89-8

JAMES E. TIERNEY
ATTORNEY GENERAL

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

June 15, 1989

Honorable Judy C. Kany
Maine Senate
State House Station #3
Augusta, ME 04333

Dear Senator Kany:

You have inquired whether the provisions of Article V, Part 1, Section 8 of the Maine Constitution require that legislation establishing a new office to be filled by appointment by the Governor and confirmation by the Legislature be enacted by a two-thirds vote of the members of each House present and voting. For the reasons which follow, the opinion of this Department is in the negative. Although statutes altering the confirmation process once established for an executive or judicial office cannot be altered except by a two-thirds vote of the members of each House present and voting, legislation establishing executive and judicial offices in the first place do not require a super majority, even if they provide for legislative confirmation of gubernatorial appointments.

Your question arises because of several bills currently pending before the First Regular Session of the 114th Maine Legislature which would establish new boards or commissions in the Executive Branch, and would provide for the appointment of the members of these boards by the Governor and confirmation of them by the Legislature. The power of the Legislature to retain for itself the power to confirm executive officers is contained in Article V, Part 1, Section 8 of the Maine Constitution, the first paragraph of which, in pertinent part, provides:

> [The Governor] shall nominate . . . all . . . civil . . . officers whose appointment is not by this Constitution, or shall not by law be otherwise provided for.

The Legislature thus has the constitutional authority to require that the appointment of any person by the Governor to any office in the Executive Branch be confirmed by it.

The second paragraph of Section 8 sets forth the procedure which the Legislature must follow for the confirmation of appointments to offices which it sees fit to subject to a confirmation process:

> The procedure for confirmation shall be as follows: an appropriate legislative committee comprised of members of both Houses in reasonable proportion to their membership as provided by law shall recommend confirmation or denial by majority vote of committee members present and voting. The committee recommendation shall be reviewed by the Senate and upon review shall become final action of confirmation or denial unless the Senate by vote of two thirds of those members present and voting overrides the committee recommendation. The Senate vote shall be by the yeas and nays.

The third paragraph of Section 8 then provides:

> All statutes enacted to carry out the purposes of the second paragraph of this section shall require the affirmative vote of two thirds of the members of each House present and voting.

The question which you raise, therefore, is whether the provisions of the third paragraph must be read not only to prevent the alteration of a pre-existing procedure for confirmation except by a two-thirds vote but also to require that the establishment of a confirmation procedure in the first place be accomplished by a super majority.

The third paragraph of Section 8 has been the subject of two previous opinions of this Department, copies of which are attached. In 1981, the Department advised that the paragraph required that a two-thirds vote was required to change the joint standing committee responsible for recommending to the Senate whether appointees to a particular state agency should be confirmed. Op. Me. Att'y Gen. 81-40A. In 1983, the Department advised that legislation adding or subtracting

members from a board appointment to which required confirmation and legislation adding specific qualifications for members of a board requiring confirmation, as well as nonsubstantive amendments to the confirmation process, does not require a two-thirds vote. The Department has not, however, directly addressed the question of whether the establishment of a confirmation requirement in the first place requires such a vote.

To answer such a question requires the Department once again to review the legislative history of the revision of Article V, Part 1, Section 8 in 1975 as part of constitutional changes abolishing the Executive Council and redistributing its confirmation powers to various units of the Legislature. As indicated in Opinion 81-40A the language which became Section 8 was the result of an amendment to the Legislative Document 24 proposed by a second conference committee which was appointed after the Senate had rejected the report of a first conference committee. Id. at 2-3. Conf. Comm. Amend. A to L.D. 24, No. S-381 (107th Legis. 1975). That amendment provided that the third paragraph of Section 8 read as follows:

> All statutes enacted to carry out this section shall require the affirmative vote of two-thirds of the members of each House present and voting (emphasis added).

In explaining the meaning of this provision during debate on it in the House of Representatives, the House Chairman of the Conference Committee explained that "the final arbiter of which appropriate committee would hear which particular nominee shall be set by statute by a two-thirds vote of both Houses of the Legislature." 2 Legis. Rec. B2328 (1975) (remarks of Rep. Tierney).

