STATE OF MAINE

SUPREME JUDICIAL COURT
DOCKET NO. OJ-15-2

In the Matter of
Request for Opinion of the Justices

REPLY BRIEF OF GOVERNOR PAUL R. LEPAGE

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I. A narrow focus on the word "prevent" misapprehends the nature of the questions at issue.

The Governor's questions regarding his veto powers touch upon fundamental issues related to the nature of our system of government. Veto authority is an often cited part of our Constitution's system of "checks and balances." The veto is a vivid instance of two branches of government at a point of conflict. As such, it is vital that the boundaries of this power be policed in order to prevent overreach by either branch of government. The formalistic approach to the questions at hand by several of the interested parties does not account for the interests at stake.

In their brief, the Senate President and Speaker of the House go to great lengths to demonstrate that the Governor was not "prevented" from returning vetoes by including e-mails and text messages showing staff were available to accept vetoes. This, however, is a too simplistic gloss on the term "prevented."

The Governor is not arguing that he was physically prevented from delivering the messages. Rather, "prevented" in this situation is a term of art that reflects the interests at stake. At this point of conflict between the Legislative and Executive Branches, it is vital that one branch, here the Legislature, not use its powers, including the power of adjournment, to frustrate the Governor's constitutionally granted veto authority. In this context, "prevented" is used more expansively to mean that the Legislature, through its adjournment, prevents the Governor from effectively

exercising his veto authority.

This interest and this boundary were exactly what the Supreme Court was policing in *The Pocket Veto Case*, 279 U.S. 655 (1929) and *Wright v. U.S.*, 302 U.S. 583 (1938). In those instances, the Chief Executive enjoyed the right to return vetoes to chambers convened and ready to transact business. The Supreme Court was guarding the interests at play when this constitutional authority is being exercised. Fundamentally, the veto is a political decision and the Chief Executive is given the three-day period in order to assess the political climate before exercising this authority. By adjourning indefinitely and dispersing its members, the Legislature frustrates the effective exercise of the veto because it is impossible to take the political pulse of the Legislature—there is no pulse. The three-day procedure guards against this very scenario by giving the Governor time to assess the political climate rather than blindly submitting vetoes to the Legislature. This is what Attorney General Joseph Brennan recognized when advising Governor James Longley that "[t]his three-day period would allow the Governor time in which to decide whether to exercise his veto power in light of circumstances then existing." Op. Me. Atty. Gen. (May 7, 1976). The formalism invoked in advocating only for *sine die* as a valid trigger and a narrow reading of "prevent" completely misapprehends the interests at stake in this dispute between branches of government.

II. <u>There are at least three forms of adjournment that prevent the Governor from returning bills to their legislative houses of origin.</u>

The Governor's initial brief focused on one form of conditional adjournment that may trigger the three-day procedure for the exercise of his veto power. He did not argue and does not maintain that that conditional adjournment is the only form of adjournment that prevents him from returning the bills. Rather, the Governor's position is that there are at least three forms of adjournment that trigger the three-day veto procedure. These forms are: 1) adjournment *sine die*, 2) statutory adjournment, and 3) an adjournment longer than 10 consecutive days, occurring after the statutory adjournment date, with no date certain for reconvening when the surrounding circumstances suggest a heightened need for protection of the balance between the Legislature's adjournment power and the Executive's veto power.

A. Adjournment *sine die* indisputably ends the legislative session, and, if done before the ten consecutive days the Governor has in which to exercise his veto power and return the bills to their houses of origin, triggers the three-day procedure.

Many of the interested parties contend that adjournment *sine die* would prevent the return of vetoed bills. The Governor agrees. The Governor does not agree that *sine die* is the only form of adjournment that triggers the three-day procedure.

Maine has a long history of recognizing adjournment *sine die* as a form of adjournment that prevents the Governor's return of bills with his objections to their legislative houses of origin. The contention in certain interested party briefs, however, that this history means it is only adjournment *sine die* that can trigger the three-day veto procedure ignores the protective purpose of the three-day procedure. The

Governor does not seek to alter the significance of adjournment *sine die*. Rather, the Governor seeks recognition that the purpose of the three-day procedure is to protect the exercise of his veto power in light of the threat posed by an adjournment under particular circumstances. Because it is not the name but the *effect* of the adjournment that triggers the three-day veto procedure, the Justices should recognize instances of adjournment that can prevent the return of vetoed bills. Besides adjournment *sine die*, there are at least two other forms of adjournment that would allow the Governor additional time to return vetoes. These are discussed in turn.

