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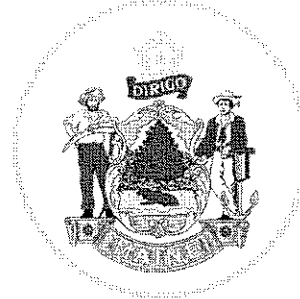
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**MEMORANDUM**

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**TO:** GOVERNOR LEPAGE  
**FROM:** CYNTHIA L. MONTGOMERY, CHIEF LEGAL COUNSEL  
HANK FENTON, DEPUTY LEGAL COUNSEL  
**SUBJECT:** GOVERNOR'S VETO POWER AND ADJOURNMENT  
**DATE:** 7/10/2015



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Governor, the following is my analysis of the current situation concerning a number of bills you are holding. This memo has been prepared for release to the Legislative leadership and the media.

First and foremost, the Governor is not exercising what is known as the "pocket veto." The Governor has not even considered using the "pocket veto" because it is not available to him during the first regular session. Any claims to the contrary by media or political bloggers are nothing but attempts to create a long line of ill-informed, one-sided and unfair news stories that are not helpful to anyone in the resolution of the dispute over the meaning of the relevant Maine Constitutional language.

Secondly, the Governor is not holding these bills as a result of a misstep or mistake. He is deliberately holding them based on his reading of the Maine Constitution. The analysis of his decision to hold these bills follows.

The Governor is holding a number of bills he has been prevented from returning to their legislative houses of origin due to the Legislature's adjournment. In situations like this, the Constitution provides that the Governor must exercise his veto power within 3 days after the reconvening of that same Legislature. In essence, the Governor is waiting for the Legislature to reconvene for 4 consecutive days (the first day does not count), at which point, he will act.

**FACTS**

Pursuant to 3 M.R.S. §2, the statutory adjournment date for the 127<sup>th</sup> Legislature was June 17, 2015. It is not totally clear but it appears that on June 17, the Legislature attempted to exercise its statutory option to extend the adjournment deadline for 5 legislative days, and it also appears it did so again on June 24. In any event, it appears that these acts (or at least one of them) carried the session to June 30. In session on June 30, 2015, the Legislature presented a number of bills to the Governor for his consideration. On that same day, June 30, the Legislature adjourned pursuant to a Joint Order "Adjourning until the Call of the Speaker and President" (SP 556). The Legislature has not returned from that adjournment.

## LEGAL ANALYSIS

The Governor is holding these bills, waiting on the Legislature to reconvene for 3 days, because he has been deprived by the Legislature's adjournment of the opportunity to return these bills to their houses of origin. He has the right to hold these bills until "3 days after the next meeting of the same Legislature which enacted the bill[s]" Me. Const. Art. IV, §2. In their zeal to play "gotcha" with the Governor, the Democrats and their many friends in the media have failed to do their research, have misread the law or simply don't understand that this is the way legal issues are raised and, ultimately, addressed: someone begins by challenging the status quo.

The Maine Constitution provides limitations on both the Legislature's and the Governor's action with respect to the enactment of laws and thereby balances the powers of government between three branches. The Legislature is restricted in the number of days it has to enact laws and, of course, its enactments are subject to the Governor's veto power. The Governor, in turn, also has time limits within which he must exercise his veto power, a power that is subject to potential override by the Legislature. In the case at hand, the Legislature chose to act in such a way as to trigger the Constitutional grant of a different procedure, which gives the Governor 3 consecutive days after the Legislature reconvenes to exercise his veto power. There is no requirement in either the Constitution or state law mandating the Legislature to adjourn for longer than the Constitutional grant of 10 days for the Governor to exercise his veto power. Once it chose to adjourn and not return within 10 days, however, the Legislature triggered the 3-day procedure.

### **Restrictions on the Legislature's enactment authority**

The Maine Constitution provides, "The Legislature shall enact appropriate statutory limits on the length of the first regular session ... The Legislature may convene at such other times on the call of the President of the Senate and Speaker of the House, with the consent of the majority of the Members of the Legislature of each political party, all Members of the Legislature having been first polled." Me. Const. Art. IV, Part Third, §2. Accordingly, Maine law provides, "... The first regular session of the Legislature, after its convening, shall adjourn no later than the 3rd Wednesday in June" 3 MRS §2. Maine law further provides,

[t]he Legislature ... may by a vote of 2/3 of the members of each House present and voting, extend the date for adjournment for the first ... regular session by no more than 5 legislative days, and ... by a vote of 2/3 of the members of each House present and voting further extend the date for adjournment by 5 additional legislative days. The time[] for adjournment for the first ... regular session[] may also be extended for one additional legislative day ..."

