2016-01

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March 4, 2016

Hon. Michael D. Thibodeau
President of the Senate
3 State House Station
Augusta, Maine 04333-0003

RE: Ranked-choice Voting

Dear Senator Thibodeau:

You asked whether L.D. 1557, *An Act to Establish Ranked-choice Voting*, presents any constitutional concerns with regard to the provisions of the Maine Constitution applicable to elections for Governor (Art. V, pt. 1, § 3), State Senators (Art. IV, pt. 2, §§ 3-4), and State Representatives (Art. IV, pt. 1, § 5). The bill proposes a new method of determining elections for the offices of United States Senator, Representative to Congress, Governor, State Senator and State Representative, and for primary elections to determine the nominees for those offices. The Maine Constitution contains no specific provisions relating to elections for Congress or the United States Senate, and primary elections are created by statute. Accordingly, we will address only those issues relating to general elections for Governor, State Senate and State Representative.[1]

Since L.D. 1557 is a citizen-initiated bill, it must be presented to the voters at the general election next November, with or without a competing measure, unless the Legislature enacts it without change this session. Me. Const. art. IV, pt. 3, § 18, cls. 2.

We have received comments from some legislators and others urging our office not to address the constitutionality of L.D. 1557 before the initiative is presented to the voters. The Justices of the Maine Supreme Judicial Court have advised that a citizen initiative must be submitted to the voters (if not enacted by the Legislature) even if it presents constitutional issues. *See Opinion of the Justices*, 673 A.2d 693, 697 (Me. 1996) (Congressional term limits initiative must be sent to voters at referendum election if not enacted by Legislature "notwithstanding the

[1] We do not address any federal constitutional issues here, except to note that courts in other jurisdictions have generally rejected challenges to ranked-choice voting based on equal protection and First Amendment grounds. *See, e.g., Dudum v. Arntz*, 640 F.3d 1088 (9th Cir. 2011) (upholding the city of San Francisco's restrictive instant runoff voting system); and *Minnesota Voters Alliance v. City of Minneapolis*, 766 N.W.2d 683 (Minn. 2009) (upholding city's instant runoff voting system).

fact that the bill is unconstitutional as written"). Nonetheless, on several occasions the Justices have answered questions about the constitutionality of initiatives at the Legislature's request, before the voters had an opportunity to cast a ballot. *See, e.g., Opinion of the Justices,* 2004 ME 54, ¶¶ 5-7 (constitutionality of Palesky tax cap petition); *Opinion of the Justices*, 623 A.2d 1258, 1262 (Me. 1993) (constitutionality of initiative setting term limits for state officials).[2] Attorneys General have also issued opinions on several occasions, even though it was likely that the office would be called upon to defend the proposed law if enacted by the voters.[3]

By illuminating the constitutional issues presented by a bill pending before the Legislature or the citizens, we are in no way attempting to tip the scales at the election on the ballot question. Rather, we are simply providing information that legislators and voters may consider when voting on an initiated bill, as this office has often done in the past.

Relevant constitutional provisions

The process for the election of State Representatives is set forth in Article IV, part first, section 5 of the Maine Constitution (emphasis added):

> The meetings within this State for the choice of Representatives shall be warned in due course of law by qualified officials of the several towns and cities 7 days at least before the election, and *the election officials of the various towns and cities shall* preside impartially at such meetings, *receive the votes of all the qualified electors, sort, count and declare them in open meeting*; and *a list of the persons voted for shall be formed, with the number of votes for each person against that person's name*... Fair copies of the lists of votes shall be attested by the municipal officers and the clerks of the cities and towns and the city and town clerks respectively shall cause the same to be delivered into the office of the Secretary of State forthwith. The Governor shall examine the returned copies of such lists and 7 days before the first Wednesday of December biennially, shall issue a summons to *such persons as shall appear to have been elected by a **plurality** of all votes returned*, to attend and take their seats.

