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To: Members of the Senate Government Operations Committee and House Local Government Committee
From: Daniel Johnson-Weinberger, General Counsel for the Center for Voting and Democracy
Date: February 27, 2003
Re: Response to Attorney-General Sorrell's letter on constitutional issues related to instant runoff voting in Vermont

SUMMARY

Attorney-General Sorrell's analysis is flawed on several major points. He fails to give recognition to the intent and overriding goal the framers in section 47 (*Baker v. State*), he fails to correctly apply the precedent of the *Temple v. Mead* decision, and he ignores the liberal standard accorded statutes in assessing their constitutionality (*State v. Reed* and *Gross v. Gates*). Instant runoff voting would almost certainly be found constitutional by the Vermont Supreme Court.

THE INTENT OF SECTION 47

Attorney-General Sorrell fails to recognize the dictates of *State v. Kirchoff* and *Baker v. State*, which reveals the Court's view that the intent and motivating values of the framers are paramount. In the *Baker* decision, quoting *State v. Kirchoff* the court wrote:
"our duty is to discover the core value that gave life to Article [7]." Out of the shifting and complicated kaleidoscope of events, social forces, and ideas that culminated in the Vermont Constitution of 1777, our task is to distill the essence, the motivating ideal of the framers. The challenge is to remain faithful to that historical ideal, while addressing contemporary issues that the framers undoubtedly could never have imagined."

The framers of Section 47 of the Vermont Constitution intended to democratize the selection process and comply with their majoritarian values. Instant runoff voting, as a majoritarian election system, is entirely consistent with the motivating ideal of the framers of the Vermont Constitution. In the context of other contemporary state constitutions and Vermont's own earliest election laws, Vermont's framers placed greater emphasis on the value of majority decision, and direct voter election than any other state. It was merely the practical limitations of 18th century technology that shaped the specific vote casting, sorting and counting procedure set out in the constitution. Clearly their intent was to facilitate the election of the candidate preferred by a majority of voters and to anticipate the problem of a "spoiler" scenario and to prevent the election of a mere plurality candidate who did not have the support of a majority of voters. Instant runoff voting more perfectly aligns with the framers intent than does Vermont's current voting method, especially considering the current laws many deviations from the procedure set out in section 47.

THE MEANING OF “VOTE” AS APPLIED TO INSTANT RUNOFF VOTING

The essence of Attorney-General Sorrell’s argument against the constitutionality of S.22 and H.82 comes down to two key points. He states about the offices of governor, lieutenant governor and treasurer, firstly, that “these offices must be filled through the one-office, one-name voting procedure Vermont has used for the past two hundred years.” Secondly he states “ 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.”

Attorney-General Sorrell’s analysis is in error factually, logically, and legally. Much of his analysis stems from a fundamental lack of understanding of the legal use of the single transferable vote (STV) or rank-order ballot, used in instant runoff voting, mistaking a voter’s “first preference” alone with the voter’s “vote,” or alternatively mistaking the ranking of candidates as casting multiple votes. As courts in the U.S. have recognized in numerous cases dealing with rank-order ballots¹, each voter has only a single vote, and that vote may or may not be a vote for a voter’s first preference.² Because a rank-order ballot allows a voter to more fully express his or her full will (both which candidate the voter likes best, but also which candidate the voter would prefer if necessary to prevent a candidate the voter dislikes from being elected), the ballot essentially has been given “marching orders” to maximize the chances of fulfilling the voters will.

¹ See as examples: *Stephenson v. Ann Arbor Board of Canvassers et al.*, File No. 75-10166 AW (1975); *McSweeney v. City of Cambridge*, 422 Mass. 648, 655 N.E. 2d 11 (1996); *Moore v. Election Commissioners of Cambridge*, 309 Mass. 303, 330, 35 N.E. 2d 222 (1941).

