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DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

October 5, 1979

Honorable Walter A. Birt
House of Representatives
State House
Augusta, Maine 04333

Re: Recall of Bills.

Dear Representative Birt:

You have asked whether the Legislature may recall a bill which was approved by both houses and presented to the Governor at the immediately preceding session of the same Legislature. Stated in more detail, the relevant facts are as follows. The bill in question was passed to be enacted by both the House and the Senate at the First Regular Session of the 109th Legislature. Although presented to the Governor, he has neither signed nor vetoed it. Furthermore, because of the adjournment of the Legislature, the bill has not become law by virtue of the running of the ten-day period after its delivery to the Governor. Since the 109th Legislature has now convened in special session, you have inquired whether the Legislature may recall the bill at the present session.

While the law on this subject is far from settled, it is our opinion that the bill in question may be recalled at the special session, provided that the recall is effected prior to the expiration of the third day of the session. See Opinion of Attorney General (September 21, 1979). Furthermore, the recall requires the approval of both houses of the Legislature, as well as the consent of the Governor.

The remainder of this opinion will explain the reasoning which underlies the conclusions set out above. For purposes of clarity, we shall first address the power to recall in general and then turn our attention to the power to recall a bill approved at a prior session.

Power to Recall in General

The question of the Legislature's power to recall a bill arises in a virtual vacuum. The Constitution, statutes, legislative rules and case law of Maine are all silent on the subject. In addition, a review of court decisions from other jurisdictions reveals a division of opinion. Some cases, alluding to constitutional provisions which detail the alternative courses of action available to the Governor after a bill has been presented to him, rely on the fact that recall by the Legislature is not one of the enumerated alternatives to hold that the power does not exist. See, e.g., Wolfe v. McCaull, 76 Va. 876 (1882). Other decisions emphasize that a bill pending before the Governor is still within the legislative process. Starting from that premise, these decisions conclude that there is no prohibition against returning a bill to an earlier stage of that process for reconsideration. See, e.g., Anderson v. Atwood, 262 N.W. 922 (Mich. 1935); Teem v. State, 188 S.W. 1144 (Tex. Crim. App. 1916).

After a review of all the relevant authorities, we are persuaded that the Maine Legislature does possess the power to recall bills presented to the Governor. Our conclusion is based on three considerations. First, although the courts are divided, the majority of the decisions uphold the existence of the power. Second, the authorities on legislative procedure appear unanimous in the view that a legislative body may request the return of a bill already sent to the chief executive. Third, the recalling of bills is a well-established practice of the legislative and executive branches in Maine.

Turning first to the case law, the majority view has been stated as follows: "[i]n the absence of constitutional restriction the legislature may by concurrent resolution recall a bill after presentation to the governor. . . . " 82 C.J.S. Statutes § 48(b) (1953). Furthermore, those cases which either hold or suggest that the Legislature lacks a recall power are generally distinguishable on their facts. See, e.g., Wolfe v. McCaull, supra. (Governor returned bill but took it back on the same day before any further legislative action); State v. Bledsoe, 31 So.2d 457 (Fla. 1947) (recall order approved by only one house of a bicameral legislature). Thus, the weight of the case law supports recall.

The acknowledged authorities on legislative procedure are in greater agreement in recognizing the power of the Legislature to request the return of a bill pending before the Governor. As stated by one such authority:

> When a bill has passed both branches of the legislature and has been signed by the appropriate officers and sent to the governor for his approval, it has passed beyond the control of either house and cannot be recalled except by the joint action of both houses. Mason, Manual of Legislative Procedure § 740(5) (1970); see also Brown, Constitution, Jefferson's Manual and Rules of the House of Representatives § 110 (1977); Hughes, American Parliamentary Guide, §§ 1075, 1557 and 1558 (1926).

Along these lines, there is clear congressional precedent for this procedure. IV Hinds Precedents of the House of Representatives § 3507 (1907). Although at least one commentator has characterized the congressional practice as "irregular," see Brown, supra, there is no doubt that the procedure is utilized, and its legitimacy has not been seriously questioned.

In determining whether a particular state legislature has a recall power, some courts have looked to local practice to determine whether there is a "custom" of recalling bills. Compare, Wolfe v. McCaull, supra, (no custom of recalling bills; power held not to exist) with McKenzie v. Moore, 17 S.W. 483 (Ky. 1891) (courtesy of returning bills "has grown into a custom;" power held to exist). When viewed from this perspective, a strong argument may be made for the authority of the Maine Legislature to request the return of bills. During the Regular Session of the 105th Legislature, eleven orders were introduced to recall bills, and nine of them were approved by both the House and the Senate. While the number of bills recalled in a session is generally not this high, it does appear that recall is a regular, if not always frequent, practice. For example, the Regular Sessions of the 104th and 106th Legislatures each approved two recall orders. In short, the existence of an established practice or custom militates strongly in favor of the conclusion that the Maine Legislature may recall bills.