The constitutional provision relating to the election of State Senators is worded in a similar manner and declares that the *votes "shall be received, sorted, counted, declared and recorded, in the same manner as for Representatives*." Me. Const. art. IV, pt. 2, § 3 (emphasis

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[2] In each instance, some of the Justices declined to answer the questions presented believing that no inquiry into the substantive constitutional validity of an initiated bill should be addressed before the referendum election. *See Opinion of the Justices,* 2004 ME 54, ¶¶38-39 (answer of Justices Clifford, Rudman and Alexander); *Opinion of the Justices*, 623 A.2d at 1264 (answer of Justices Glassman and Clifford); *Opinion of the Justices*, 673 A.2d at 696 (answer of Justices Glassman, Clifford and Lipez); *see also Wagner v. Secretary of State*, 663 A.2d 564, 567-68 (Me. 1995) (Law Court declined to address constitutionality of initiative before referendum election).

[3] *See Op. Att'y Gen.* 06-4 (April 5, 2006) (constitutionality of TABOR initiative); *Op. Att'y Gen.* 04-1 (Mar. 23, 2004) (constitutionality of Palesky tax cap initiative); *Op. Att'y Gen.* 03-7 (Oct. 16, 2003) (tribal casino initiative); *Op. Att'y Gen.* 91-11 (Sept. 6, 1991) (term limits for state officials); and *Op. Att'y Gen.* 91-9 (Aug. 5, 1991) (initiative relating to discrimination based on sexual orientation).

added). The lists of votes are to be attested by the municipal clerks and delivered to the Secretary of State's office. *Id.* The Governor is then required to "examine the copies of such lists, and ... issue a summons to *such persons, as shall appear to be elected by a **plurality** of the votes* in each senatorial district, to attend and take their seats." *Id.* § 4 (emphasis added).

The Constitution includes a parallel provision for counting votes in elections for Governor, in Article V, part first, section 3:

> The meetings for election of Governor shall be notified, held and regulated and *votes shall be received, sorted, counted and declared and recorded, in the same manner as those for Senators and Representatives. Copies of lists of votes shall be sealed and returned to the secretary's office* in the same manner and at the same time as those for Senators. The Secretary of State for the time being shall, on the first Wednesday after the first Tuesday of January then next, lay the lists returned to the secretary's office before the Senate and House of Representatives to be by them examined, together with the ballots cast if they so elect, and they shall determine the number of votes duly cast for the office of Governor, and *in case of a choice by **plurality** of all the votes returned they shall declare and publish the same.*

Four essential elements are common to these constitutional provisions: 1) the votes for all of these offices must be received, sorted, counted and declared in open meeting by local election officials; 2) local officials in each municipality must create "a list of the persons voted for...with the number of votes for each person against that person's name" and transmit those lists to the Secretary of State; 3) the Secretary of State must receive and transmit the lists to the appropriate body or official (to the Governor, for election results of House and Senate races, and to the House and Senate for results of a gubernatorial race); and 4) the winners of the election for each office are determined by plurality.

How L.D. 1557 proposes to change the election process

As the Secretary of State described in a fiscal impact statement prepared for this citizen initiative, on October 20, 2014:

> Currently, ballots are cast in 500 municipalities and counted on election night by hand (in 265 municipalities) or tabulated by a digital scan tabulator (in 235 municipalities). The municipal count determines a plurality winner for their town (i.e., the candidate with the most votes); the municipalities report their results to the Secretary of State; and the Secretary of State then aggregates the results from 500 municipalities into a single tabulation of the vote for each office and candidate.

L.D. 1557 does not amend the provisions of Title 21-A that specify how local election officials sort, count, declare and record the votes cast in their respective municipalities, or how they prepare the election returns to submit to the Secretary of State. *See* 21-A M.R.S. §§ 695-712. Rather, the bill amends Title 21-A section 722 to provide that, instead of simply aggregating data from the municipal officials' election returns in a tabulation, as occurs now, the

Secretary of State would "tabulate" election results based on the ranked-choice voting method described in a proposed new section 723-A.[4]

