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DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

February 24, 1981

Honorable Charles M. Webster
House of Representatives
State House
Augusta, Maine 04333

Dear Representative Webster:

You have requested an opinion from this office concerning the constitutionality of L.D. 685. This bill proposes to amend Art. IV, pt. 2, § 2, 1st paragraph of the Maine Constitution by adding the following language:

> If a county has a population falling between seventy-five percent and one-hundred and five percent of the mean population for Senate seats, if that county is divided in the apportionment of the State into Senate seats, it shall be divided so that residents of the county constitute at least fifty-one percent of the population of one Senate seat.

The apparent purpose of the bill is to guarantee that the residents of certain smaller counties constitute the majority of the electorate of at least one Senatorial District. We conclude that enactment of L.D. 685 would not violate the United States Constitution. We do, however, perceive two problems which may occur in the application of this provision to future reapportionment. First, depending upon the State's population and its distribution at the time required for reapportionment, it might prove mathematically impossible to implement the provisions of L.D. 685 for all of the affected counties without violating the requirements of the Equal Protection Clause of the United States Constitution. In such cases, the State

Constitution would have to yield to the Federal Constitution. A second and more minor problem is to establish in terms of precedence the relationship among the various apportionment requirements of the Maine Constitution, including the provisions of L.D. 685.

The United States Supreme Court has interpreted the Equal Protection Clause to provide that both houses of a state legislature must be apportioned on a substantially equal population basis. E.g., Mahan v. Powell, 410 U.S. 315 (1973); Reynolds v. Sims, 377 U.S. 533 (1964). Divergences from strict equality of up to a 10% maximum difference between the smallest and largest districts have been allowed without policy justifications. E.g., White v. Regester, 412 U.S. 755 (1973)(maximum deviation of 9.9% allowed); Gaffney v. Cummings, 412 U.S. 735 (1973)(maximum deviation of 7.83% allowed). Such divergences are considered to be de minimis and therefore do not make out a prima facie case of malapportionment. Id.; see also In re Apportionment of House of Representatives, 315 A.2d 211, 214-15 (Me. 1974). A maximum deviation of 16.4% was allowed by the Court in Mahan v. Powell, supra, on the ground that the state involved had based its districting not only on population but had also consistently attempted to maintain the boundaries of traditional political subdivisions, including counties. The Court permitted the higher deviation because of "'legitimate considerations incident to the effectuation of a rational state policy.'" 410 U.S. 325, citing Reynolds v. Sims, supra.

These principles must be followed in apportioning the houses of a state legislature. To the extent that state constitutional requirements mandate plans not in accord with these principles, the state provisions must yield. See In re Apportionment of House of Representatives, supra. Although L.D. 685 does not itself dictate a particular method or plan of apportionment, the Legislature will have to implement its provisions as part of any apportionment plan it adopts. If it is mathematically impossible to arrive at a plan implementing L.D. 685 which also accords with the requirements of the United States Constitution, the Legislature or Court must put aside the provisions of the bill to the extent necessary to formulate a constitutional plan. Thus, while the amendment proposed by L.D. 685 is not unconstitutional, situations could arise in which the amendment could not be fully effectuated because it would lead to an unconstitutional result.

The second problem is one which, although not fatal to this bill, may merit legislative clarification. Article IV, pt. 2, § 2 of the Maine Constitution provides that the Maine Senate is to be apportioned "using the same method as provided in Article IV, Part First, Section 2 for apportionment of Representative Districts." Article IV, pt. 1, § 2 contains some specific directions for apportioning the State. Conceivably, confusion and perhaps outright conflict in specific applications could occur between these directions and the provisions of L.D. 685. In order to prevent

such problems, it may be advisable to indicate in the bill whether its provisions or the already existing rules are to take precedence if a specific conflict arises.

We hope this information addresses your concerns. If you have any further questions or comments, please feel free to contact this Office.

Sincerely,

JAMES E. TIERNEY
Attorney General

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