B. Statutory adjournment prevents the Governor's return of bills with his objections to their legislative houses of origin.

The Maine Constitution specifies that no legislative session can go on indefinitely. In fact, it requires the Legislature to enact statutory limits on the length of the first regular session. ME. CONST. art. IV, pt. 3rd, § 1. The Maine Legislature has done so: "[t]he first regular session of the Legislature shall adjourn no later than the 3rd Wednesday in June." 3 M.R.S. § 2. Contrary to the claims of other interested parties, these provisions are not simply internal procedural rules to be swept aside when they prove inconvenient. It is a constitutionally required law mandating that the first regular session cease on the third Wednesday in June unless the Legislature legally extends it for a maximum of 11 additional legislative days. Unless legally extended, the statutory adjournment is a final adjournment by operation of law.

The only time the Legislature can validly act is when it is duly and legally

convened. When the Legislature is finally adjourned, its authority to act is dissolved until it is duly convened again. *See* Br. Att'y Gen. 12-13. The Constitution goes on to specify the procedures by which the Legislature might convene itself between sessions. ME. CONST. art. IV, pt. 3rd, § 1. There is nothing in either the Constitution or statute that differentiates the effect of a final adjournment by motion from a final adjournment by operation of law. In fact, any construction of the statutory adjournment as less than final would run afoul of the Constitutional requirement that a session end pursuant to a statutory enactment.

The facts giving rise to the Governor's questions include the failure of the Maine Legislature to extend the session while it was legally convened. The first regular session, therefore, ended by operation of law at the adjournment of the June 17 legislative day. Once the session ended, the Legislature lost its authority to act. When it reconvened the next day, it did so without the authority to meet as it did not convene via special session. Thus, its retroactive "ratification" of all acts taken during the session, along with its attempt to extend the session that had already ended, were ineffective.

Despite the Legislature's failure to legally extend the session while it had the authority to do so or to convene itself in a legal fashion the next day, the Governor is not advocating for, nor could the Justices provide in an advisory opinion, a declaration that all legislative acts taken after June 17 were invalid. When he decided to hold the bills, the Governor was not aware of, and did not rely on, the Legislature's

failure to extend the session or reconvene legally. Instead, the Governor reasonably believed other events were sufficient to trigger the three-day procedure. Still, the June 17 inaction is significant because it likely resulted in the bills at issue never having been enacted by the Legislature in the first place, in which case, the Governor could not enforce them. If nothing else, the Legislature's failure to follow the adjournment statute, and the reticence in acknowledging as much, is ironic given its scrutiny of the Governor's return of the vetoes. In law, as in life, what's good for the goose is good for the gander.

C. When an adjournment is longer than ten consecutive days (excluding Sundays), occurs after the statutory adjournment date, and has no date certain for reconvening, the Governor may be prevented from returning bills with his objections to their houses of origin.

As discussed in his initial brief to the Justices, the Governor contends that there are times when particular facts may converge to trigger the 3-day procedure. Three of these facts are likely to be: 1) when the adjournment is longer than ten consecutive days; 2) it occurs after the statutory adjournment date; and 3) there is no date certain for reconvening. These three factors signal an increased risk of greater pressure and less communication between the two branches as they work through the count-down to the end of the session.

The adjournment should be longer than ten consecutive days because with shorter adjournments, the Governor is afforded the full ten days granted him under the Constitution. Likewise, just like in the U.S. Constitution, the Maine Constitution's

use of the word "House" should mean "House in session," and that to be in session, the legislative House must be present with a quorum and ready to conduct legislative business. As long as the adjournment is ten consecutive days or less, the three-day procedure is not needed.

An adjournment that prevents the bills' return is more likely to occur after the statutory adjournment date. Once statutory adjournment has passed (if the Legislature is duly convened), it has a maximum of 11 legislative days in which to conclude its business. To complicate matters, these 11 legislative days are not consecutive calendar days, like those afforded the Governor in which to veto bills. During this race to the end of the session, therefore, the constant negotiation of the legislative process takes on a new intensity, wherein the Legislature's use of its adjournment power is most likely to materially disadvantage the Executive by denying him access to legislators constituted to carry out legislative business. Consequently, the need for the protection of the Constitution's three-day procedure is at its highest.

