#2003-1 Informal Opinion

February 24, 2003

Senator William Doyle, Chair
Senate Government Operations Committee
State House
115 State St.
Montpelier, VT

Re: Instant Run-Off Voting – Constitutional Issues

Dear Senator Doyle:

I am writing to confirm my advice that the Legislature allow the voters to consider any proposal that would establish an instant runoff voting system for statewide offices. Voter approval of a constitutional amendment is legally required before the runoff system can be applied to elections for the offices of governor, lieutenant governor and treasurer. A constitutional amendment is not legally required for the other statewide offices, and the Legislature could change these voting procedures without voter participation. As a practical matter, however, the Legislature may want to await a constitutional change so that a common procedure will apply to all statewide offices.

A constitutional change is legally required for the offices of governor, lieutenant governor and treasurer because the present election procedure for these offices is established by the Constitution. The Constitution provides that these offices must be filled through the one-office, one-name voting procedure that Vermont has used for the past two hundred years. The Constitution also provides that when no candidate wins a majority under this procedure, the General Assembly must fill the office by a joint ballot.

It has been suggested that the instant runoff procedure conforms to these constitutional requirements. I respectfully disagree. The differences between the constitutional and the instant runoff procedures are readily apparent when the language of the Constitution is compared to the language of the instant runoff bill.

For example, the Constitution provides that "[t]he voters … shall … bring in their votes for Governor, with **the name** fairly written…." Vt. Const., ch. II, § 47 (emphasis added). The instant runoff bill provides that "[b]allots … shall allow a voter to **rank candidates** for an office in order of choice…." S. 22, Sec. 3 (adding 17 V.S.A. § 2473a(c)) (emphasis added).

Thus, the Constitution directs voters to select a single candidate or "name" for the office of governor. It neither requires nor authorizes voters to select more than one name. It does not contemplate that voters will list multiple names and rank them in order of choice.

The Constitution goes on to address the prospect that in some instances no candidate will receive "the major part of the vote," and that "there shall be no election." Vt. Const., ch. II, § 47. In that circumstance the Constitution provides "the Senate and House of Representatives shall by a joint ballot, elect to fill the office…one of the three candidates for such office (if there be so many) for whom the greatest number of votes have been returned." *Id.*

The instant runoff bill would establish a different procedure. It provides that in this circumstance the Washington Superior Court "shall appoint an instant runoff count committee." S. 22, Sec. 7 (adding 17 V.S.A. § 2593(b)(2)). This committee would eliminate all candidates "except the two candidates with the greatest number of first choices." *Id.* Then:

> Ballots which rank eliminated candidates and which indicate one of the final candidates as an alternate choice shall be counted as votes for whichever of the final candidates is ranked higher for that office on each ballot. In each round,[1] each ballot is counted as one vote for the highest ranked advancing candidate on that ballot.

Id.

This ranking and counting procedure would depart from the Constitution in two respects. First, it would eliminate the third-place candidate as a matter of course, infringing the constitutional status afforded "the three candidates … for whom the greatest number of votes shall have been returned." (This problem could be resolved by letting all three participate in the runoff count.) Second, it would displace the joint ballot of the Senate and House of Representatives with the process of a court-appointed committee.

[1] It is not clear why there should have to be more than one "round." This phrasing was perhaps borrowed from a proposal that contemplated more than two finalists and multiple rounds of counting.

Arguably, the joint ballot process would still apply in the rare instance of a tie vote. However, the constitutional reference to "three candidates" anticipates plurality votes as well as tie votes. This reference, coupled with the requirement that joint ballots be used "if, at any time" no candidate receives "the major part of the votes", shows an intent that the Legislature should elect the governor when the popular vote results in a plurality or a tie.

This intent was just as apparent prior to the "gender inclusive" constitutional revisions in 1995. The earlier language, dating back to 1836, described the problem as "no election by the freemen" and required joint ballots "to fill the office, not filled by the freemen…." Records of the Council of Censors 763 (Paul S. Gillies & D. Gregory Sanford eds., 1991). Please note that the 1995 revisions did "not alter the sense, meaning or effect of the [revised] sections of the Constitution." Vt. Const., ch. II, § 76.

It has also been suggested that the constitutional requirements imposed by Section 47 have been honored in their breach more than in their observance, and therefore may be disregarded. *See, e.g.,* Final Report of the Vermont Commission to Study Instant Runoff Voting (January 1999). However, I am aware of just two opinions in which the Vermont Supreme Court has considered this Section. There is nothing expressed in either of them that lessens the importance of the constitutional requirements.

