

STATE OF MAINE

BEFORE THE JUSTICES OF THE
SUPREME JUDICIAL COURT

DOCKET NO. 0J-26-1

IN THE MATTER OF
REQUEST FOR OPINION OF THE JUSTICES

BRIEF OF CABANNE HOWARD, ESQ.

Cabanne Howard
Bar No. 001390
choward@maine.edu
16 Wabon Street
Augusta, ME 04330
(207) 622-9562

TABLE OF CONTENTS

STATEMENT OF INTEREST.....3
ARGUMENT.....4

TABLE OF AUTHORITIES

Answer of the Justices, 2017 ME 100.....3,4
Laws of Maine of 1847, Resolves, ch. 45.....4
Laws of Maine of 1875, Resolves, ch. 98.....4
Laws of Maine of 1880, Resolves, ch. 159.....4

STATEMENT OF INTEREST

I am a former Assistant and Deputy Maine Attorney General and a former Adjunct and Assistant Professor of Law at the University of Maine School of Law, in which capacity I taught courses on the constitutions of the United States, Canada, France and Germany. I have long been concerned about the manner in which public officials in the United States are elected, in which, when there are multiple candidates, a person can be elected with well less than a majority of the vote. In contrast, for example, in France, which, like the United States, elects its President and the members of its legislature directly, if no candidate receives a majority of the vote on election day, a runoff election between the two top vote getters is held two weeks later, thus guaranteeing that the winning candidate is supported by a majority of the votes.

As a result of this concern, I became involved in the Ranked Choice Voting (RCV) movement, in which states and municipalities are encouraged to adopt a system of voting that ensures that the winning candidate obtains a majority of the votes. Consequently, I was disappointed when the Justices of the Supreme Judicial Court rendered an advisory opinion on an RCV statute that had been passed by the voters of the state in a referendum that, as applied to the general elections for Governor, State Senator and State Representative, the statute was unconstitutional. Answer of the Justices, 2017 ME 100.

As the Justices are aware, a similar statute is now pending before the Legislature, and the Legislature has again inquired whether the current Justices adhere to the opinion of their predecessors that the statute, if enacted, would be unconstitutional. For the following reason, I urge the Justices to find to the contrary.

ARGUMENT

THE PROPOSED RANK CHOICE VOTING STATUTE IS CONSTITUTIONAL BECAUSE IT IS NOT INCONSISTENT WITH THE PURPOSES OF THE NINETEENTH CENTURY AMENDMENTS TO THE MAINE CONSTITUTION CONCERNING THE GENERAL ELECTIONS FOR GOVERNOR, STATE SENATOR AND STATE REPRESENTATIVE

In their 2017 Answer, the Justices set forth the manner in which Maine's original 1820 Constitution provided that state officials were to be elected. The Constitution first provided that the Governor, State Senators, and State Representatives must be elected by a majority vote. Answer of the Justices, 2017 ME 100 at paragraph 61. If no candidate received a majority, the Constitution provided (1) in the case of the House of Representatives, further elections must be held until someone receives a majority of the vote; (2) in the case of the Senate, the vacancy would be filled by a joint ballot of the Senate and the House of Representatives; and (3) in the case of the Governor, the House would select two of the candidates from those four who received the most votes, and the Senate would elect the winner from those two. Answer of the Justices, 2017 ME 100 at paragraph 62.

All of these provisions were subsequently amended. In 1847, the provision concerning the House of Representatives was amended to provide that a plurality of the vote would suffice in the first election, thus eliminating the need for more elections. Laws of Maine of 1847, Resolves, ch. 45. In 1875, the provision concerning the Senate was similarly amended, thus taking the Legislature out of the process. Laws of Maine of 1875, Resolves, ch. 98. And in 1880, after an election in 1878 in which, using the original procedure, a candidate who finished third in the general election was elected Governor by the Legislature, the provision concerning the Governor was similarly amended, again taking the Legislature out of the process. Laws of Maine of 1880, Resolves, Ch. 159.

There is no suggestion in the virtually nonexistent legislative history of these amendments as to the Legislature's intention in enacting them, but those intentions are clear. In the case of the House of Representatives, the intention was to end the practice of holding multiple elections until someone obtained a majority. In the case of the Senate and the Governor, the intention was to take the Legislature out of the process.

Ranked Choice Voting is clearly consistent with the amendment concerning the House of Representatives, since it essentially provides for an instant runoff, rather than holding further elections, which is what the 1847 amendment was trying to accomplish. As to the amendments concerning the Senate and the Governor, RCV is not inconsistent with the purposes of the 1875 and 1880 amendments, since it does not reintroduce the Legislature into the process. Thus, RCV should not be found to be unconstitutional.

In their 2017 Answer, the Justices did not consider this explanation as to why Ranked Choice Voting is not inconsistent with the nineteenth century amendments to the Maine Constitution. The current Justices are thus free to reach the conclusion recommended by this brief without contradicting the views of their predecessors.

Respectfully submitted,

/s/
Cabanne Howard, Esq.
Bar No. 001390
choward@maine.edu
16 Wabon Street
Augusta, Maine 04330
(207) 622-9562

