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January 15, 2007

Honorable Glenn Cummings
Speaker of the House
Maine House of Representatives
2 State House Station
Augusta, ME 04333-0002

RE: Proposed Joint Rule 219

Dear Speaker Cummings:

You have asked whether the Legislature's Proposed Joint Rule 219, which would impose a supermajority voting requirement upon any legislation exceeding the spending limits in 5 M.R.S.A. § 1534, is constitutional.

Your January 9, 2007 letter to me sets out the text of the proposed rule, which reads:

> Rule 219. Legislation that exceeds spending limitations.
>
> Any legislation that exceeds the spending limitations established under the Maine Revised Statutes, Title 5, section 1534 must be proposed in a separate measure that addresses the excess amount solely and that may be enacted only by a 2/3 vote of the elected members of each chamber.
>
> This rule expires December 2, 2008.

Senate Paper 10 (123rd Legis. 2007).

The proposed rule concerns the spending limitations set forth in Title 5, section 1534, which requires that as of December 1st of each even-numbered year, a limitation must be established on all General Fund appropriations for the ensuing legislative

biennium. This limitation is calculated separately for each year of the biennium under a formula set forth in section 1535 that is based on the ranking of Maine's local tax burden relative to that of the other states.[1] Section 1534(3) identifies "extraordinary circumstances" under which the limitation can be exceeded, such as loss of federal funding.

INTRODUCTION

The issues presented by your question are complex as well as important. In the short time allowed to our office by the exigencies of the Legislature's business, we have focused on those issues that appear to be most significant in the absence of an opportunity to undertake a more comprehensive review.

Proposed Joint Rule 219 contains two requirements. First, any legislation that would result in exceeding the spending limits in Title 5, section 1534 would have to be proposed in a separate measure that addresses only the excess amount. We can think of no constitutional defect in a legislative rule requiring that such a measure be proposed in a separate bill.

The second requirement of the proposed rule is that enactment of any such measure would require a 2/3 vote of the elected members of the House and the Senate. This is the aspect of the rule that presents significant constitutional issues and is therefore the focus of our analysis.

DISCUSSION

A. Sufficiency of a Majority Vote for Non-emergency Enactments

Under Maine Constitution Article IV, part 3, section 2, every bill or resolution "having the force of law...which shall have passed both Houses, shall be presented to the Governor..." This provision, which is sometimes referred to as the "presentment clause," has been described by the Justices of the Supreme Judicial Court as follows:

> "Every bill or resolution, having the force of law", the phrase employed in Article IV, Part Third, Section 2, means every bill or resolution which, upon completion of the legislative process, shall have the effect of law. The legislative process here involved is composed of concurring action by both Houses of the Legislature together with consideration by the Chief Executive resulting in (a) approval, (b) disapproval, followed by reconsideration and passage by the Legislature over such disapproval, or (c) failure of the Chief Executive to either approve or disapprove within

[1] The only exception to this limitation requirement is the additional cost of essential programs and services for kindergarten to grade 12 education over the fiscal year 2004-05 appropriation for general purpose aid to local schools; this exception applies only until the state share of that cost reaches 55% of the total state and local cost.

> the applicable period of time prescribed in the last sentence of Article IV, Part Third, Section 2.

Opinion of the Justices, 231 A.2d 617, 619 (Me. 1967) (citations omitted).

The reference in the presentment clause to bills "which shall have passed both Houses" is not further explained, nor is the term "passed" defined in this context in Maine's Constitution. However, passing legislation is perhaps the quintessential legislative function and the Constitution expressly specifies that in each house "a majority constitutes a quorum to do business." Me. Const., art. IV, pt. 3 § 3.[2] If a majority of the members is sufficient to do business, it would be logical to conclude that "passing" legislation requires a simple majority vote unless the Constitution itself provides otherwise.

While the applicability of majority rule in the passage of legislation is so fundamental to American democracy that it is rarely addressed expressly by the courts, we have found several judicial decisions on this point. The Justices of the Maine Supreme Judicial Court discussed the majority rule in responding to questions addressed to them by the Governor during a constitutional crisis that arose in 1879 when the outcome of the election for Governor was in the hands of the newly elected Legislature, and where a number of legislative seats were contested. The Governor requested the opinion of the Justices on several legal issues that were in dispute. In responding to a question concerning the number of selectmen needed to sign the election returns for their town, the Justices relied on the rule applicable to the Legislature and concluded:

> [A] majority of the whole must be present to constitute a legal quorum, but a majority of the quorum may act,--and so far as we are aware, the law is so stated in substance by all ancient and modern authorities. The rule applicable to such cases is similar to that which applies to our house of representatives. The whole number of representatives established by law is one hundred and fifty-one. A majority, (that is, seventy-six members) constitute a quorum to do business. If there is actually that number present, and a majority of them (that is thirty-nine members) vote in the affirmative, a valid law can be enacted or other business transacted. If less than seventy-six members are present, then no legal business can be done, except to adjourn, or compel the attendance of absent members. This is familiar law....