The case *Temple v. Mead*, 4 Vt. 535, 539-40 (1832), is cited for the proposition that the courts must give effect to the "spirit" of the Constitution "without regarding too strictly the literal meaning of the terms made use of." This is certainly a fair statement of the law. However, the "literal meaning" argument that the Court rejected in that case was the argument that a printed ballot was not a "written" ballot. As the Court observed, "[t]he definition of the word writing includes printing; it means no more than conveying our ideas to others by letters or characters…." *Id.* at 542.

The *Temple* case is instructive for another reason. The opinion discusses the ballot required by Section 47, and describes it as "a paper on which is **the name** of **the person** he intends for **the office**." *Id.* at 541 (emphasis added). The Court then explains that "[t]he clause in the constitution directing the election of the several state officers, was undoubtedly intended to provide that the election should be made by this mode of voting, **to the exclusion of any other**." *Id.* at 542 (emphasis added). This interpretation underscores the constitutional nature of the requirement that a voter select just one "name" or "person" for each office and casts doubt on any system that would require voters to rank multiple candidates on a preferential scale.

The only other Vermont Supreme Court opinion that considered the gubernatorial election language had nothing to do with the marking of ballots. Rather, the question was whether a Civil War law allowing soldiers to cast absentee ballots complied with the requirement that voters "bring in their votes." *See Opinion of the Judges of the Supreme Court on the Constitutionality of "An Act Providing for Soldiers Voting"*, 37 Vt. 665 (1864). In this instance, the Court applied a very literal standard and held that the law was not constitutional. However, the Court reached this conclusion "without the advantage of argument by counsel" or even a conference of the justices. *Id*. at 678-79. The opinion itself was published as an "appendix" apart from the "cases argued and determined," and it has generally been ignored. It has no bearing at all on the instant runoff voting issues.

The Constitutional provision for electing the Secretary of State and the Auditor of Accounts is quite different from the provision for electing the Governor, Lieutenant Governor and Treasurer. The Secretary of State/Auditor of Accounts section gives the Legislature broad discretion to establish voting procedures for these offices. *See* Vt. Const., ch. II, § 48. It does not require "the name" to be fairly written, nor does it require joint ballots by the General Assembly. It provides only that the Secretary of State and the Auditor shall be elected "upon the same ticket with the Governor" and that "the Legislature shall carry this provision into effect by appropriate legislation."

Therefore, the Legislature already has the constitutional authority to require or to permit instant runoff voting procedures for the Secretary of State and the Auditor of Account. Similar enabling language appears in the Constitutional provisions for electing senators and representatives (ch. II, § 45); assistant judges, sheriffs and state's attorneys (ch. II, §§ 50, 53); and judges of probate (ch. II, § 51). The Vermont Constitution is not an impediment to instant runoff voting in any of these cases.

Notwithstanding this authority to legislate instant runoff voting for the Section 48 offices, there may be some practical advantage to proceed first with a constitutional proposal for the Section 47 offices (Governor, etc.). If the proposal passed, this would avoid the confusion that might result if different systems applied to the different statewide offices. Also, a constitutional debate would help to inform the voters about the proposed changes.

S. 22 provides for a "voter education campaign to educate voters on the use and purpose of the instant runoff voting method." Sec. 3, adding 17 V.S.A. § 2473a(d). The need for a voter education campaign is substantiated by a footnote in a court opinion that considered the Cambridge, Massachusetts preferential voting system. The Massachusetts Supreme Judicial Court characterized that system (sometimes cited as a model) as "so complicated that few voters participating in it

are likely to understand it fully." *McSweeney v. City of Cambridge,* 422 Mass. 648, 654, 665 N.E.2d 11, 15 (1996) (holding that the Cambridge system did not violate the U.S. Constitution or the Massachusetts Declaration of Rights). A statewide discussion involving citizens as well as legislators may help to inform voters and elections officials about the changes that would be required to introduce instant voting to Vermont. [2]

In summary, for all of these reasons, my advice is that voter approval is legally required before the instant runoff system can be applied to elections for the offices of governor, lieutenant governor and treasurer. The voting system for other statewide offices can be changed by legislation. But it may be advisable to treat all statewide offices alike and await the outcome of a constitutional vote before making any changes.

Please let me know if you have related questions or need additional information.

Thank you.

Sincerely,

William H. Sorrell
Attorney General

[2] A policy statement published by the Center for Voting and Democracy proposes several guidelines for implementing instant runoff voting in San Francisco. They propose contracts with consultants who have expertise in ranked ballot systems and in community education about ranked ballot systems; community education that "will be broad and last for a minimum of six months"; timelines for vendors to apply for the certification of hardware and software used in the voting process; and procedures for interpreting ballots with errors on them. *See* Draft Implementation Policy for Instant Runoff Voting (November 2002).