

MAINE STATE LEGISLATURE

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*Regulation - election of constitutional officers
Maine Const. - Art. V, Pt. 3, §1 and Pt. 4, §1
Art. IX, Pt. 9, §11*

79-1

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STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL

AUGUSTA, MAINE 04333

January 4, 1979
~~December 3, 1979~~

Honorable John L. Martin
Speaker of the House of Representatives
State House
Augusta, Maine 04333

Dear Speaker Martin:

You have inquired of me whether the Legislature, when it meets in convention to select the constitutional officers of Secretary of State, Treasurer and Attorney General, may authorize an absent member who has been officially sworn in and who is in the hospital to vote without being physically present in the Chamber. Based on the research we have been able to do in the limited time available to us, and for the reasons set forth below, the answer appears to be that the convention may authorize a member to vote by absentee ballot, provided that the method of voting qualifies as a "ballot" as that term is used in the Maine Constitution.

The relevant constitutional provisions to be examined in answering your question are Article V, Part Three, Section 1 (Secretary of State, Article V, Part Four, Section 1 (Treasurer), and Article IX, Section 11 (Attorney General). Those provisions each provide that the prospective constitutional officers shall be selected "by joint ballot of the Senators and Representatives in convention." It is that constitutional provision which must be construed in order to determine whether an absent member may be authorized to vote in the convention.

As a general principle of law, the convention is empowered to adopt its own rules of procedure subject to the above constitutional limitation. In Richardson v. Young, 125 S.W. 664, 680 (Tenn., 1910) the Tennessee Supreme Court held that a joint convention of the Tennessee Legislature meeting to select the Controller, Secretary of State and Treasurer had authority to adopt its own rules of procedure. The Court said,

"These conventions are deliberative bodies, and, their organization and proceedings not being regulated by any statute, it would seem, like all other bodies, they would have their power to elect their own officers, and adopt their own rules and be governed by established parliamentary usages and laws, one of which is that a majority of its members constitute a quorum to do business, and a majority of that majority controls and has the power to do the work of the whole."

The view that the convention may adopt its own rules is confirmed by an opinion of this office to the Secretary of the Senate dated October 29, 1976. A copy of the opinion is appended hereto.

Having determined that the convention may adopt its own rules of procedure, the issue then becomes whether the method of voting is limited by the terms of the Constitution. As noted above, the applicable provisions state that the officers shall be elected by "joint ballot." The use of the term "ballot" appears to mean that voting is required to be conducted by the casting of paper ballots or some other method designed to protect the secrecy of the elective process and not by voice vote. While there is no case law on that issue in Maine, the general authorities on the subject appear to agree that the use of the term "ballot" is intended to signify a secret voting technique. See for example, State v. Shaw, 9 S.C. 94 (1877); and Mason's Manual of Legislative Procedure, § 536 (1975). I understand that longstanding practice of the Legislature when meeting in joint convention is consistent with this interpretation of the term "ballot." Accordingly, I conclude that the constitution requires a written, paper or other secret method of voting.

I have reviewed the applicable rules of the Legislature and have found no rule which would limit the convention or otherwise prohibit the casting of an absentee ballot. However, as a matter of parliamentary practice, the general rule appears to be that in the absence of an authorizing rule, absentee ballots may not be cast in a legislative body. Robert's Rules of Order, pages 355-360 (1970); Mason's Manual of Legislative Procedure, § 538 (1975); 7 Cannon's Precedents, § 1014 (1936); 5 Hinds' Precedents, § 5941 (1907).

Of course, parliamentary precedent is not legally binding on a legislative body, but is looked to merely as a guide for regulating conduct of the body. Therefore, the convention may

either by adoption of a rule authorizing the casting of an absentee ballot or by implementing its usual parliamentary procedure (which in this case I understand would involve a ruling by the chair on the propriety of an absentee ballot subject to a parliamentary challenge from the floor), authorize an absentee ballot.

Sincerely,

JOHN M. R. PATERSON
Deputy Attorney General

JMRP:mfe

cc: Hon. Joseph Sewall

Legislative Organization
Maine Art. IV, Pt. 1, § 7 and Pt. 2, § 7

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DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

October 29, 1976

Honorable Harry N. Starbranch
Secretary of the Senate
State House
Augusta, Maine 04333

Dear Mr. Starbranch:

This office has recently received an oral request from you for advice on a question concerning legislative voting requirements in certain situations. It is our understanding that the question is asked because although the Constitution provides that each house of the Legislature "shall choose" their own officers and that constitutional officers "shall be chosen . . . by joint ballot of the Senators and Representatives in convention," there is no specific statement whether such selections shall be by majority, plurality, or other vote. Your question is:

"What is the voting requirement--majority or plurality--in the following situations: (1) for organization of a house of the Legislature; and (2) when the houses are voting in convention for constitutional officers?"

