

STATE OF MAINE
SUPREME JUDICIAL COURT
DOCKET NO. OJ-12-2

IN THE MATTER OF REQUEST FOR OPINION OF THE JUSTICES

Brief of Amicus Curiae The Maine Heritage Policy Center
In Response to the Court's Procedural Order Dated March 5, 2012

David P. Crocker, Esq.
Attorney for Amicus Curiae
The Maine Heritage Policy Center
4 Milk Street
P.O. Box 7829
Portland, ME 04112
(207) 879-0708
dcrocker@mainepolicy.org

TABLE OF CONTENTS

Table of Cases, Statutes and Other Authorities Cited.....	a-b
Statement of Amicus Curiae.	1
Statement of the Facts of the Case and Procedural History.....	2
Statement of Issues Presented for Review.....	3
Summary of Argument.	3
Argument.....	5

Table of Cases, Statutes and Other Authorities Cited

Constitutions

Maine Constitution

Art. III, §§ 1, 2

Art. IV, Part First, § 8

Art. V, Part Third, §§ 1, 3

Art. VI, § 3

Art. IX, § 5

Massachusetts Constitution of 1780

Chapter III, Art. 2

Cases

Opinion of the Justices, 69 Me. 596 (1879)

Opinion of the Justices, 70 Me. 608 (1880)

In re Removal and Appointment of County Attorneys, 27 A. 454 (Me. 1891)

Opinions of the Justices, 51 A. 224 (Me. 1901)

Opinion of the Justices, 69 A. 627 (Me. 1908)

Opinion of the Justices, 128 A. 691 (Me. 1925)

Opinion of the Justices, 167 A. 176 (Me. 1933)

Opinion of the Justices, 191 A. 485 (Me. 1936)

Opinion of the Justices, 216 A.2d 656 (Me. 1966)

Opinion of the Justices, 260 A.2d 142 (Me. 1969)

Opinion of the Justices, 281 A.2d 321 (Me. 1971)

Opinion of the Justices, 339 A.2d 483 (Me. 1975)

Opinion of the Justices, 340 A.2d 25 (Me. 1975)

Opinion of the Justices, 355 A.2d 341 (Me. 1976)

Opinion of the Justices, 371 A.2d 616 (Me. 1977)

Opinion of the Justices, 396 A.2d 219 (Me. 1979)

Opinion of the Justices, 437 A.2d 597 (Me. 1981)

Opinion of the Justices, 460 A.2d 1341 (Me. 1982)

Opinion of the Justices, 623 A.2d 1258 (Me. 1993)

Opinion of the Justices, 673 A.2d 1291 (Me. 1996)

Opinion of the Justices, 682 A.2d 661 (Me. 1996)

Opinion of the Justices, 709 A.2d 1183 (Me. 1997)

Opinion of the Justices, 815 A.2d 791 (Me. 2002)

Opinion of the Justices, 850 A.2d 1145 (Me. 2004)

Maine Attorney General Opinions

Opinion of the Maine Attorney General (February 10, 2012)

U.S. Attorney General Opinions

36 Opinion of the Attorney General 12 (March 4, 1929)

Legislative Materials

Maine House of Representatives Order HO-0041 (February 29, 2012)

J. Perl, *Debates and Journal of the Constitutional Convention of the State of Maine* 236 (1894)

Law Review Articles

Topf, *State Supreme Court Advisory Opinions as Illegitimate Judicial Review*, 2001 L. Rev. M.S.U.-D.C.L. 101 (2001)

Comment, *The Validity of the Restrictions on the Modern Advisory Opinion*, 29 Me.L.Rev. 305 (1978)

Felix Frankfurter, *A Note on Advisory Opinions*, 37 Harv. L. Rev. 1002 (1924)

Statement of Amicus Curiae

The Maine Heritage Policy Center is a research and educational organization whose mission is to formulate and promote conservative public policies based on the principles of free enterprise, limited and constitutional government, individual freedom, and traditional American values all for the purpose of providing public policy solutions that benefit the people of Maine.