Opinion of the Justices, 70 Me. 560, 563 (1880).

The presentment clause of Maine's Constitution closely follows the presentment clause of the United States Constitution, Article I, section 7, which provides in pertinent part: "Every Bill which shall have passed the House of Representatives and the Senate,

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[2] Section 3 also provides that a smaller number may adjourn from day to day and may also compel the attendance of members.

shall, before it becomes a Law, be presented to the President of the United States..." The United States Supreme Court, in resolving a challenge to the legality of an act of Congress in *United States v. Ballin,* 144 U.S. 1 (1892), made this comment on the rules established by the House of Representatives:

> The Constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights.

144 U.S. at 5. The Supreme Court then addressed the intrinsic majority rule as follows:

> [T]he general rule of all parliamentary bodies is that, when a quorum is present, the act of a majority of the quorum is the act of the body. This has been the rule for all time, except so far as in any given case the terms of the organic act under which the body is assembled have prescribed specific limitations.

144 U.S. at 6.

The principle that acts of the Legislature are accomplished by majority vote unless the Maine Constitution provides other specific limitations is one of long-standing tradition and application. The precise question raised by Proposed Joint Rule 219 is whether the Legislature can vary that principle absent a constitutional amendment.

B. Requiring Supermajority Vote of the Legislature for Non-Emergency Enactments

1. Supermajority Requirements Imposed by Statute

In an opinion (Op. Me. Att'y Gen. 06-04) we provided last spring concerning *An Act to Create the Taxpayer Bill of Rights* ("TABOR"), Initiated Bill 1, L.D. 2075 (122nd Legis. 2006), we discussed provisions in TABOR that would have required a supermajority of a 2/3 vote in both Houses for any enactment resulting in either an increase in revenue (through taxes or fees) or any expenditure in excess of limits specified in TABOR. We noted that under the Maine Constitution, a 2/3 vote of the Legislature is required only for certain limited actions of a non-emergency nature.[3] These include: overriding a veto (art. IV, pt. 3, § 2); adopting an apportionment plan (art. IV, pt. 3, § 1-A); changing the confirmation process (art. V, pt. 1, § 8); proposing bond issues (art. IX, § 14); imposing an unfunded mandate on municipalities (art. IX, § 21); change of use of state park land (art. IX, § 23); and proposing a constitutional amendment (art. X, § 4).

[3] We focus our discussion here on non-emergency measures because any emergency enactment, *i.e.*, one intended to take effect immediately, requires a 2/3 vote under Article IV, part 3, section 16.

We concluded that, because these TABOR provisions would have imposed a 2/3 vote requirement on non-emergency measures for which such a vote is not required by the Maine Constitution, a Maine court would likely find such a requirement unenforceable.[4] "To be enforceable, a supermajority vote requirement for measures to increase the revenue of the state through taxes or fees would have to be inserted in the [Maine] Constitution." Op. Me. Att'y Gen. 06-04, p. 11.

We continue to hold the opinion that the Legislature cannot impose a supermajority requirement by statute on non-emergency measures for which the Maine Constitution does not already impose one. The question we now turn to is whether an enforceable supermajority requirement can be imposed by legislative rule.

2. Supermajority Requirements in Legislative Rules

The Maine Constitution provides that "[e]ach House may determine the rules of its proceedings." Art. IV, pt. 3, § 4. Under this fundamental precept of government, the bodies of the Legislature establish procedures governing the conduct of their business. Examples of such rules include those governing the introduction of bills; cloture; establishment of committees; the committee process; floor action and debate; responsibilities of the presiding officer and clerk; legislative confirmations; and participation in budget hearings and work sessions. These and numerous other matters concerning the internal workings of the Legislature are within the authority of the bodies to determine. The separate measure requirement of Proposed Joint Rule 219 is similar to these examples.