In elections for Governor, State Senator, State Representative, U.S. Senator and Congressional Representative, ballots would be designed to allow voters to rank all the candidates listed for a particular office (plus one write-in candidate) in order of the voter's preference. L.D. 1557, §§ 1 & 3. Thus in a 3-way race, instead of marking one vote on the ballot for candidate A, B or C, the voter could express a preference for all three candidates by ranking them as choice #1, 2 or 3 on the same ballot.[5] All of the voters' first-choice votes would be tallied in round one. In a multi-candidate race, if one candidate were to win more than 50% of the total votes in the first tally, then that candidate would be declared the winner.[6]

If no candidate received over 50% of the vote in round one, then a second round of tallying would begin. The candidate in last place after the first round would be eliminated, and the second choice votes *of the voters whose first-ranked candidate was eliminated in round one* would be distributed to those voters' second-choice candidates. If there were only two "continuing candidates" after round one, then the candidate with the most votes after round two would win. *See* proposed § 723-A(1)(C) & (2)(A). If it were a 4-way race and three candidates continued into round two, then the candidate with the fewest votes after round two would be eliminated, and the second-choice (or third-choice) votes of the voters who preferred the eliminated candidate would be redistributed to those voters' second (or third) choice candidates. Two candidates would be left in the final round, and the candidate receiving the most votes in that round would be elected. *Id.* § 723-A(2)(A).

Constitutional issues presented by ranked-choice voting

The ranked-choice voting system proposed by L.D. 1557 presents two constitutional concerns that are intertwined and affect the validity of the entire bill. The first concerns how the winner of a multi-candidate race is determined (plurality vs. majority), while the second relates to how ballots are counted and by whom (local vs. state). A third, narrower concern relates to how L.D. 1557 provides for resolving tie votes in a gubernatorial election.

1. Plurality versus majority

As stated in the constitutional provisions quoted above, the winner of an election for Governor, State Senate or State Representative is determined by "a *plurality* of all the votes" or a "*plurality* of all votes returned." The choice to determine elections by plurality was made

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[4] The ranked-choice voting process described in the bill requires actual re-counting of ballots and not merely tabulating (or re-tabulating) results reported on municipal election returns.

[5] L.D. 1557 applies ranked-choice voting to all elections for the five offices listed in section 1 of the bill, but the method would only affect electoral races with more than two candidates.

[6] The bill avoids using the word "majority," but the definitions of terms and the description of the ranked-choice voting procedure support this conclusion. *See* L.D. 1557, § 5, proposing to enact 21-A M.R.S. § 723-A(1) & (2).

deliberately by the Legislature and the voters, through three separate amendments to Maine's Constitution adopted at various times in the 19th century.

Maine's first Constitution provided that the election of State Representatives, Senators and Governor would be determined by "a majority of all the votes" cast.[7] In 1847, this phrase was deleted for the election of State Representatives, and replaced with "the highest number of votes." Resolves 1847, ch. 45, amending Me. Const. art. IV, pt. 1, § 5 (eff. July 29, 1848).[8] A later amendment adopted the word "plurality" in lieu of the phrase "the highest number of votes." Resolves 1864, ch. 344 (eff. Oct. 6, 1864). In 1875, "majority" was changed to "plurality" for determining the election of State Senators. Resolves 1875, ch. 98 (eff. Jan. 5, 1876), amending Me. Const. art. IV, pt. 2, § 5. Four years later, the same change was adopted for Governor. Resolves 1880, ch. 159 (eff. Nov. 9, 1880), amending Me. Const. art. V, pt. 1, § 3.

The meaning of these constitutional provisions is plain and unambiguous. The word "majority" means "a number more than half of the total" – i.e., more than 50%. *American Heritage Dictionary of the English Language* (4th ed. 2000) at 1056. "Plurality" means a number that "exceeds that of the closest opponent"– i.e., one more vote than the next highest vote-getter. *Id.* at 1351.

In an election contest with multiple candidates, unless there is a tie, one candidate will always receive a *plurality* based on the initial tally. The results of that tally are "declared publicly" by officials in each municipality, pursuant to 21-A M.R.S. § 695(3), and the provisions of the Constitution quoted above.