MHPC's staff pursues this mission by undertaking accurate and timely research and marketing these findings to its primary audience: the Maine Legislature, nonpartisan Legislative staff, the executive branch, the state's media, and the broad policy community. Governed by an independent Board of Directors, The Maine Heritage Policy Center is a nonprofit, nonpartisan, tax-exempt organization.

MHPC is filing an Amicus Curiae brief in this matter because it believes that the issues in the current request to the justices are important to orderly and constitutional government and are of great interest to the people of Maine. While Maine Constitution Article VI, § 3 provides a narrow exception to the doctrine of separation of powers, it is MHPC's position that any such exception to the basic structure of our constitutional life must be limited by judicial prudence and discretion. For the justices to answer the questions proposed would erode that structure and compromise the judicial power as a separate and coordinate branch of Maine's government.

Statement of the Facts

On February 29, 2012, the Maine House of Representatives approved HO-0041, which referred three questions of law to the justices of the Supreme Judicial Court pursuant to the Maine Constitution, Article VI, § 3, which provides that the Justices “shall be obliged to give their opinion upon important questions of law, and upon solemn occasions, when required by the Governor, Senate or House of Representatives.” The three questions are:

Question 1. Does mere ownership of business interests or stock by the Treasurer of State constitute engaging in any business of trade or commerce, or as a broker, or as an agent or factor for any merchant or trader as such terms are used in the Constitution of Maine, Article V, Part Third, Section 3?

Question 2. If the answer to Question 1 is in the affirmative, would the Treasurer of State be engaged in any business of trade or commerce, or as a broker, or as an agent or factor for any merchant or trader if the Treasurer of State did not manage or involve himself in the day-to-day activities of such business interests or stock?

Question 3. If it is determined that the Treasurer of State has engaged in any business of trade or commerce, or as a broker, or as an agent or factor for any merchant or trader, does that finding affect or have an impact on the validity of the actions taken by the Treasurer of State in the performance of his official duties as used in the Constitution of Maine, Article V, Part Third, Section 3?

Although the Preface to HO-0041 pronounced the questions of law important and the occasion solemn, the order itself did not provide any factual background or describe any pending action, only that “there is a question within the House of Representatives as to what activities constitute the engaging in trade or commerce

within the meaning of the Constitution of Maine, Article V, Part Third, Section 3.” The section of the Maine Constitution referenced by HO-0041 involves certain restrictions on private business activities imposed upon the Treasurer of the State, a member of the Executive Branch. There is no indication whether the questions involve a particular Treasurer, past or present, nor do the questions relate to pending legislation, the powers and duties of the House of Representatives or any action pending in the House of Representatives.

Statement of the Issues

1. Whether HO-0041 presents a “solemn occasion” pursuant to the Maine Constitution, Article VI, § 3, requiring the justices’ answer to the questions propounded by the Maine House of Representatives.

2. Whether the questions of law referred to the justices of the Supreme Judicial Court by the Maine House of Representatives are sufficiently clear and grounded in specific facts even to permit an answer.

Summary of Argument

HO-0041 does not present a “solemn occasion” on an “important question of law” pursuant to the Maine Constitution, Article VI, § 3. The matter presented to the justices of the Supreme Judicial Court must be of “live gravity”. As used historically by the justices, this phrase implies some “unusual exigency” that exists because the House

of Representatives has “some action in view” and has “serious doubts as to its power and authority to take such action under the Constitution or under existing statutes”. The questions referred to the Justices in HO-0041 do not refer to any contemplated action to be taken by the House of Representatives nor do they involve the House of Representatives’ powers or prerogatives under the Maine Constitution or statute. In addition, the questions are not based on any stated facts and therefore the questions, while interesting, are “tentative, hypothetical and abstract” and therefore not answerable by the Justices. Further, the questions involve an inquiry by one part of the Legislative branch into the powers, qualifications or duties of a member of Executive branch. The justices have repeatedly refused such inquiries on separation of powers grounds. Finally, even if the justices were to attempt to answer the questions referred, the legal issues involved are contingent on specific facts not provided by HO-0041. It simply would not be possible for the justices to provide legal answers to such fact-specific questions without a statement of fact or record.