The essence of these provisions is that "adjournment" has legal significance in the Constitution and it operates to trigger particular deadlines.

### **Restrictions on the exercise of the Governor's veto power**

With respect to the Governor's general veto power, the Maine Constitution provides,

... If the bill ... shall not be returned by the Governor [to the bill's house of origin] within 10 days (Sundays excepted) after it shall have been presented to the Governor, it shall have the same force and effect as if the Governor had signed it unless the Legislature by their adjournment prevent its return, in which case it shall have such force and effect unless returned within 3 days after the next meeting of the same Legislature which enacted the bill ... [emphasis added] Me. Const. Art. IV, Part Third, §2.

The essence of this provision is to answer the question, "What happens if the Legislature presents bills to the Governor, then adjourns, and does not reconvene within the 10 days the Governor is constitutionally given to exercise his veto power?" The answer is that the Legislature must reconvene for 3 full consecutive days, giving the Governor the opportunity to return the bills to their house(s) of origin and giving the Legislature time to reconsider the vetoed bills and vote on sustaining or overriding them.

**The Supreme Court has already opined on and answered some of the questions at hand.**

In 1981, Governor Joseph Brennan submitted a series of legal questions to the Justices of the Maine Supreme Court concerning the State's trust responsibility with respect to submerged lands because of a newly enacted law pending the Governor's action. In that case, the bill was presented to Governor Brennan on June 19, 1981. On that same day, the Legislature adjourned *sine die*. Ordinarily, the bill would have become law when not acted on by the Governor within 10 days. "However," the Justices said in their August 27, 1981 answer, "the adjournment of the Legislature tolled that period, and the Governor has until three days after the next meeting of the 110<sup>th</sup> Legislature to act on the bill." The Justices further noted that the Governor was entitled to the 3 days even though "the Legislature met in special session for one day on August 3, 1981." The Justices stated, "We are of opinion, however, that article IV, pt. 3, §2 requires that the same Legislature must be continuously in session for three days before the period in which the Governor may act on the pending bill expires. That is so because article IV, pt. 3 §2 also provides that the Governor, if he disapproves a bill, shall return it to the Legislature, obviously for the purpose of the Legislature's reconsideration. The Legislature would have no opportunity to do that unless it is still in session." The Justices concluded that the bill had not yet become law as of August 27 and was still awaiting the Governor's signature. *Opinion of the Justices*, 437 A.2d 597 (1981).

How to count the 3 days was a subsequent question answered by the Justices in 1984. In that case, a bill was presented to Governor Brennan on May 7, 1984, following adjournment of the Legislature on April 25, 1984. Governor Brennan did not return his objections to the House until September 7, 1984, the fourth calendar day of Special Session, which commenced on September 4, 1984. The Justices opined that the Governor's objections were timely filed because the day of the triggering event is excluded from computation of the 3 days. *Opinion of the Justices*, 484 A.2d 999 (1984).

**The Governor has until after the Legislature is in session for 3 consecutive days to deliver his veto message(s) to the bills' house(s) of origin.**

As it did in the situation Governor Brennan faced, the Legislature's adjournment on June 30, 2015 has prevented the Governor from returning his objections to the bill(s)'s house(s) of origin within the 10 days he is constitutionally granted for the exercise of his veto power. In essence, the Legislature's

adjournment has tolled the 10-day period. Consequently, the Governor has until 3 days *after* the triggering event, which is the reconvening of the Legislature.

In fact, the Maine Legislature has faced this situation before. In 2003, LD 1361 was enacted on June 11 and sent to Governor Baldacci. On June 14, the Legislature adjourned *sine die*. The Governor held the bill—which had been enacted by both houses with “veto-proof” margins—as of June 26. The Legislature was in special session from August 21 to 23, 2003 but did not deal with the bill. On January 13, 2004, the bill was recalled from the Governor’s desk and eventually “died.”

Likewise, LD 1690 was enacted on June 16, 2005 and delivered to Governor Baldacci. Though that Legislature came back for a one-day special session on July 29, 2005, the bill sat until the Legislature reconvened in January 2006. Governor Baldacci then delivered his objections on January 10, 2006 and his veto was sustained.

Others may argue that in these cases and the ones before the Justices, the adjournment was *sine die*, and therefore they are inapposite to the question at hand. That argument must fail, however, for two reasons: 1) the Constitution does not require “adjournment *sine die*” to trigger the 3-day procedure and 2) even if it does, the Legislature has in essence and effect, adjourned *sine die*.