Thirdly, a longer than ten-day adjournment occurring post-statutory adjournment with no date certain for the Legislature to reconvene creates confusion for both the Executive and the public. The Legislature's adjournment to a definite date—even if that adjournment is longer than ten days—adds certainty and predictability to the Legislature's return; the Executive and the public are clearly informed when it will be reconstituted to carry out business. This kind of certainty simply does not exist when a Legislature adjourns until it calls itself back in.

Finally, while all three of these factors were present in the instant case, the querulous and strained political environment after June 17 even further increased the risk that the adjournment power could infringe on the veto power. Consequently, the need for the protection of the three-day procedure was heightened. When the legislative process is going smoothly and the branches are communicating, it is less likely that issues like the instant ones will arise. It is when democracy is at its messiest that the balance between the adjournment power and the veto power needs the most protection.

III. All three of the Governor's questions constitute a solemn occasion necessary to invoke the Justices' constitutional obligation to provide an advisory opinion.

Certain interested parties argue that Questions 2 and 3 do not constitute a solemn occasion because they "address only the power, duty or authority of the Legislature." *See* Br. of Planned Parenthood, *et al.* 9; Br. of Att'y Gen. 9-10; Br. of Eves, *et al.* 3-4. Such a narrow reading of the questions presented is unwarranted in light of the fact that almost all interested parties concede that the Governor needs to know immediately whether his constitutional duty to faithfully execute the laws has been activated with respect to the 65 bills in question.

Because his constitutional duty is invoked only with respect to validly enacted laws, the answers to Questions 2 and 3 will help him discern the parameters of his own constitutional obligation as it relates to these bills. The Justices must decline requests for advisory opinions "made by one branch of government regarding the

power, duty, or authority of another branch," *Opinion of the Justices*, 709 A.2d 1183, 1186 (Me. 1997), but this is not what the Governor is seeking. Instead, he asks the Justices to review the acts and omissions of the Legislature only as necessary to determine whether the bills are valid law, thereby invoking his responsibility to enforce them. The Justices cannot advise the Governor as to his duty to execute the law without looking at the circumstances around and manner in which the bills were enacted. It would be nonsensical to maintain that the Justices, in analyzing the Governor's constitutional obligation, cannot even examine all the facts that caused questions about the validity of the bills.

Similarly, these interested parties point out that the Legislature, exclusively, decides when it is in session and when and how it adjourns, therefore the Justices should not issue an opinion in answer to Questions 2 and 3. *See* Br. of Planned Parenthood, *et al.* 12; Br. of Att'y Gen. 9-10; Br. of Eves, *et al.* 3-4. They claim that any opinion on whether the Legislature was duly convened is an intrusion into powers allocated exclusively to the Legislature. Again, the Governor must only enforce laws, not bills, and so it is essential to determine if *all the steps* necessary have been taken for these bills to become laws. Moreover, the Governor is not asserting that he, rather than the Legislature, should declare adjournment. To the contrary, it is the Legislature's call to adjourn; it just cannot use its adjournment power to infringe on the Executive's veto power. Further, while in most instances, the internal workings of the Legislature are the sole province of the Legislature, with adjournment, this is not

the case. The Maine Constitution requires an adjournment date that is set in statute and is not merely a rule of the Legislature. Statutes require both legislative and Executive action in order to be adopted. This is a unique situation where the Executive plays a role in establishing legislative procedure and the question of adjournment is not simply left to the Legislature alone.

Although the Governor inquires into action of the Legislature, it is solely to determine what his own course of action must now be. Consequently, a solemn occasion sufficient to invoke the Justices' constitutional obligation to issue an advisory opinion exists with respect to Questions 2 and 3.

CONCLUSION

The circumstances underlying the Governor's request for an opinion of the Justices present a solemn occasion, thereby enabling the justices to provide an advisory opinion. Because the Legislature adjourned in a manner that prevented the return of the Governor's vetoes to the houses of origin, the constitutional three-day procedure was triggered, and the vetoes were properly returned by the Governor on July 16, 2015.

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