Argument

I. HO-0041 Does Not Present a “Solemn Occasion” on an “Important Question of Law” Pursuant to the Maine Constitution, Article VI, Section 3.

A. Introduction and Background.

By now, it is axiomatic that advisory opinions rendered pursuant to Article V, § 3 are narrowly-defined departures from the separation of powers both inherent in the Maine Constitution and explicitly stated by it. *See* Me.Const. Art. III, §§ 1, 2; *Opinion of the Justices*, 815 A.2d 791, 794 (Me. 2002); *Opinion of the Justices*, 396 A.2d 219, 223 (Me. 1979). The provision of Maine’s Constitution permitting advisory opinions comes directly from that of Massachusetts, *see* Mass.Const. of 1780, Chapter III, Art. 2, and was adopted without debate at Maine’s constitutional convention. *See* J. Perl, *Debates and Journal of the Constitutional Convention of the State of Maine* 236 (1894). In Maine as in Massachusetts, the justices of the Supreme Judicial Court initially felt obliged to answer all questions placed before them and accepted the notion that it was the requesting body that defined the “solemn occasion” with the respective constitutional language being mandatory in nature. *See* *Opinion of the Justices*, 70 Me. 608 (1880); *Opinion of the Justices*, 69 Me. 596, 596-97 (1879); Topf, *State Supreme Court Advisory Opinions as Illegitimate Judicial Review*, 2001 L. Rev. M.S.U-D.C.L. 101, 116-17 (2001); Comment, *The Validity of the Restrictions on the Modern Advisory Opinion*, 29 Me.L.Rev. 305, 313 (1978).

In 1891, however, the Maine justices reversed position, asserting that it was their prerogative in the first instance to determine whether the particular occasion was “solemn” within the meaning of the Maine Constitution. *See* *In re Removal and*

Appointment of County Attorneys, 27 A. 454 (Me. 1891). While there was some discussion about the doctrine over the next twenty years, Maine’s justices have followed this principle ever since.¹ The rationale is that advisory opinions breach normal separation of powers and unavoidably implicate and involve the judicial power as a coordinate branch of government. Justices must therefore determine the scope of their own constitutional powers and duty when receiving requests from the other branches. *Opinion of the Justices*, 815 A.2d at 794; *Opinion of the Justices*, 682 A.2d 661, 663 (Me. 1996). Over the past century, the justices have distilled this general limitation into specific criteria applicable to HO-0041.

B. The Questions Referred to the Justices Involve No Matter of “Live Gravity”

The first guideline used is whether the particular question is one of “live gravity”, referring to the immediacy of the actions that the requesting body must take in response to the guidance they receive from the justices. *Opinion of the Justices*, 815 A.2d at 794; *Opinion of the Justices*, 709 A.2d 1183, 1186 (Me. 1997). As the justices in

¹Chief Justice Lucilius Emery was the doctrine’s principal commentator during the early 20th century and provided memorable quotes on both sides of the issue. While he was a signatory to the justices’ 1891 Opinion, he vociferously defended the earlier practice in *Opinions of the Justices*, 51 A. 224, 227-34 (Me. 1901) and just as vociferously defended the right of the justices, “each for himself”, to determine what was a solemn occasion in *Opinion of the Justices*, 69 A. 627, 630 (1908). While he always expressed his distaste for Article VI, § 3, see Emery, *Advisory Opinions from Justices*, 2 Me. L. Rev. 1 (1908), in 1917, he appeared to revert to a position closer to 19th century practices. See Emery, *Advisory Opinions of the Justices No. II*, 11 Maine L. Rev. 15, 16 (1917). In 2004, four justices, citing Emery’s before-mentioned articles as their sole authority, appeared to revert to the early 19th century practice of permitting the requesting body to define what is a “solemn occasion”. See *Opinions of the Justices*, 850 A.2d 1145, 1148 (2004). This seems strange in light of Emery’s hot and cold approach to the justices’ prerogative to determine the initial question and difficult to reconcile with the long-held proposition that the opinion of a particular justice is simply the opinion of that particular justice. *Opinion of the Justices*, 281 A.2d 321, 322 (Me. 1971).