² Do note that any argument that only the first-preferences of an instant runoff voting election should be considered a ‘vote’ to determine if any candidate earned the requisite majority of the votes is nonsensical. No court has ever interpreted a vote in a preferential ballot to mean only some of the preferences expressed by the voter. There is no authority for an interpretation of a preferential ballot that defines a majority of the vote as a majority of only the first-preferences of the votes. The logic of counting the second preferences of eliminated candidates to see if there is a majority winner is sound. Otherwise, if a court defined a first-preference as a “vote” for purposes of determining a majority winner, the court would then be transforming second-preferences into second votes, which raises other constitutional concerns, as some voters will choose not to cast a second-preference in their vote. If a preferential ballot is constitutionally permissible, then a court can not interpret a majority of votes cast to be defined by only the first-preferences on ballots. A majority winner is found – or not found – after the instant runoff voting process has completed and lower-preferences are tabulated.

The Vermont Supreme Court’s definition of a “vote” includes the concept of a preferential ballot: “A vote is the formal expression of a will, preference, wish or choice in regard to any measure proposed.” *Sawyer Stores, Inc. v. Mitchell*, 62 P.2d 342, 348 (1936) (internal citations omitted). Black’s Law Dictionary defines a “vote” as “the expression of one’s will, preference, or choice” Black’s Law Dictionary, 1576 (6th ed. 1990).

The federal Voting Rights Act’s definition of vote is instructive (and to some degree controlling). “The terms ‘vote’ or ‘voting’ shall include all action necessary to make a vote effective in any primary, special or general election” 42 U.S.C. s.19731(c)(1). In order to make a preferential vote effective, lower-ranked preferences can’t simply be ignored, while only the first-preference is considered a “vote” for purposes of determining a majority winner. The full ballot with all rankings is a “vote” in order to make a vote effective.

Also note a United States Supreme Court concurring opinion recognized the value (and constitutionality) of instant runoff voting. *Williams v. Rhodes*, 393 U.S. 23, 47 fn. 8 (1968) (J. HARLAN, concurring).

THE APPLICATION OF *TEMPLE v. MEAD* TO INSTANT RUNOFF VOTING

On the first point, Attorney-General Sorrell's hyper-literal reading of the language in the constitution cannot be sustained when taken together with the rest of the language of section 47 in light of Vermont's election statutes since 1815. Attorney-General Sorrell chooses to focus like a laser on the singular use of the word "name," while ignoring the many other specific constitutional requirements such as that the ballots be sealed by the town constable and given to the representative-elect for delivery to the opening session of the legislature, where the sealed packages are to be opened, sorted and counted by a special committee of the general assembly. Vermont's election statutes have deviated from this constitutional provision (and many others) since the 19th century. As the Vermont Supreme Court wrote in *Temple v. Mead*, such a hyper-literal interpretation as proposed by Attorney-General Sorrell for section 47 would invalidate every statute for electing a governor in use since 1815. That decision states:

"We ought not to believe that it was intended that voting for those officers should always continue in the same particular manner, or that the votes should be of the same -materials, or in the same way which was then in use, without any regard to the changes which might take place, or the improvements which might be made. This limited view of the constitution would wholly destroy the statute passed in 1815, under which our elections are now made."

Contrary to Attorney-General Sorrell's argument, the fact is, that Vermont long-ago abandoned the "one-name" voting procedure he incorrectly asserts has been in use for two hundred years. Since the reform of 1890, voters have been depositing ballots with the names of multiple candidates for each office -- not just one name. The framers clearly didn't anticipate voters might use ballots with a list of all qualified candidates, but as long as the voter's will can be determined and each ballot ultimately put in the pile for one particular candidate, this deviation used for over a century is not unconstitutional. Just as the current voting procedure allows a voter to mark a ballot containing multiple names in a manner that allows those sorting and counting the ballots to ultimately determine which candidate that ballot should count for, the "single transferable vote" (STV) used under instant runoff voting accomplishes the same result and is fundamentally the same. Each voter has only one vote, and that vote will ultimately count for only one candidate. The fact that one voting method utilizes an "x" or a filled in bubble, or a line connecting an arrow point and fletch, while the other involves ranking candidates, does not change the fact that both methods involve ballots with many names yet achieve the same result -- that being, at the end of the process of sorting and counting votes, each voter has one vote for one candidate.