This statement led this Department to state in course of its 1981 Opinion that "it was the intent of the framers of the constitutional amendment that the creation or designation of a committee to review particular gubernatorial appointments would receive a two-thirds vote." Op. Me. Att'y Gen. 81-40A at 3 (emphasis added). The Opinion then went on to conclude that, that being the case, the transfer of confirmation power from one committee to another required a two-thirds vote, the narrow question with which it was presented. As the Opinion noted, however, Section 8 was further amended in 1980 to limit the applicability of its third paragraph to "the second paragraph of this section." Me. Const. Amendment CXLIII (effective Nov. 25, 1980). The question thus becomes, therefore, whatever the Legislature intended in 1975 with regard to the amount of votes

necessary to establish a confirmation process in the first place, what was its intention in 1980 in limiting the two-thirds vote requirement of the third paragraph of Section 8 to the provisions of the second paragraph of the section?

The legislative history of the 1980 amendment is not clear as to its precise scope. The only indication of legislative intent is the Statement of Fact to Legislative Document No. 2007 which states that the amendment of the third paragraph of Section 8 was intended "to clarify that the legislative two-thirds voting requirement only applies to statutes relating to confirmation of gubernatorial nominees." L.D. 2007, Statement of Fact at 3 (109th Legis. 1980). It is clear that this statement limits the applicability of the third paragraph to statutes concerning confirmation, but it is not clear that it was intended to relate to all such statutes. Indeed, the plain language of the amendment appears to suggest otherwise, since it confines the applicability of the third paragraph to the second paragraph of Section 8, and therefore precludes its applicability to the first paragraph of the Section. Since, as indicated above, that paragraph is the one which authorizes the Legislature to establish a confirmation power in the first place, it is a better construction of the third paragraph in its current form that it was not intended to require a super majority for a statute establishing a confirmation process for a new executive position in the first instance. Rather, it is reasonable to conclude that the Legislature, in enacting this amendment, intended to require such a majority only when alterations in a confirmation process, once established, were proposed. In short, therefore, the Legislature may enact legislation creating new executive positions requiring confirmation, or requiring that existing executive positions be subject to confirmation, by an ordinary majority. It is only when the Legislature seeks to change the procedure by which a particular appointee is to be confirmed that a two-thirds vote is required. Op. Me. Att'y Gen. 81-40A.

I hope the foregoing answers your question. Please feel free to reinquire if further clarification is necessary.

Sincerely,

JAMES E. TIERNEY
Attorney General

JET:sw

cc: President Charles P. Pray
Speaker John L. Martin

JAMES E. TIERNEY
ATTORNEY GENERAL

83-21

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

May 20, 1983

Honorable John Martin
Speaker of the House
State House Station #2
Augusta, Maine 04333

Dear Representative Martin:

You have requested an Opinion from this Office on several questions regarding the effect on the legislative process of certain provisions of Me. Const. art. V, pt. 1, § 8, which deals with the appointment and confirmation process for executive and judicial officers. The second paragraph of that section provides, in pertinent part, as follows:

> The procedure for confirmation [of gubernatorial appointments] shall be as follows: an appropriate legislative committee comprised of members of both houses in reasonable proportion to their membership as provided by law shall recommend confirmation or denial by majority vote of committee members present and voting. . . .

The third paragraph of that section states that

> All statutes enacted to carry out the purposes of the second paragraph of this section shall require the affirmative vote of two-thirds of the members of each House present and voting.

You have asked whether a two-thirds vote of each House is necessary:

1. To enact a bill which would add a new member to a board when both the old and new members require confirmation;

2. To enact a bill adding specific qualifications for board members subject to confirmation without changing the number of members on the board or the confirmation procedure;

3. To enact a bill making certain technical changes in the confirmation procedure;

4. To enact any of the changes described in questions 1-3 by repealing and replacing the appropriate section, including the confirmation procedure language, when the repeal and replacement does not change the confirmation procedure.

This Office concludes that a two-thirds vote is not necessary in any of the situations you raise. This conclusion is based on the clear language and the legislative history of Article V, part 1, Section 8. The two-thirds vote requirement applies only to "statutes enacted to carry out the purposes of the second paragraph" of Section 8. This language was intended to encompass statutes directly affecting the confirmation procedure itself and, more particularly, statutes which designated the committee which was to confirm a given appointment. See Op. Me. Att'y. Gen. 81-40A, a copy of which is attached. As concluded in that Opinion, the relevant legislative history, most significantly the comments of the chairman of the second Committee of Conference, Rep. Tierney, 2 Legis. Rec. B2328 (1975), supports the proposition that the most important concern of the drafters of Section 8 on the issue of when a two-thirds vote would be required for implementing legislation on confirmation procedures was the method by which the various appointments would be assigned to legislative committees for confirmation. Neither the language nor the legislative history of Section 8 suggests that statutes establishing the composition of boards and qualifications of board members were intended to be within its scope.