1901 observed, a solemn occasion refers to an “unusual exigency, such an exigency as exists when the body making the inquiry, having some action in view, has serious doubts as to its power and authority to take such action under the Constitution or under existing statutes”. *Opinion of the Justices*, 51 A. 224, 225 (Me. 1901). This principle has been applied numerous times. See *Opinion of the Justices*, 69 A. 627, 631 (Me. 1908) (Legislature unable to act prior to adjournment); *Opinion of the Justices*, 167 A. 176, 179 (Me. 1933) (requesting body must have authority to act on the opinion); *Opinion of the Justices*, 339 A.2d 483, 488 (Me. 1975) (opinion must involve some contemplated action and not merely the interpretation of an existing statute). As late as 2002, the justices opined that a solemn occasion would not exist except “in those circumstances when the facts in support of the alleged solemn occasion are clear and compelling.” *Opinion of the Justices*, 815 A.2d at 795.

In the present case, HO-0041 recites no contemplated action awaiting the justices’ guidance nor any pending legislation or other disposition within the power of the House of Representatives and, indeed, no facts or other present situation requiring the justices’ opinion. See *Opinion of the Justices*, 623 A.2d 1258, 1261 (Me. 1993) (matters to which the justices may answer must be those of “instant, not past or future concern”); See also *Opinion of the Justices*, 355 A.2d 341, 389 (Me. 1976); *Opinion of the Justices*, 260 A.2d 142, 146 (1969).

The preface to HO-0041 does state that “there is a question within the House of Representatives as to what activities constitute the engaging in trade or commerce within the meaning of the Constitution of Maine, Article V, Part Third, Section 3.” As

stated, however, the questions appear to be of academic interest and unrelated to any contemplated action. HO-0041 is therefore “tentative, hypothetical and abstract” and perforce involves no solemn occasion. *Opinion of the Justices*, 815 A.2d at 795; *Opinion of the Justices*, 437 A.2d 597, 611 (Me. 1981); *Opinion of the Justices*, 371 A.2d 616, 620 (Me. 1977).

C. The House of Representatives is Inquiring After the Duties and Limitations of the Treasurer of State, a Member of the Executive Branch

Second, the justices on several occasions have refused to opine when the request involves an inquiry by one branch into the powers and duties of another branch. See *Opinion of the Justices*, 460 A.2d 1341, 1349 (Me. 1982) (Governor inquires into the duties of the Legislature); *Opinion of the Justices*, 167 A. 176, 179 (Me. 1933) (Senate inquires into the Governor’s duties).

Here, the House of Representatives is inquiring into the constitutional limitations placed upon the Treasurer of State, a member of the Executive branch. Me.Const. Art. V, Part Third. Although the Treasurer of State is elected by the entire Legislature, sitting in convention, see Me.Const. Art. V, Part Third, § 1, apart from impeachment, see Art. IV, Part First, § 8, or address, see Art. IX, § 8, or general oversight, the House of Representatives has no constitutional power thereafter over the Treasurer of State. HO-0041 alleges no misconduct, no specific inquiry into the activities of the sitting Treasurer of State and, indeed, no specific duty to be undertaken by the House of Representatives. The inquiry into the constitutional powers, duties and limitations on the Treasurer of

State is therefore academic and unreachable by the justices under Art. VI, § 3.²

D. The Questions Presented Lack Sufficient Clarity to Permit the Justices to Determine the Exact Nature of the Inquiry

On several occasions, the justices have stated that they can only answer questions that are precise enough for them to determine the nature of the inquiry. See *Opinion of the Justices*, 460 A.2d at 1346; *Opinion of the Justices*, 216 A.2d 656, 661 (Me. 1966). The questions presented by the House of Representatives are imprecise and dependent on specific facts not provided.