This lack of understanding of the STV voting method used by instant runoff voting leads Attorney-General Sorrell to make another fundamental error. He jumps in and assumes there is "no election" -- meaning no majority winner -- after only the first preferences have been examined. He then leaps ahead to that section of section 47 that describes what is to be done when there is "no election" by the voters (election by the full general assembly of

one of the top three candidates). His basic error is in not waiting until the process of sorting and counting the votes has been completed as specified in the bill. It can not be determined if there is “no election” or no majority winner, until the vote counting procedure is at an end -- that is, until the instant runoff voting tabulation is complete. Jumping in in the middle of the vote tallying process and declaring “no election” would be like jumping in under the current statute before the absentee ballot totals were added in, or before a legally authorized court recount was complete. The procedure for sorting and counting votes provided in law must be followed to completion before declaring whether there has been “no election.” In all likelihood, instant runoff voting will result in a majority winner, but this is not a mathematical certainty, and the provision for election by the legislature is retained as an ultimate backstop.

Attorney-General Sorrell mistakenly asserts that S.22 and H.82 provide a “different procedure” for resolving an election when there is “no election” meaning no majority winner. This is factually incorrect. Again, Sorrell is confusing the first tally of first preferences, with the final result of the sorting and counting of the votes. He makes a point of the fact that the counting and sorting procedure of S.22 and H.82 drop candidates until only two remain, and suggests the constitution’s allowance for the legislature to elect any of the top three contradicts this. Again, Attorney-General Sorrell is making the same mistake. The allowance for the legislature electing any of the top three candidates only comes into play when there is “no election” by a majority of voters. S.22 and H.82 abide by this requirement quite faithfully. Sub-section 5 beginning at the bottom of page 10 states:

*“(5) If neither of the last two remaining candidates for the office of governor, lieutenant governor, or treasurer receives a majority of the votes cast, excluding blank and spoiled votes, the court shall prepare a report of no election. The report and the tabulations performed by the committee shall be forwarded to the official canvassing committee appointed by the general assembly, pursuant to Chapter II, § 47 of the Vermont Constitution, for its use in the election of the governor, lieutenant governor, or treasurer if it desires. **The general assembly shall proceed to elect one of the three candidates for whom the greatest number of votes has been returned.**” [emphasis added]*

Temple governs the interpretation of Section 47’s detailed provisions for electing a governor, and under this liberal standard, instant runoff voting safely complies with Section 47. As quoted earlier, it is clear that *Temple v. Mead* leaves the door open to an evolution and improvement of the method of voting. Justice Williams also wrote in that decision,

“But I apprehend, in giving a construction to a constitution which was to secure the rights and liberties of the citizens, and which was intended to present a frame of government and a mode of election for future generations, as well as for the one then on the stage, we are to regard its spirit, and endeavour to give effect to its provisions, without regarding too strictly the literal meaning of the terms made use of.”

And further,

“I apprehend that all which was intended in article [47], was to secure to the freemen the privilege of voting for the several state officers therein named by ballot...”

PRESUMPTION OF CONSTITUTIONALITY

Finally, Sorrell completely ignores the fact that the Vermont Supreme Court grants a wide degree of latitude to statutes when assessing their constitutionality and “accord[s] statutes a presumption of constitutionality.” *State v. Reed*, 680 A.2d 944 (1996). Statutes are presumed to be constitutional, and must meet a high burden to be unconstitutional, as stated in a controlling 1937 opinion: “a statute. . . is not to be adjudged unconstitutional without clear and irrefragable evidence that it infringes the paramount law.” *Gross v. Gates*, 194 A. 465, 469 (1937). Thus, any statutes passed by the General Assembly implementing instant runoff voting will be presumed constitutional, and the Supreme Court will have to find “clear and irrefragable evidence” in order to declare it unconstitutional. *Id.* There is no such clear evidence regarding instant runoff voting. The Supreme Court can not find instant runoff voting to be unconstitutional under this standard.

CONCLUSION

Once the intent of the framers is considered, the use of the single transferable vote or rank-order ballot used by instant runoff voting is fully understood, and the standard used by the court in assessing a statute’s constitutionality is recognized, there are no grounds for suggesting that the Vermont Supreme Court would find instant runoff voting as set forth in S.22 or H.82 unconstitutional.