to provide paper to the state of New Hampshire, or we want to make a decision to use New Hampshire labor to work in the state — if in some way, we can help industry in the state, help our own business here, then it helps our own state to do that,” MacKenzie said.

But that could be judged an unfair trade practice under the trade agreements currently being negotiated, said Arnie Alpert, New Hampshire director of the American Friends Service Committee and an active opponent of a number of world trade agreements.

“That means that if government at any level — in this case, the state — wants to spur economic activity and stem the loss of jobs through its own purchasing policies, those practices could be considered unfair trade and illegal,” Alpert said. “If New Hampshire were to try and have a policy that said any jobs created in call centers coming from government contracts would be created in the United States, that could be challenged as an unfair trade practice.”

To make matters worse, Alpert said, if the state were charged with an unfair trade violation in its procurement procedures under the proposed CAFTA agreement, the charge “would not go before a New Hampshire court, it would not go before a U.S. court, it would go before a (international) dispute resolution panel. Three arbitrators would meet behind closed doors.”

“It’s just another example of the way self-government, as well as open government, are being undermined by these kind of provisions,” Alpert said.

“I’m not sure that’s the case at all,” Benson said when asked about the controversy. “I think we could still do what we want with our bid procedures. If we wanted to give, say, a 50 percent advantage to an in-state business, I think we could still do that.”

The governor said he supports the free trade agreements as a way to “cut the bureaucracy” and red tape and facilitate the business New Hampshire companies can do with international trade partners.

“I’m just trying to make it easier to do business in New Hampshire,” Benson said. “A good part of our manufacturers want to export.”

Bill Hennessey, a professor at Franklin Pierce Law Center in Concord, said the question of preferential treatment in state procurement codes was made moot by the U.S. Supreme Court in 2000, with its decision in *Crosby v. The National Foreign Trade Board*.

At issue was a Massachusetts law barring any state agency from contracting with any company doing business in Burma.

“The Supreme Court found this was actually an area of international trade law pre-empted by federal law and that the state statute frustrated the purpose of federal statutes,” said Hennessey. “To the extent the New Hampshire Legislature or governor wanted to come up with a procurement policy that was any different from what was negotiated by the trade representative and approved by Congress, it would seem to be disallowed under *Crosby*,” he said.

Apart from the legal issues, the letter controversy appears to be bound up in decades-old political battles over free trade agreements. Manchester Republican Hagan, one of the legislators who signed the mock-up of the letter to the attorney general on Labor Day, said she finds the Republican leadership at the State House seemingly unconcerned about the loss of more than 20 percent of the state’s manufacturing jobs in the past four years.

“It’s the issue Pat Buchanan talked about when he was here, when I stapled his signs in front of my house,” said Hagan. “We’re getting a huge bunch of rhetoric, but neither of these presidential candidates right now is really for the blue-collar working guy.”