Question 1 asks whether “mere ownership” of “business interests” or “stock” by the Treasurer of State violates Article V. Part Third, § 3. The answer to the legal question is dependent on highly specific facts. What is a “business interest” and the nature of entity involved? Is it a proprietorship, partnership, limited liability company or corporation? If the latter two, do the articles of organization or incorporation provide for member or shareholder management? If the members and shareholders do manage the enterprise, have the members or shareholders delegated their authority to one or more managers? The answer to Question 1 requires both further legal clarification and unknown facts.³

²As the justices observed in 1936, the proper means at that time of addressing the questions at issue would be through the application of a writ of *quo warranto* by which the Attorney General could judicially test the powers and conduct of a sitting state official. As the justices noted, “[i]n such a proceeding, both the state and the officer could be represented and heard, and a final judgment could be rendered.” *Opinion of the Justices*, 191 A. 485, 487 (Me. 1936). Although the *quo warranto* writ was abolished by a 2000 rule change, see M.R.Civ.P 81(c), presumably the same result could be accomplished under Rule 80B.

³As an aside, it should be noted that the U.S. Attorney General attempted to answer a similar question in 1929. See 36 Opinion of the Attorney General 12 (March 4, 1929).

Question 2 involves the further matter of day-to-day management. We are not told the extent of the divestiture of control and delegation nor whether the Treasurer of State retains any authority to overrule decisions made by the manager of the undefined enterprise. Management and trust arrangements can be complex and are usually specific, if not *sui generis*. The justices are given no facts as to the exact arrangement.

Question 3 asks whether the Treasurer of State's official acts would be invalidated should the justices determine that he had engaged in a trade or business in violation of Art. V, Part Third, § 3. It is not clear whether the question refers to past acts or present acts. If retrospective, the justices are not informed as to the nature of the trade or business or whether the trade or business intersected any of his official acts. If Question 3 refers to present activity and the Treasurer of State's continuing fitness to serve, HO-0041 is silent as to contemplated action in response to an opinion and still involves an inquiry into the duties of another branch of government. It is not clear on the face of the question whether the trade or business assumed in Question 3 even relates to the inquiry in Question 1. It is wholly vague and "in the air".

As a general matter, when a requesting body refers questions to the justices, it provides a statement of facts or includes sufficient specifics to enable the justices to render an opinion. In *Opinion of the Justices*, 340 A.2d 25, 28 (Me. 1975), the justices refused to answer Gov. Longley's questions without specific facts and here, as in 1975, there are no facts at all to permit the justices to opine on questions that are inherently complex.⁴ As Justice Felix Frankfurter observed, advisory opinions without facts are

⁴Even if the House of Representatives had provided more facts, it is unlikely that a more specific request could succeed. For the request to achieve the requisite specificity, it would

“bound to result in sterile conclusions unrelated to actualities.” Felix Frankfurter, A Note on Advisory Opinions, 37 Harv. L. Rev. 1002, 1003 (1924).

Conclusion

That a solemn occasion does not exist seems abundantly clear. There is no live gravity, the questions are abstract and hypothetical and indicate no present action by the House of Representatives requiring the justices’ opinion. The questions involve an academic inquiry by the House of Representatives into the activities of an Executive branch official with specific facts utterly lacking. To pronounce HO-0041 a “solemn occasion” would call into question the justices’ habits over a century of shared constitutional labor. For all the good and sufficient reasons cited herein, the justices should find that there is no solemn occasion pursuant to Me.Const. Article VI, § 3.

DATED: March 15, 2012.



David P. Crocker
Attorney for Amicus Curiae
The Maine Heritage Policy Center
4 Milk Street, P.O. Box 7829
Portland, ME 04112
(207) 879-0708
dcrocker@mainepolicy.org

involve focusing on the activities of the actual serving Treasurer of State. This might run afoul of the justices’ further prohibition on opining on the rights of a particular person. See Opinion of the Justices, 191 A. 485, 487 (1936); Opinion of the Justices, 128 A. 691, 691-92 (1925). It should also be noted that the Maine Attorney General has offered his opinion on similar facts with highly generalized results. Me.Atty.Gen.Op (February 10, 2012).