The system of ranked-choice voting described in proposed section 723-A, however, requires additional rounds of counting if no candidate receives a *majority* in the first tally. Under ranked-choice voting, when there are multiple candidates in a race, some of whom are eliminated in the first or second round of vote tallies, the winner of the final two-person round will have received a majority of the votes counted in that round but <u>not</u> necessarily *a plurality of all votes cast for that electoral office.*

L.D. 1557 thus conflicts with the constitutional requirement that winners be determined by "a plurality" of all the votes.[9]

The prospect of a constitutional challenge is not merely theoretical. All of the gubernatorial elections during the past 40 years (from 1974-2014) have involved multiple candidates, and in most cases at least three candidates achieved a significant percentage of the

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[7] *See* Me. Const. art. IV, pt. 1, § 5, art. IV, pt. 2, §§ 4 & 5, and art. V, pt. 1, § 3, Laws of Maine 1820 at xiii, xiv and xvii.

[8] The resolve was originally drafted to make this change applicable to the election of Representatives, Senators and Governor, but the voters approved the change only for Representatives. *See* Resolves 1847, ch. 45; Tinkle, *The Maine State Constitution: A Reference Guide* (1992) at 71, 100.

[9] We have carefully reviewed letters submitted by several attorneys on behalf of the initiative proponents expressing contrary views on this issue but find them unpersuasive in the face of the clear language of the Constitution.

total ballots cast for Governor. Review of this historical data (*see* attached list) shows that had ranked-choice voting applied to any one of those elections, the winner of a plurality in round one might have lost the election in round two, after the second-choice votes of voters who preferred the last-place candidate were redistributed. If L.D. 1557 were implemented and a candidate for Governor were to win round one by a plurality but fail to gain a majority, and then lose in round two, that candidate could challenge the election result on the grounds that ranked-choice voting violates the constitutional provisions discussed here.

2. Local versus state processing of ballots

The second constitutional issue arises from the fact that the process of electing State Representatives, State Senators and the Governor that is enshrined in Maine's Constitution is a decentralized one in which all ballots are cast *and counted* at the municipal level. Ranked-choice voting is a fundamentally different process, which cannot be performed at the local level for electoral offices that encompass from two to 500 different municipalities.[10] The process of re-allocating voter preferences in a multi-candidate race has to be done centrally, and is typically performed using computer software to read digitally scanned images of the ballots. L.D. 1557 assigns this task to the Secretary of State, presumably for these practical reasons, but nothing in the constitutional provisions at issue here authorizes the Secretary of State to process ballots or to count votes on individual ballots.[11]

The Constitution expressly provides that votes for Governor, State Senate and State Representative shall be received, sorted, counted, declared and recorded by local election officials during an open meeting in each municipality; that a list of the persons voted for shall be formed with the number of votes for each person against that person's name; and that such lists shall be delivered to the Secretary of State. Me. Const. art. IV, pt. 1, § 5. These lists are the official election returns and provide the basis upon which the Governor must "issue a summons to such persons as shall appear to have been elected by a plurality:" *See Opinion of the Justices*, 2002 ME 169, ¶16 n. 1. The tabulation that the Secretary of State prepares under current law is simply an aggregation of the data from these election returns. The ballots remain in the custody of municipal officials. 21-A M.R.S. § 698.[12] The Justices have advised that the Governor's duty

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[10] It might be more feasible to implement ranked-choice voting in a state that conducts elections at the county level. As far as we can determine, however, although legislation to adopt ranked-choice voting has been considered or is pending in several states, no state uses the system described here for legislative or statewide elections. It is currently used in about 10 major cities in the United States. *See* http://www.ncsl.org/research/elections-and-campaigns/elections-legislation-database.aspx; http://www.fairvote.org/rankedchoicevoting#research_rcvamericanexperience.

[11] By contrast, the Secretary of State does have authority to count absentee ballots of military and overseas voters, pursuant to 21-A M.R.S. § 783, but that statute is expressly authorized by Article II, section 4 of the Maine Constitution.

