

# WASHINGTON Examiner

## **Bruce Poliquin wants a federal judge to throw out Maine's instant-runoff vote. It's a long shot**

David Freddoso

November 13<sup>th</sup>, 2018

Rep. Bruce Poliquin, R-Maine, currently holds a narrow plurality lead in the race for his 2nd District seat, 46.2 to 45.5 percent over Democrat Jared Golden. But he's considered likely to lose anyway. That's because Maine voters narrowly adopted a "ranked-choice" voting system. Poliquin is now suing to try to prevent that system from being used.

The ranked-choice or instant-runoff system is similar to the one used in Australia. Instead of choosing just one candidate, voters rank the candidates in order of preference. First-choices are counted first. If no one gets 50 percent of first-choice votes, then second-preferences are counted for the last-place finisher, and then the next-to-last finisher, et cetera, until someone gets above 50 percent.

Poliquin and a handful of voters in the district are now suing in federal court to prevent the use of this new system. This isn't the first time instant runoff has been before a court — Maine's Supreme Court disallowed it for state races based on specific language in the state constitution requiring a "plurality" to win. But this is the first lawsuit over the system at the end of a general election. Their case is that they are being deprived the right to vote "effectively."

The arguments employed include that the instructions on the ballot were vague, voters cannot know the potential consequences of second- and third- and fourth-choice votes, and other non-ranked races were on the same ballot, creating confusion. But I really think that their argument overall proves too much. For example, this is one of their arguments that this system is unconstitutional:

Article I, section 2, clause 1 of the United States Constitution provides that “[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States.” This provision “has always been construed to mean that the candidate receiving the highest number of votes at the general election is elected, although his vote be only a plurality of all votes cast.” *Phillips v. Rockefeller*, 435 F.2d 976, 980 (2d Cir. 1970) (emphasis added). By declining to recognize Bruce Poliquin as the winner after the first round of balloting and certifying him as the Representative from Maine’s Second Congressional District for the 116th Congress, the Secretary has and continues to violate Article I, section 2, clause 1 of the United States Constitution.

My first question is, what would this do to the states that hold runoffs? That's never been understood as unconstitutional before. A ruling in Poliquin's favor on this ground would certainly be a problem for states such as Georgia, Mississippi, both Carolinas, and Louisiana.

The plaintiffs actually do make the case that this system is defective, but not too effectively, in my opinion. And you have to ask yourself, is any federal judge really going to go for that?

This isn't the only argument in the complaint, but it's certainly the easiest to explain. The others involve a supposition of rights ("the right to vote strategically" is actually cited in the complaint) whose existence is ... well, kind of doubtful. There's also a complicated argument that instant-runoff voting "distorts majorities." Writing two years ago, Jason Sorens of the Cato Institute provided an extreme example of how this can happen:

Suppose 35% of voters prefer Bill Clinton to George H.W. Bush to Perot, 31% prefer Bush to Clinton to Perot, and 34% prefer Perot to Bush to Clinton. If everyone votes sincerely under IRV, Clinton wins after Bush is eliminated in the first round — even though 65% of voters prefer Bush to Clinton. But it gets worse. If just a small number of Perot preferrers (>3%) put Bush first and Perot second, then Perot would be eliminated first, and Bush — their second choice — would win. They'll have a strategic incentive to falsify their preferences.

One more thing: If Poliquin succeeds in court, then is the proper remedy to make him the congressman because he got a plurality of first-choice votes? Or is it to throw out this election, since it was held using a supposedly unconstitutional or otherwise illegal or confusing system?

Anyway, the case is being argued right now. I'm skeptical that they're going to throw out instant runoff. As with the many redistricting cases that we see, federal courts would do well to let states figure out how they're going to choose members of Congress.