The Maine Constitution does not require adjournment *sine die* to trigger the 3-day procedure. First, the plain language in Article IV, Pt. 3, §2 unambiguously provides that when “adjournment” – not “adjournment *sine die*” – prevents the Governor’s return to the bill’s House of origin, he gets 3 days after the Legislature reconvenes to exercise his veto power. Moreover, the Constitution, in another, unrelated provision refers to “adjournment without day” (i.e., adjournment *sine die*), which indicates that the Constitution contemplates the distinction between adjournment and “adjournment without day.” Since the triggering event in this provision is adjournment and because the Legislature is currently adjourned, the Governor has been unable to return his objections to the bill(s)’ house(s) of origin. Rejecting the argument that the word “adjourn” in the veto provision of the Pennsylvania Constitution meant “adjournment *sine die*,” the Commonwealth Court of Pennsylvania said, “... if we were to accept ... [the] interpretation [that adjournment meant adjournment *sine die*] ... then the General Assembly could prevent the Governor’s veto, and thereby subvert the checks and balances of the Pennsylvania Constitution, by passing a bill, presenting it to the Governor and adjourning for a period longer than ten days.” *Jubelirer v. Pennsylvania Dept. of State*, 859 A.2d 874, 877 (2004), ftnt 2.

In addition, some may argue that – as has been asserted by Democratic Majority Leader Jeff McCabe – that the Legislature is not adjourned; it is in “recess.” Hence, the argument goes, the bills on the Governor’s desk have become law because they were presented to the Governor more than 10 days ago and the Legislature is not adjourned. This argument ignores its own fatal flaw. The Legislature has indisputably been adjourned for the purposes of Art. IV, Part Third, Section 2, since June 30, 2015. The Legislative record clearly shows that Senate Paper 556 titled “Adjourn Until the Call of the Speaker and President” was passed on the evening of June 30, 2015. Because the Legislature adjourned and has not reconvened since the passage of SP 556, these bills have not become law without signature. The Legislature must meet for 3 full consecutive days in order for the bills to either be vetoed by the Governor or become law.

In the alternative, even if the word “adjournment” in the Constitutional provision at issue is construed to mean “adjournment *sine die*,” the facts suggest that while no one used the phrase, “*sine die*,” the Legislature has actually done just that – adjourned “without day.” On June 30, 2015, the Legislature

adjourned “Until the call of the Speaker and President.” While many claim that the Legislature will reconvene on July 16, it will not be done pursuant to a duly raised, considered and voted on motion that can be found in the Legislative database. Rather, the June 30 joint order makes clear that the Legislature is adjourning until some unspecified future day—or not, if the Speaker and President do not call them back. Likewise, according to Mason’s, “When no provision has been made as to the time for reconvening, and the adoption of the motion to adjourn would have the effect of dissolving the body, the motion is, in fact, a motion to ... adjourn *sine die* ...” Mason, Paul, *Mason’s Manual of Legislative Procedure*, Eagan, MN: West, 2010, §201, p. 162. In this case, the Legislature did not provide a time for reconvening and the motion did dissolve the body. Finally, once the bills being held by the Governor became the subject of intense media scrutiny on July 8, 2015, the Maine Office of the Revisor of Statutes notified legislative leadership that it was “chaptering” the bills as law. Pursuant to Title 3 MRS §163-A, sub-§§ 3 and 4, the legislative staff (which includes the Revisor’s Office) chapters laws “after the adjournment of each session ...” In essence and effect, the Joint Order to adjourn until the call of the Speaker and President constituted an adjournment without day and the conduct of the Legislature subsequent to that adjournment confirms that.

Others may also maintain that because the Legislative clerks remain in the State House when the legislators are gone, the adjournment does not prevent the return of the bill to its house of origin. The weakness in this claim is that the clerks were presumably present in 1981 and 1984 when the Justices issued their opinions and they were likely present when Governor Baldacci did not return LD 1361 in 2003 or LD 1690 in 2005. Clearly, returning a bill to its house of origin must be more than simply dropping it off in a clerk’s office. If simply delivering the bill to the clerk satisfies the Constitutional requirement of returning a bill to its house of origin, then there would never be a need for the 3-day procedure.