Having concluded, for the reasons stated above, that bills may be recalled, two further points must be made. First, as may already be apparent, the relevant authorities all seem to accept the proposition that recall may be effected only by the approval of both houses of a bicameral legislature. See, e.g., Opinion of the Justices, 174 A.2d 818 (Del. 1961); Mason, supra. Our research suggests that the Maine practice is in conformity with this principle. Second, while this opinion is not specifically directed at the Governor's role in the recall process, we should at least note the generally held assumption that the decision to return a bill to the Legislature is discretionary with the chief

executive. Virtually all of the cases refer to the Governor's acquiescence in the legislative request as an act of "courtesy." See, e.g., Anderson v. Atwood, supra; McKenzie v. Moore, supra. Furthermore, we have found no court or commentator who even intimates that the Governor may be compelled to return a bill. In short, recall would appear to require the consent of the Governor.

Power to Recall a Bill Approved by the Legislature at a Prior Session.

The remaining question is whether, notwithstanding the general power of the Legislature to recall a bill, the circumstances surrounding the measure in question preclude the exercise of that power. To recapitulate the relevant facts, the bill about which you have inquired was approved by both the House and the Senate at the Regular Session. It is still pending final action, however, because the Governor neither signed nor vetoed it and because the Legislature adjourned before the ten-day period after presentation had expired. Simply stated, the question is whether the Legislature may now recall this bill.

While there is no direct precedent to assist us on this rather unusual issue, we are of the opinion that the bill in question may be recalled. Our opinion is based largely on logic and on the policy considerations which we believe underlie the practice of recalling bills.

Viewed conceptually, the power to recall is predicated on the notion that since gubernatorial approval is the final "legislative" step necessary for a bill to become law, see, Opinion of the Justices, 231 A.2d 617 (Me. 1967); Stuart v. Chapman, 104 Me. 17 (1908), the bill remains within the legislative process until that step has been taken. Accordingly, recall simply involves returning the measure to an earlier stage of the process. Under this view, we can see no basis for drawing a distinction betweenbills approved at the same session as the recall order and those approved at a prior session. In both instances, the legislative process has not been completed; thus, the bill may be returned to an earlier stage.

It might be argued with respect to billsapproved at a prior session that once the Governor has lost the power to sign a measure into law because ten days have run since its presentation to him, the measure should no longer be subject to recall. We find that argument unpersuasive. The fact that the Governor has lost the power to sign the bill in no way means that the legislative process has terminated. The significance of the expiration of the ten-day period is simply

that the measure can only become law if the Governor fails to return it to the Legislature within three days after the commencement of the next meeting. See, Op. Atty. Gen. (July 10, 1979). As a matter of logic, the bill remains within the legislative process, and thus, we can see no reason to conclude that it is no longer subject to recall.1/

An examination of the policy underlying the recall procedure also leads us to conclude that it should be applicable to the bill in question. Ostensibly, the primary purposes for recalling a bill after presentation to the Governor are to enable legislative errors to be corrected and to create a mechanism for making changes agreed to by both the Legislature and the Governor. It would appear that these objectives are equally justifiable whether the bill to be recalled was approved by the Legislature at the same session or at a prior session.2/

1/ We do not interpret art. IV, pt. 3, § 2 of the Maine Constitution as limiting the legislative power to recall a bill pending final action. While virtually all jurisdictions have constitutional provisions similar to § 2, see, e.g., U.S. Const., art. I, § 7, the majority nonetheless recognize recall as a legitimate procedure. Furthermore, we believe that the primary purpose of § 2 is to create an elaborate system of checks and balances designed to prevent the Governor and the Legislature from encroaching upon each other's legislative powers. Since recall requires the consent of both branches, we do not believe the practice contravenes the purposes of § 2 regardless of whether the recalled bill was enacted at the same or at a prior session.

2/ Our research into recent legislative practice does not provide clear guidance on the issue under consideration. We should note, however, one instance in which the Legislature's actions might be construed to reflect an interpretation different from that expressed in our opinion. In that instance, the Legislature recalled a bill which it had approved at a prior session. The Senate then tabled the measure after having voted to reconsider enactment. Following a two-week hiatus, the House and Senate approved, without explanation, an order to transmit the bill to the Secretary of State, who treated it as a finally enacted law. Since the record is totally silent on the reasons for the Legislature's actions, we do not believe this isolated transaction can be accorded any significance. (Cont.)

For the reasons stated above, then, we are of the view that the Legislature may recall a bill pending before the Governor even though the measure was passed to be enacted by the House and the Senate at a prior session of the same Legislature.

I hope this information is helpful. Please feel free to call on me if I can be of any further service.

Sincerely,

RICHARD S. COHEN
Attorney General

RSC:ec
cc: Honorable Joseph E. Brennan
Honorable Joseph Sewall
Honorable John L. Martin

2/ Cont.

Although the other two instances we found in which the Legislature recalled bills presented to the Governor at a prior session would appear to weigh in favor of our conclusion, they are also of limited precedential value. In both cases, the bills had been erroneously sent to the Governor, in that they contained language different from that actually approved by the Legislature. Thus, these bills were not truly "approved" at the prior session.