Viewing the questions posed from this perspective, this Office concludes that a bill which adds or subtracts members from a board or changes their qualifications but which does not change the actual confirmation procedure or the committee assigned to confirm is not "enacted to carry out the purposes of the second paragraph" of Section 8. Therefore, questions one and two are answered in the negative.

We deem your third question to address the several changes which have been made in the current legislative session in the language establishing the identity of confirming committees. Legislative Document No. 1363 presents a good example of such a change. This bill, in addition to altering the qualifications of one of the members of the Maine Resources Advisory Council, would change the language describing the confirming committee from "the joint standing committee on Marine Resources" to "the joint standing committee of the Legislature having jurisdiction over Marine Resources.' L.D. 1363 (111th Legis. 1983) It appears that these changes are intended to preclude confusion as to the proper confirming committee in the event a committee's name or area of jurisdiction is changed. This Office does not regard such changes as substantive in nature; they need not, therefore, be approved by a two-thirds vote.[1/]

Finally, this Office concludes that a two-thirds vote would not be required if any of the proposed amendments discussed herein are accomplished, as a matter of form, by repealing and replacing the relevant section. Even if this method of amendment involves the repeal and replacement of the language establishing the confirmation procedure, a two-thirds vote is not necessary as long as the confirmation procedure is not changed. Such a purely formal amendment would not constitute the enactment of a statute to carry out the purpose of the second paragraph of Section 8.

I hope this analysis addresses your concerns. if you have any further questions or comments, please do not hesitate to contact me.

Sincerely,

JAMES E. TIERNEY
Attorney General

JET/ec

1/ An amendment intended to change the confirmation power from one committee to another, however, requires a two-thirds vote. See Op. Me. Att'y. Gen. 81-40A.

81-40

JAMES E. TIERNEY
ATTORNEY GENERAL

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

May 7, 1981

Honorable Judy Kany
House of Representatives
State House
Augusta, Maine 04333

Dear Representative Kany:

You have asked whether art. V, pt. 1, § 8 of the Maine Constitution requires a two-thirds vote for the enactment of legislation which would change the joint standing committee responsible for recommending to the Senate whether prospective appointees to the State Personnel Board should be confirmed.[1/] It is our opinion that such legislation would require the affirmative vote of two-thirds of the members of each House present and voting.

Art. V, pt. 1, § 8 provides, in relevant part, as follows:

> §8. To appoint officers
> Section 8. He [the Governor] shall nominate, and, subject to confirmation as provided herein, appoint all judicial officers except judges of probate and justices of the peace if their manner of selection is otherwise provided for by this Constitution or by law, and all other civil and military officers whose appointment is not by this Constitution, or shall not by law be otherwise provided for.
>
> The procedure for confirmation shall be as follows: an appropriate legislative committee comprised of members of both houses in reasonable proportion to their membership as provided by law shall recommend confirmation or denial by majority vote of committee members present and voting. The committee recommendation shall be reviewed by the Senate and upon review shall become final action

---

1/ We understand your question is prompted by L.D. 1566 of the 110th Legislature, section 4 of which would, among other things, substitute the Joint Standing Committee on State Government for the Joint Standing Committee on Labor as the body empowered to review gubernatorial appointments to the State Personnel Board. The conclusions expressed in this opinion apply only to that change and not to other provisions in the bill.

> of confirmation or denial unless the Senate by vote of two thirds of those members present and voting overrides the committee recommendation. The Senate vote shall be by the yeas and nays.
>
> All statutes enacted to carry out the purposes of the second paragraph of this section shall require the affirmative vote of two-thirds of the members of each House present and voting. (Emphasis added)
>
> .....