This answer is necessarily advisory because the ultimate decision, especially with regard to organization of either legislative body, is one which must be made by the legislative bodies themselves, either alone or in convention as appropriate. Both the House of Representatives and the Senate are constitutionally charged with the selection of their own officers. Art. IV, Pt. 1, § 7 and Pt. 2, § 7, Constitution of Maine. However, we advise that the answer to your question in either of the stated situations is that a majority vote would ordinarily be necessary, as indicated by accepted rules of parliamentary procedure and the practice of the Legislature.

There is general agreement among commentators on parliamentary procedure that the basic principle of parliamentary decision making is the rule of the majority of the body in electing officers.

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"In the absence of a special rule, a majority vote is necessary to elect officers and a plurality is not sufficient. A vote for the election of officers, when no candidate receives a majority vote, is of no effect and the situation remains exactly as though no vote had been taken." Mason's Legislative Manual, p. 393, § 553.

"A plurality that is not a majority never chooses a proposition or elects anyone to office except by virtue of a special rule previously adopted." Robert's Rules of Order, p. 343, § 43 (1970 ed.)

Adherence to this basic principle in the election of officers has been the practice of both houses of the Maine Legislature, as exemplified by the format of the report of the committee which superintends counting of the ballots. In each case the committee reports the total number of votes cast, followed the number necessary for a choice - in terms of a majority of the votes cast - and the votes for each nominee.

Two examples of past practice of the Legislature, at least with respect to election of constitutional officers, can be found in the proceedings of the 77th and 105th Legislatures. The 77th Legislature met in convention on January 6, 1915, to elect the constitutional officers. There were 17 Republicans and 14 Democrats in the Senate, and 78 Democrats, 69 Republicans and 4 Progressives in the House of Representatives. The report of the first ballot for Secretary of State was: votes cast - 180; necessary for a choice - 91; John E. Bunker - 89; Joseph E. Alexander - 87; Roland E. Clark - 4. The report was accepted but the vote was declared "no choice" because none of the nominees received a majority of the votes cast. It was not until six days and 10 ballots later that Mr. Bunker was elected by receiving a majority of 91 of the 180 votes cast. Legislative Record, House of Representatives, January 6-12, 1915.

The second example concerns the election of the Attorney General by the 105th Legislature in 1971. The committee report on the first ballot was: votes cast - 179; necessary for a choice - 90; James S. Erwin - 90; Bruce Chandler - 89. The report was challenged on the basis that the 179 votes cast did not include 3 which were considered void because they were for people who had not been nominated, therefore there were actually 182 votes cast and 92 would have been needed for a majority. Another question was raised concerning the accuracy of the total votes cast since two legislators were absent. As a result, the Chair ruled that since Mr. Erwin did not receive a majority of all votes cast and since it appeared that there were more votes cast than there were legislators present and voting, another

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written ballot would be ordered. Mr. Erwin was elected on the subsequent ballot, receiving 92 of the 180 votes cast. Legislative Record, House of Representatives, January 6, 1971, Vol. 1, pp. 18-19.

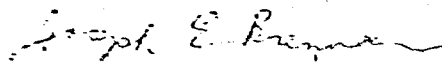
The foregoing examples demonstrate the practice of the Maine Legislature in requiring a majority vote for constational officers. It is believed that the same procedure is contemplated by the Constitution for organization of the two bodies, insofar as this relates to election of legislative officers. A parallel situation exists in the United States Congress which, like the Maine Legislature, is constitutionally charged with the selection of its officers, with the exception of the President of the Senate. Art. I, §§ 2 and 3, United States Constitution. No specific vote is required in the United States Constitution, however, it has been decided as a parliamentary matter that a majority is required. VI Cannon's Precedents, p. 15, § 23. It should be noted that in two cases the United States House of Representatives has abandoned this rule by vote of the House in electing its Speaker. In 1849, after 19 days and 59 ballots, a special plurality rule was adopted and a Speaker was elected. I Hind's Precedents, p. 124, § 221. In 1856 a similar special plurality rule was adopted after 129 ballots had failed to elect a Speaker. I Hind's Precedents, p. 126, § 222.

There may be some question as to the applicability of the majority rule for the purposes discussed above in light of the fact that the Governor, Senators and Representatives are elected by plurality. Art. IV, Pt. 1, § 5 and Pt. 2, §§ 3 and 4, and Art. VI, Pt. 1, § 3, Constitution of Maine. However, plurality election of these officials was not always the case. The Constitution originally required a majority vote and it was sequentially amended to change the requirement for the House of Representatives in 1848 (Resolves, 1847, c. 45), the Senate in 1876 (Resolves, 1875, c. 98), and the Governor in 1880 (Resolves, 1880, c. 159). In each case the change of voting requirement was accomplished by amendment of the state's organic document - its Constitution - and would not compel different requirements for other voting situations.

In summary, we advise that the voting requirement for both organization of the two legislative bodies and for election of constitutional officers by joint ballot in convention should be a majority of the votes cast. However, this requirement would be subject to change by the body or convention if such change proved necessary and sufficient support for such change is found.

Please continue to contact us if we can be of assistance.

Sincerely,


JOSEPH E. BRENNAN
Attorney General

JEB:mfe

cc: Honorable Edwin H. Fert