[12] Ballots may be retrieved from municipal officials if a recount is requested in a particular election contest, pursuant to 21-A M.R.S. § 737-A, but the Secretary of State does not count ballots in an election recount either. Representatives of the candidates are the ones who re-count the ballots in order to check the accuracy of the election-night results that were reported by the municipal officials.

to "examine the returned copies of [the] lists" under Article IV of the Constitution does not give him authority to review ballots. *Opinion of the Justices*, 2002 ME 169, ¶¶ 22-25. The Secretary of State's constitutional authority is similarly limited.

As a practical matter, in any gubernatorial race or election for a House or Senate district that is comprised of more than one municipality, the Secretary of State cannot "tabulate" a second round of counting under the ranked-choice process by simply reviewing the lists returned by local election officials. Indeed, the Secretary of State could not do so even if municipal officials were to record the number of first, second and third choices each candidate received from voters in their respective municipalities on their election returns. A municipal return showing second and third choices would be useless because the second and third-choice votes could not be redistributed based on that list. Instead, round two of ranked-choice voting involves re-assigning to the "continuing candidates" the second-choice votes of *only those voters whose number one choice was eliminated in the first round.* This means that a human being *or a computer* has to *re-examine each ballot* that was cast for the last-place candidate in round one (who is eliminated), and redistribute the second-choice vote of that voter if it is for one of the continuing candidates in round two.[13]

The Secretary of State's office has explained in its fiscal impact statement that to implement the ranked-choice voting process described in L.D. 1557 for a statewide office, or multi-town electoral district, would require the Secretary of State to retrieve and collect at a central location all the ballots from the hand-count towns and all the memory devices from the digital scan tabulator machines for the towns that use tabulators. State officials would have to run the ballots from the hand-count towns through a high-speed tabulator. At that point, digital scanned images of all the ballots from the tabulators would be stored in a central computer, and the process of redistributing second-choice votes would be performed by the computer using a software program. The outcome of ranked-choice voting would then be determined by running the algorithms in the computer software program.

Having the Secretary of State process ballots (or scanned images of ballots) at a centralized location using computer software involves a fundamental change to the process of determining elections in Maine and does not appear to be consistent with Maine's Constitution.[14]

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[13] It would be theoretically possible for the Secretary of State to aggregate the first-choice votes based on municipal election returns; identify the last-placed candidate from that tabulation; and instruct local election officials to re-count the ballots that had been cast for that candidate and produce a new tally after distributing the second-choice votes on those ballots to the remaining (or "continuing") candidates. Each round could go back and forth in this manner between state and local officials, with the local officials doing the counting, but it would be extremely cumbersome, time-consuming, and fraught with potential human error. We presume this is why the bill calls for central processing by the Secretary of State.

[14] It is worth noting that every time the Legislature has made a major change in the election process, it has done so by constitutional amendment. *See, e.g.*, Me. Const. art. II, § 5 (authorizing use of mechanical voting machines as a new way to cast ballots); Me. Const. art. II, § 4 (authorizing absentee voting); Me. Const. art. IX, § 12 (authorizing division of towns into separate voting districts).

3. Tie votes in a gubernatorial election

The bill provides that a tie vote between candidates in the final round of the ranked-choice voting process would be decided by lot. L.D. 1557, § 5, enacting proposed section 723-A(3). This is in direct conflict with Article V, part first, section 3, which provides that "[i]f there shall be a tie between the 2 persons having the largest number of votes for Governor, the House of Representatives and the Senate meeting in joint session... shall elect one of said 2 persons... and the person so elected ... shall be declared the Governor."

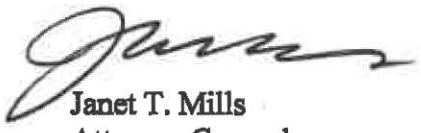
Conclusion

Maine's Constitution provides for winners to be determined by "a plurality of all votes returned" and for votes to be counted by local election officials in each municipality. It does not contemplate multiple rounds of tallying (and redistributing) voters' preferences through a centralized, computer-driven process administered by the Secretary of State until a majority winner can be determined.

