

MAINE STATE LEGISLATURE

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STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, MAINE 04333

April 9, 1986

Honorable Patrick K. McGowan
House of Representatives
State House Station #2
Augusta, Maine 04333

Dear Representative McGowan:

You have asked the opinion of this Department whether initiated legislation presented to the Second Regular Session of the 112th Legislature, if not enacted, could be presented to the voters in referendum at the time of the statewide primary elections on June 10, 1986. In response, it is the Opinion of this Department that the inquiry is answered directly by the final sentence of subsection 2 of Article IV, Part 3, Section 18, of the Maine Constitution:

The Legislature may order a special election on any measure that is subject to a vote of the people.

This conclusion is reached notwithstanding the next sentence of the same section:

The Governor shall, by proclamation, order any measure proposed to the Legislature as herein provided, and not enacted by the Legislature without change, referred to the people at an election to be held in November of the year in which the petition is filed.

Article IV, part 3, section 18 is the constitutional provision most directly addressed to the initiative means of

APR 29 1986

enacting legislation. Until amendment in 1980, section 18 consisted of a single paragraph, without subsections. The two quoted sentences read as follows, prior to the 1980 amendment:

The Legislature may order a special election on any measure that is subject to a vote of the people. The Governor may, and if so requested in the written petitions addressed to the Legislature, shall, by proclamation, order any measure proposed to the Legislature as herein provided, and not enacted by the Legislature without change, referred to the people at a special election to be held not less than four nor more than six months after such proclamation, otherwise said measure shall be voted upon at the next general election held not less than sixty days after the recess of the Legislature, to which such measure was proposed.

In this form, the two sentences are substantially identical to the provision as it was originally enacted. Res. 1907, c. 121.

Until the 1980 amendment then, the petitioners could compel the presentation of the initiated legislation (if not enacted by the Legislature) to the voters at a special election. In an advisory opinion of the Supreme Judicial Court, this power of the petitioners was construed to be paramount, automatically limiting the constitutional powers of the Legislature and the Governor. "The request [for a special election] in the written petitions, by creating a mandatory obligation for action by the Governor, negates, ipso facto, a repository of discretion either in the Governor or in the Legislature." Opinion of the Justices, 275 A.2d 800, 805 (Me. 1971). If the petitioners made no such request, both the Legislature and the Governor were constitutionally authorized, but not required, to order its presentation at a special election. If neither did, the measure would be voted on at the next general election held not less than 60 days after recess of the Legislature to which the measure was proposed.

The 1980 amendment affected only two of the three means of ordering a special election that were historically available. The amendment stripped the petitioners of their power to determine when the matter would be voted upon, and removed all

discretion from the Governor's power to order an election.^{1/} It made no change at all to the Legislature's power to order a special election. As can be seen from the pre-1980 language, the Governor's control over the timing of a referendum election existed only if neither the petitioners nor the Legislature directed the measure to a special election. Accord, Opinion of the Justices, 275 A.2d 800 (Me. 1971). It is most unlikely that the further limitation of that authority was intended to override the independent authority of the Legislature, which was left untouched.

The 1980 amendment makes changes to each of the various constitutional provisions dealing with referendum elections, sections 17, 18, 20 and 21 of Me.Const., art. IV, pt. 3. Const.Res. 1979, ch. 3, passed in 1980. One plain thrust of these amendments was to reduce the occasions when the presentation of referendum questions would require a special election to be held. The amendment establishes a clear preference for the presentation of referendum questions at an otherwise scheduled "statewide election."^{2/} This purpose is clearly reflected in the ballot question prepared by the same committee that wrote the amendment, and contained in the Resolve itself:

Shall the Constitution of Maine be amended
to change the referendum provisions so that

^{1/} The legislative history of the amendment makes clear the purpose of each change. The Governor was stripped of any discretion to control the timing of a referendum election as a result of an instance where the Governor was held to have abused that discretion by refusing to proclaim a required special election for more than six months after the recess of the Legislature. Kelly v. Curtis, 287 A.2d 426 (Me. 1972), cited in Legis. Record 495 (1980). At the same time, the combination of the popularity of the initiative and people's veto provisions and the petitioners' power to require a special election within a specified two-month time "sometimes force[d] the State to hold 3 or 4 elections in one calendar year." L.D. 1747, Statement of Fact (109th Legis. 1980).

^{2/} One aspect of the constitutional amendment was to replace the definition of "general election" ("the November election for choice of presidential electors, Governor and other state and county officers") with a new definition of "statewide election" ("any election held throughout the State on a particular day"). The new term was then used in several places in these sections of the Constitution, specifically to make the reference applicable to "primary and regular as well as general and special elections." Comm. Amend. A to L.D. 1787, No. H-881, Statement of Fact (109th Legis. 1980).

the direct initiative and people's veto elections can be held at the same time as a scheduled statewide election?