Legislative rules cannot, however, supersede constitutional requirements. *See Ballin, supra.* The quorum provision in Article IV, part 3, section 3 provides that a majority of the members are sufficient to do business. In the House of Representatives, a majority of the 151 members is 76. By requiring that 2/3 of the elected members of the House, or 101 members, must vote in favor of a particular type of measure for which the Constitution does not already require such a vote, Proposed Joint Rule 219 purports to prohibit the House from doing certain business even when it has a quorum. We believe that a court would find this to be in violation of Article IV, part 3, section 3. The further question posed by your inquiry is whether the proposed rule also conflicts with the majority rule requirement implicit in the presentment clause of Maine's Constitution that provides for bills that have been "passed" by both bodies to go to the Governor for signature or veto.

We have found no case, either in Maine or at the federal level, that specifically decides this question. However, we reviewed several federal circuit court decisions that consider challenges to rules established by Congress. Of these, the case that is closest on

[4] We also pointed out that if enacted into statute, such a requirement would violate the principle that neither acts of the Legislature nor those initiated by the citizens can bind the lawmaking powers of future State Legislatures. This concern would not arise with respect to Proposed Joint Rule 219, which by its terms would expire on December 2, 2008.

its facts to the instant question is *Skaggs v. Carle,* 110 F.3d 831 (D.C. Cir. 1997). There, a challenge was brought to Rule XXI(5)(c), adopted by the U.S. House of Representatives, which read as follows:

> No bill or joint resolution, amendment or conference report carrying a Federal income tax rate increase shall be considered as passed or agreed to unless so determined by a vote of not less than three-fifths of the Members voting.

Id. at 832.

This rule was challenged by 27 Representatives, six of their constituents, and the League of Women Voters. They argued that the three-fifths vote requirement violated the principle of majority rule embodied in the presentment clause of Article I, section 7 of the United States Constitution, quoted *supra* (which, as we have noted, is very similar to Maine's presentment clause in Article IV, part 3, section 2). Plaintiffs argued that by increasing the number of votes needed to pass the specified measures, the rule diluted the vote of each Representative and the citizens he or she represented because an individual vote was no longer one of a total of 218 (a majority of the 435 House members) needed for passage but now one of 261 (two thirds of 435, assuming all members voted).

The majority opinion in *Skaggs* did not reach the merits of these claims. It concluded that the plaintiffs lacked standing because they had shown no actual injury resulting from the rule. Starting from the premise that the appellants' alleged injury depended upon their assertion that a majority could not pass legislation subject to the rule, the court said:

> Both the House Rules and their role in the 104th Congress strongly suggest that Rule XXI(5)(c) does not prevent 218 Members set upon passing an income tax increase from working their legislative will. First, the House Rules allow any Member to introduce a resolution to amend or to repeal Rule XXI(5)(c), and any such resolution could be adopted by the vote of a simple majority...Although the Rules Committee would have jurisdiction over such a resolution and might slow or block its consideration, 218 Members of the House could by petition cause a resolution to be discharged from that Committee and put to a vote on the floor of the House...For that matter, a simple majority may suspend Rule XXI(5)(c) in order to allow a bill carrying a tax increase to pass by a simple majority vote; although suspending a rule ordinarily requires the support of two-thirds of those voting, *see* House Rule XXVII, a simple majority has in the past resolved to suspend this two-thirds requirement.

110 F.3d at 835.

In sum, the court found that the legislative supermajority rule challenged in *Skaggs* could not be shown to have precluded the majority from passing anything because

a majority was sufficient to amend, repeal or suspend the rule. As a result, the court concluded that any injury asserted by the plaintiffs was hypothetical, and thus insufficient to support their standing to challenge the rule on its merits. We note that Proposed Joint Rule 219 differs materially from the rule reviewed by the court in *Skaggs* because it would be subject to amendment or repeal after January 19th only by a vote of 2/3 of the members present and voting in both bodies under Joint Rule 102.[5] Thus even if a Maine court were to employ the *Skaggs* standing analysis, it might well conclude that the inability of a majority to suspend or repeal the rule demonstrated injury sufficient to support standing.[6]

The *Skaggs* dissent, having concluded that standing did exist, reviewed the merits of the challenge to House Rule XXI(5)(c) and concluded that it was unconstitutional because it conflicted with the presentment clause of the United States Constitution and diluted the votes of both the Members of the House and the citizens they represented.[7] This lengthy dissent, while not a direct precedent binding on Maine's Law Court, is useful because of the detailed history it provides of the role of majority rule in the development of the United States Constitution. The Constitutional Convention was mindful of the various failures of the Articles of Confederation, one of which was the difficulty in mustering a 2/3 vote where required, which prompted considerable discussion of the relative merits of majority and supermajority voting requirements.