The answer to your question is that L.D. 1557 does raise significant constitutional concerns, and it may not be possible to implement ranked-choice voting as envisioned by this legislation without amending the Maine Constitution.

I hope this is helpful. If you have further questions regarding the bill or our analysis, please let me know.

Sincerely,



Janet T. Mills
Attorney General

Gubernatorial Elections (1974-2014)

Year	Candidates	Votes	% of total vote
2014	Paul LePage	294,519	47.7%
	Michael Michaud	265,114	42.9%
	Eliot Cutler	51,515	8.3%
2010	Paul LePage	218,065	37.6%
	Eliot Cutler	208,270	35.9%
	Libby Mitchell	109,387	18.8%
	Shawn Moody	28,756	5.0%
	Kevin Scott	5,664	1.0%
2006	John Baldacci	209,927	38.11%
	Chandler Woodcock	166,425	30.21%
	Barbara Merrill	118,715	21.55%
	Pat LaMarche	52,690	9.56%
	Philip Morris Napier	3,108	0.56%
2002	John Baldacci	238,179	47.15%
	Peter Cianchette	209,496	41.47%
	Jonathan Carter	46,903	9.28%
	John Michael	10,612	2.10%
1998	Angus King	246,772	58.61%
	James Longley, Jr.	79,716	18.93%
	Thomas Connolly	50,506	12.00%
	Pat Lamarche	28,722	6.82%
	William Clarke	15,293	3.63%
1994	Angus King	180,829	35.37%
	Joseph Brennan	172,951	33.83%
	Susan Collins	117,990	23.08%
	Jonathan Carter	32,695	6.39%
	Mark Finks	6,576	1.29%
1990	John McKernan	243,766	46.7%
	Joseph Brennan	230,038	44.0%
	Andrew Adam	48,377	9.3%

1986	John McKernan	170,312	39.90%
	James Tierney	128,744	30.16%
	Sherry Huber	64,317	15.07%
	John Menario	63,474	14.87%
1982	Joseph Brennan	281,066	61.06%
	Charles Cragin	172,949	37.57%
	J. Martin Vachon	2,573	.56%
	Vern Warren	3,650	.79%
1978	Joseph Brennan	176,493	47.67%
	Linwood Palmer	126,862	34.26%
	Herman Frankland	65,889	17.80%
	James Longley (write-in)	628	.17%
1974	James Longley	142,464	39.14%
	George Mitchell	132,219	36.33%
	James Erwin	84,176	23.13%
	William Brown Hughes	1,314	.36%
	Stanley Leen, Jr.	2,883	.79%
	Leigh Hartman	889	.24%

127th Legislature
Senate of Maine
Senate District 11

Senator Michael D. Thibodeau
President of the Senate
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Augusta, ME 04333-0003
(207) 287-1500

169 Coles Corner Road
Winterport, ME 04496

January 27, 2016

Honorable Janet Mills
Office of the Attorney General
6 State House Station
Augusta, ME 04333

Dear Attorney General Mills:

I am requesting your advice concerning LD 1557, *An Act to Establish Ranked-choice Voting*. LD 1557 has been tabled in the Maine Senate due to constitutional concerns.

LD 1557 proposes a ranked choice voting method for the offices of United States Senator, United States Representative to Congress, Governor, State Senator and State Representative. The bill describes a process "in which voters rank candidates in order of preference, tabulation proceeds in sequential rounds in which last-place candidates are defeated and the candidate with the most votes in the final round is elected."

Please tell me whether there are concerns about the constitutionality of the Initiated Bill, particularly with regard to *Article IV, Part First, Section 5; Article IV, Part Second, Section 4 & 5*; and *Article V, Part First, Section 3*.

Should you have any questions or if I can clarify this request in any way, please do not hesitate to contact me.

Thank you,

Michael D. Thibodeau
President of the Senate

cc: Senator Garrett Mason, Majority Leader
Senator Andre Cushing, Assistant Majority Leader
Senator Justin Alfond, Minority Leader
Senator Dawn Hill, Assistant Minority Leader