As is readily apparent, the critical question is whether the legislation which prompted your inquiry would constitute a statute "enacted to carry out the purposes" of the second paragraph of section 8. Guided by the maxim that unambiguous language in a constitutional provision should be read in accordance with its plain meaning, we think it clear that an act which assigns to a legislative committee the confirmation power for particular civil officers is one which is enacted to carry out the purposes described above. Furthermore, we can see no reason why this conclusion should not apply when legislation is enacted to change the committee so empowered. Thus, a literal reading of section 8 leads to the conclusion that the contemplated change requires the affirmative vote of two-thirds of the members of each House present and voting.

Our interpretation of section 8 is supported by the legislative history underlying the passage of the constitutional resolution which, upon its approval by the electors, established the appointment and confirmation process currently found in section 8.[2/] This process was created as part of a broader constitutional amendment eliminating the Executive Council. The legislative debate suggests that while there was rather widespread support for the abolition of the Council, there was considerable disagreement as to the entity or entities which should inherit the Council's power to approve civil officers.[3/] In fact, the procedure ultimately adopted was the recommendation of a second conference committee appointed to resolve the differences between the House and the Senate after the latter body had rejected the report of the first such committee.[4/]

2/ The current provisions in section 8 were adopted pursuant to Chapter 4 of the Constitutional Resolutions of 1975, with minor changes made by Chapter 4 of the Constitutional Resolutions of 1979.

3/ This disagreement is evidenced by the fact that the bill proposing the constitutional amendment, L.D. 24 of the 107th Legislature, was reported out of the State Government Committee with four different reports. Three of those reports recommended passage but contained different confirmation procedures. The fourth opposed passage.

4/ L.D. 24 was ultimately passed as amended by Conference Committee Amendment "A", S-381 of the 107th Legislature. The first conference committee had recommended passage of one of the reports of the State Government Committee.

When the amendment proposed by the second conference committee was put before the House, Representative DeVane specifically asked how the responsibility for holding confirmation hearings and making recommendations to the Senate would be assigned to the various legislative committees. The response of Representative Tierney, a member of the second conference committee, is particularly relevant to your inquiry.

> MR. TIERNEY: . . . The answer to the gentleman's . . . question as to the final arbiter of the appropriate committee is that the Legislature itself is the final arbiter of the appropriate committee, because all of this constitutional provision would have to be supplemented by enabling legislation which, under the terms of this section of the Constitution, must be passed by a two-thirds vote of both Houses of the Legislature. Again, the final arbiter of which appropriate committee would hear which particular nominee shall be set by statute by a two-thirds vote of both Houses of the legislature.

Representative Tierney's remarks leave no doubt that it was the intent of the framers of the constitutional amendment that the creation or designation of a committee to review particular gubernatorial appointments would require a two-thirds vote.

The relevant legislative history also supports our conclusion that a two-thirds vote is needed to transfer the confirmation responsibility from one legislative committee to another. As noted above, the focal point of the disagreement over the abolition of the Executive Council concerned the exercise of the Council's power to approve gubernatorial appointees. Thus, the requirement of a two-thirds vote was a central feature of the compromise developed by the second conference committee, insofar as it insured that the allocation of the confirmation power to particular committees would have widespread support in the Legislature. To find the requirement inapplicable to legislation transferring the power from one legislative committee to another would undermine the compromise which was critical to the Legislature's adoption of the resolution to amend art. V, pt. 1, § 8 of the Maine Constitution.[5/]

5/ We would note that in 1980 the third paragraph of art. V, pt. 1, § 8 was amended by Chapter 4 of the Constitutional Resolutions of 1979 which added the language underlined below:

> All statutes enacted to carry out <u>the second paragraph of</u> this section shall require the affirmative vote of two-thirds of the members of each House present and voting.

Since the second paragraph of section 8 outlines the confirmation procedure, the 1980 amendment serves to reinforce the conclusion reached herein.

For the reasons stated above, we conclude that legislation which would change the committee responsible for making recommendations to the Senate on gubernatorial appointments to the State Personnel Board[6/] must be enacted by the affirmative vote of two-thirds of the members of each House present and voting.

I hope this information is helpful.

Sincerely,

Stephen L. Diamond

STEPHEN L. DIAMOND
Deputy Attorney General

SLD:jg

6/ Implicit in our answer to your question is the conclusion that the members of the State Personnel Board are "civil officers," and thus, their appointments are subject to the provisions of Art. V, pt. 1, § 8. Given the duties of the Board, we do not think it can be reasonably argued that its members are not civil officers. See generally, Advisory Opinion to Senate, 277 A.2d 750, (R.I. 1971).