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[5] We have not been asked and offer no opinion as to whether other supermajority requirements in the legislative rules conflict with the quorum or presentment clauses of the Maine Constitution.

[6] The standing issue is one that deserves more careful consideration than we have time to give it here, because standing is a prerequisite to judicial review. The determination of standing is very fact specific, and depends not only on the circumstances in which the issue arises but also who brings the case. The dissent in *Skaggs* points out that the D.C. Circuit's decision on standing in *Skaggs* is inconsistent with its decision in *Michel v. Anderson*, 14 F. 3d 325 (D.C. Cir. 1994), where the court found standing on the part of voters sufficient to challenge a House rule giving each territorial delegate a vote in the Committee of the Whole because the rule increased the total possible number of votes from 435 to 440. The *Michel* court reached this result despite the fact that the rule in question required that whenever the votes of the territorial delegates were dispositive, a new vote would have to be taken in which the territorial delegates did not vote. In addition to examining whether the person bringing a challenge to Proposed Joint Rule 219 had standing, a court would likely consider whether it should refrain from reaching the merits under the political question doctrine. Derived from the principle of separation of powers, this doctrine seeks to "restrain courts from inappropriate interference in the business of other branches of government." *Nixon v. United States*, 506 U.S. 224, 252-53 (1993). Based on our review of relevant case law in the limited time available, we do not believe that this doctrine would preclude all possible challenges to the proposed joint rule. Courts typically decline to consider disputes involving the internal operations of a legislature, but they will intervene if the issue concerns an alleged violation of the constitution. *See, e.g., Baines v. New Hampshire Senate President*, 876 A.2d 768 (N.H. 2005) and cases cited therein.

[7] For a Maine case discussing vote dilution in the context of a statute establishing the relative representation of two towns on the board of a school administrative district, *see Cohen v. Hoye*, 280 A.2d 778 (Me. 1971). While not controlling here, we mention this case because it stands for the principle that the constitutional analysis outlined in this opinion concerning votes taken by the Legislature does not prohibit the Legislature from enacting statutes that limit the ability of local government to undertake certain actions unless a supermajority approves.

Having discussed comments made on majority rule by several participants in the Constitutional Convention, the *Skaggs* dissent quotes James Madison in *The Federalist*:

> In explaining why supermajority votes were inappropriate for the passage of legislation, Madison said: 'In all cases where justice or the general good might require new laws to be passed, or active measures to be pursued, the fundamental principle of free government would be reversed. It would be no longer the majority that would rule; the power would be transferred to the minority. Were the defensive privilege limited to particular cases, an interested minority might take advantage of it to screen themselves from equitable sacrifices to the general weal, or in particular emergencies to extort unreasonable indulgences.'

110 F. 3d at 843, citing James Madison, *The Federalist No. 58* at 396 (Jacob E. Cook ed., 1961).

This quote from Alexander Hamilton follows:

> The public business must in some way or other go forward. If a pertinacious minority can controul the opinion of a majority respecting the best mode of conducting it; the majority in order that something may be done, must conform to the views of the minority; and thus the sense of the smaller number will over-rule that of the greater, and give a tone to the national proceedings...For upon some occasions, things will not admit of accommodation; and then the measures of government must be injuriously suspended or fatally defeated. It is often, by the impracticability of obtaining the concurrence of the necessary number of votes, kept in a state of inaction. Its situation must always savour of weakness—sometimes border on anarchy.

Id. at 843, citing Alexander Hamilton, *The Federalist No. 22* at 141.

The history of the development of the United States Constitution is the background against which the framers of Maine's Constitution, adopted in 1820, conducted their deliberations. The pervasive understanding that parliamentary procedure and the conduct of governing bodies are subject to an overarching rule of majority vote is further supported by *Mason's Manual of Legislative Procedure*, National Conference of State Legislatures (2000). The rules of parliamentary practice contained in *Mason's Manual* are incorporated in the Rules of the House "in all cases in which they are applicable and in which they are not inconsistent with the standing rules and orders of the House and the joint rules of the Senate and House of Representatives." Maine House Rule 522. A similar rule is in place in the Senate; *see* Maine Senate Rule 520.