Some may also claim that if the Governor’s position is correct, then 3 MRS §2, which allows the Legislature to extend the statutory adjournment date by two 5-legislative-day periods and one more day, known as “veto day,” would be invalid. Such an argument is short-sighted. As the law currently stands, the Legislature’s “remedy” is simple. When the Legislature adjourns as it did on June 30, 2015, it must do so knowing that under the Constitution, it will be required to deal with the bill(s) at issue at a time when it is in session for 3 consecutive days. Among other possible options, it can schedule “veto day” on the eleventh day after it presents the bill(s) to the Governor; it can call a special session at any time after its adjournment to deal with the Governor’s objections; or it can wait to deal with the Governor’s objections during the second regular session in January. In all of those cases, 3 MRS §2 is valid and operating consistently with the Constitution.

Some may also contend that strictly construing the word “adjournment” as used in the Constitution would wreak havoc during future sessions because each temporary adjournment would subject the Legislature to uncertainty as to the legal significance of that adjournment and would increase the risk of repeatedly triggering the 3-day procedure. These fears are unwarranted because this dispute did not arise during the regular session. Rather, it arose after the statutory adjournment date. As mandated by the Constitution, the Maine Legislature has a very specific, statutorily created period of time in which to conduct its business. It cannot drag things out forever – the legislative session must end. That same statute allows the Legislature to extend the period in which it may conduct business by 11 additional days – 10 days for the Governor to exercise his veto power and one more day for the Legislature to reconsider the bill once it is returned by the Governor. It is reasonable and consistent with the rules of statutory construction to treat the period of time beginning with the statutory adjournment date to the end of the statutorily allowed 11 days or to adjournment *sine die*, whichever comes first, differently

than the regular session. This is so because in the vast majority of instances during the regular session, the Governor is allowed 10 days in which to exercise his veto power and temporary adjournments do not prevent the return of the bill to its house of origin. This is so because adjournments fix a date and/or time of return. Moreover, should the Constitution be so construed, the Legislature can handle any uncertainty or sense of risk by simply adjourning to a date certain or paying attention to the timing of when bills are presented in relation to when they must be returned so that the Governor is allowed 10 days to exercise his veto power and can return the bills when the Legislature is not adjourned.

Finally, some may also argue that the Governor's position is inconsistent with standing practice. If there's one thing this Governor is known for, it is not doing things a certain way just because "that's the way we've always done it." While it may have been the practice to schedule "veto day" outside of the 10 days that the Governor is granted to exercise his veto power, the Legislature cannot insist that its practice and/or interpretation of its statute trump the plain language of the Maine Constitution. Moreover, this is not the first time a bill has been held because the Legislature's adjournment prevented its return. In fact, it happened at least twice during the Baldacci administration. The Legislature can continue its practice as long as it desires, but if it chooses to adjourn after the statutory adjournment date and within the 10-day period the Governor has to exercise his veto power, then it must then follow the Constitution and understand that the Governor's veto message is not due until "3 days after the next meeting of the same Legislature which enacted the bill."

### CONCLUSION

By adjourning on June 30, 2015 after presenting to the Governor a large number of bills, the Legislature deprived the Governor of the opportunity to return them to their house(s) of origin within 10 days of their presentment. Fortunately, the Constitution contemplates just such a scenario and offers a very simple remedy. It grants the Governor the right to hold these bills until "3 days after the next meeting of the same Legislature which enacted the bill[s]" Me. Const. Art. IV, §2. The Justices of the Maine Supreme Judicial Court have also shed light on the application of this Constitutional provision. In 1981, they opined that when the Legislature's adjournment prevents the Governor from returning the bill to its house of origin, the Governor is not required to return the bill until 3 days after the same Legislature reconvenes, and they have to convene for 3 consecutive days. Convening for just one day is insufficient to trigger the 3 days. In 1984, the Justices said that because the Legislature reconvening is the triggering event, the date that they first reconvene does not count when computing the 3 days. Hence, they must convene for four days.

Approximately 20 years later, in 2003, Governor Baldacci did exactly what Governor LePage is doing. After the Legislature had adjourned, a bill sat on his desk until the following January when it was actually recalled by the Legislature and later killed. A couple of years after that, in 2005, Governor Baldacci held another bill after the Legislature had adjourned, and he vetoed it the following January.

While there are a number of arguments on both sides of the issue of whether the 127<sup>th</sup> Legislature's June 30 adjournment prevented the Governor from returning the bills to their House(s) of origin, this is clearly not a settled question of law. That said, the Constitution's plain language, the opinions of the Justices and the conduct of the previous Governor all strongly suggest that once the 127<sup>th</sup> Legislature reconvenes for 3 consecutive days, the 3 day-procedure is triggered.