Const.Res. 1979, ch. 3. Consistent with that purpose, the failure of the amendment to repeal or amend the last sentence of section 18, subsection 2, authorizing the Legislature to order a special election on any referendum question, must be understood at least to permit the Legislature to direct the presentation of initiated legislation to referendum vote at the time of a scheduled statewide primary election. Only in the event that the Legislature fails to order a special election will the provisions of the following sentence take effect, requiring presentation of the initiated legislation to the voters in referendum at an election to be held in November of the year in which the petition is filed.^{3/} If the two sentences are not given this construction, they cannot be squared with one another.

As to the means of ordering a special election, you have inquired whether such a directive requires legislative action, subject to gubernatorial veto and the 90-day, post-recess waiting period for non-emergency legislation to become effective. By the terms of the Constitution the power to direct the referendum vote to be held at a special election is confided to "the Legislature," so any such action must represent the will of both Houses. Me.Const. art. IV, Pt. 1, § 1. However, the Constitution speaks of "ordering" a special election, which, in the context of the Constitution as a whole, implies that such an action does not represent an exercise of the legislative power. First, in accepted legislative parlance, an order is one of the basic instruments by which the Legislature conducts its business. See Director of Legislative Research, Manual for Legislative Drafting (1980) at 63. In established practice, an order is not a vehicle for enacting laws. Id. at 135. Moreover, this use of the legislative order is reflected in the language of the constitution. Compare, for example, the enumeration of "bills, orders or resolutions" in art. IV, pt. 3, § 9 (origination of actions) with the requirement of the veto clause that "every bill or resolution, having the force of law, to which the concurrence of both Houses may be necessary . . . shall be presented to the Governor" Art. IV, pt 3, § 2. Likewise, the 90-day waiting period after the recess of the Legislature for non-emergency laws to become effective applies to "Act[s] or

^{3/} In odd-numbered years an election held in November would be a special election, since general elections are held only biennially in the even-numbered years.

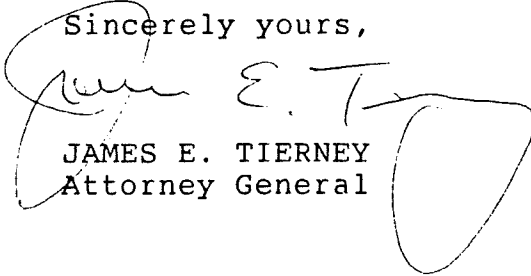
joint resolution[s] of the Legislature, except such orders or resolutions as pertain solely to facilitating the performance of the business of the Legislature," Article IV, pt. 3, § 16.

In addition, there is no logical imperative to treat a legislative command that a special election be held to vote on an initiated law as a law in itself. The procedural provisions of the constitution addressing initiated legislation mention the Governor's veto power expressly. Article IV, part 3, § 19 provides that ". . . any measure initiated by the people and passed by the Legislature without change, if vetoed by the Governor and his veto is sustained by the Legislature shall be referred to the people to be voted on" This reference in § 19 to the Governor's veto power extends only to initiated measures adopted by the Legislature. Upon enactment by the Legislature, there is no less reason why initiated legislation should be presented to the Governor than any other bill enacted. By contrast, an action of the Legislature directing a referendum to be held on initiated legislation merely affects the timing of its potential enactment, a matter which is fully within the control of the Legislature with respect to all other legislation. Accordingly, there is no discernible basis for concluding that an "order" of a special election would require presentation to the Governor.

Similarly, the post-recess 90-day waiting period is inapplicable to this situation. This provision was enacted together with the "people's veto" provision of art. IV, pt. 3, § 17, and exists solely to allow time for petitions to be circulated to invoke the "people's veto" procedure. In this case, if the Legislature fails to enact the initiated legislation, with the result that the proposal must be submitted to the people in referendum, there would be no legislation that could logically be the object of a people's veto. Therefore, there is no logical application of the 90-day waiting period in section 16 to action of the Legislature directing a special election to consider a referendum question. Accordingly, it is the conclusion of this Office that the referendum vote on initiated legislation not enacted may be ordered to take place at the same time as the previously scheduled June, 1986 primary election, or at any other time, by passage of a joint order by a majority of each House directing the conduct of a special election.

If this Office can be of further assistance in connection with this inquiry, please feel free to contact me again.

Sincerely yours,



JAMES E. TIERNEY
Attorney General

JET/EC
cc: Legislative Council