Mason's contains several provisions that address the instant issue. Section 51(6) provides:

> The duties and responsibilities vested in a group are of necessity to be exercised by the majority unless granted subject to other conditions. Such a body cannot delegate its essential powers to a minority even of its own members. A provision in the rules—for example, that a two-thirds vote is necessary to take a particular action—would delegate to a minority of more than one-third of the members the power to prevent the action being taken and grant to that minority the power to control the determinations of the body. The powers of the body to that extent would be delegated to a minority.

Mason's Section 51(6). Section 285(1) further provides that a legislative body "cannot, for example, require a two-thirds vote to pass legislation that the constitution permits it to pass by a majority vote."

This is not to suggest that provisions of *Mason's* would control over legislative rules that are inconsistent. Rather, we cite these provisions because they represent an authoritative statement of law that is relied on by legislative bodies across the country and that has been relied upon by Maine's Legislature in numerous instances.[8]

As we noted at the outset of this discussion, Maine's Constitution grants to the Legislature the power to establish rules governing its proceedings in Article IV, part 3, section 4. The argument in support of the constitutionality of Proposed Joint Rule 219 is that the authority to impose supermajority requirements is part of the ability of the bodies to set rules for the conduct of their own proceedings.[9] We do not find this argument persuasive for several reasons.

First, the language of the presentment clause itself protects the ability of the Legislature to take actions to control its proceedings, but only where those actions are not, in the words of Article IV, part 3, section 2, ones "having the force of law." Similarly, "such orders or resolutions as pertain solely to facilitating the performance of the business of the Legislature, of either branch, or of any committee or officer thereof" are also excepted from the requirement in Article IV, part 3, section 16 that acts of the Legislature cannot take effect until ninety days after the recess of the session in which they were enacted, absent an emergency. These provisions make a distinction between actions taken during the internal proceedings of the Legislature and the action required to enact or pass measures out of the legislative bodies to the Governor's desk.

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[8] Other portions of *Mason's* confirm that majority rule is the presumed basis of legislative action. *See, e.g.,* Sections 4(5), 285, and 513.

[9] Although there is no legal precedent that decides this issue on its merits, academics have engaged in a lengthy debate of the question since Congress adopted the supermajority rule challenged in *Skaggs*. Some of the law review articles on the issue include: King, "Deconstructing Gordon and Contingent Legislative Authority: The Constitutionality of Supermajority Rules," 6 U. Chi. L. Sch. Roundtable 133 (1999); and McGinnis and Rappaport, "The Constitutionality of Legislative Supermajority Requirements: A Defense," 105 Yale L. J. 483 (1995).

Perhaps most importantly, if the Legislature has the authority to alter the majority rule requirement on the theory that it can define by rule what vote constitutes "passage" of specific legislative matters, there is no standard provided for the exercise of that power. If a supermajority is permissible, perhaps a ninety or one hundred percent vote can be required. The framers of the federal constitution made deliberate decisions to move away from supermajority voting requirements as a result of the legislative logjams they experienced under the Articles of Confederation; it is not difficult to imagine circumstances in which a supermajority requirement might make legislation on certain topics difficult, if not impossible, to enact. A two-thirds requirement would also transform the legislative process from a two-tiered one, in which the Legislature enacts and the Governor may veto legislation, to one where the Governor's veto power is a mere formality.[10]

CONCLUSION

As we have stated, the issues presented by your question are complex as well as important. In the short time allowed to our office by the exigencies of the Legislature's business, we have focused on those issues that appear to be most significant in the absence of an opportunity to undertake a more comprehensive review.

We can find no direct legal precedent concerning the constitutionality of the supermajority voting requirement in Proposed Joint Rule 219. Moreover, if the proposed rule is adopted by the Maine House and Senate, and a legal challenge were to be brought, a court's initial focus would be on threshold matters such as whether, under the circumstances of the particular case, the party bringing it has standing to pursue the substantive issues.

However, we believe that if a court were to address the constitutionality of Proposed Joint Rule 219, it would likely conclude that the proposed rule's supermajority requirement conflicts with both the quorum provision in Article IV, part 3, section 3 and the presentment clause in Article IV, part 3, section 2 of the Maine Constitution. For such a supermajority requirement to be effective, we believe that it must be made part of the Maine Constitution.

I hope the information in this letter is helpful to you. Please feel free to contact me if you have questions.

Sincerely,

G. STEVEN ROWE
Attorney General

[10] This is another issue that would benefit from more consideration if time permitted, particularly because the Governor is perhaps the person with the clearest standing to challenge a supermajority requirement under the right circumstances.