February 12, 1976

Honorable Joseph Sewall
President of the Senate
State House
Augusta, Maine

Honorable John L. Martin
Speaker of the House
State House
Augusta, Maine

Gentlemen:

Since the January 30 Supreme Court decision on the Federal Election Campaign Act, our office has conducted a detailed review of this decision and its relation to Maine election laws.

On the basis of our review, we believe that the following provisions of Maine law are not consistent with the Federal Constitution as interpreted by Buckley v. Valeo, 44 L.W. 4127, Supreme Court January 30, 1976:

1. 21 M.R.S.A. § 1397, sub-§ 3. This section places limitations on expenditures by candidates for office. The limits are 25¢ for each vote in the previous election for each office for a primary and 50¢ for each such vote for a general election. These limits are clearly unconstitutional under the Supreme Court decision.

2. 21 M.R.S.A. § 1397, sub-§ 4. Limiting expenditures of personal funds by candidates. These limits are $35,000 for candidates for Governor and U. S. Senator; $25,000 for candidates for U.S. Representative and $5,000 for all other offices. This also is clearly unconstitutional under the Supreme Court decision.

In addition, the following provisions of Maine law are partially violative of the Federal Constitutional principles enunciated in Buckley v. Valeo:

1. 21 M.R.S.A. § 1397, sub-§ 7. To the extent that it requires written approval of a candidate for a person to expend funds in a candidate's behalf.

2. 21 M.R.S.A. § 1397, sub-§ 8. To the extent that it requires written approval of the beneficiary of campaign expenditures for those expenditures to be made.

Both of these sections by requiring written approval for expenditures to be made implicitly allow veto of expenditures and thus veto of freedom of expression if the written approval is withheld. Such is not consistent with either the First Amendment of the United States Constitution or Article I, § 4 of the Maine Constitution.

Additionally, as violation of sections 7 and 8 can subject a person to criminal penalties, their disclosure requirements appear to be too vague.

Our analysis also indicates that there is a constitutional risk in requiring reporting and disclosure of all expenditures by persons in relation to election or referendum campaigns, no matter how small these expenditures may be. This problem affects 21 M.R.S.A. § 1392 relating to referendum campaigns and the provisions and the notification requirement of § 1397, sub-§§ 7, 8 and 9 relating to campaigns.

We would suggest the following amendments to clarify the Maine law in these areas and to reduce constitutional problems:

1. Section 1391. The Statement of Purposes should be amended to strike the purpose of limiting expenditures.

2. Minimum expenditure limitations (e.g. $10) should be placed on §§ 1392 and sub-§§ 7, 8 and 9 of § 1397 below which disclosure and reporting of expenditures by private citizens would not be required. Sections 1392 and subsections 7, 8 and 9 all presently require disclosure and reporting of all expenditures in referendum or election campaigns without a minimum limit.

3. Subsections 3 and 4 of § 1397 (campaign spending limits) should be repealed.

4. Subsections 7 and 8 of § 1397 (disclosure and notification requirements) should be amended to:

(a) Strike the requirement of written approval as a precondition to making expenditures.

(b) Clarify those expenditures which must be reported and disclosed.

(c) Establish a minimum expenditure limit (e.g. $10) below which expenditures by private citizens need not be reported or disclosed. (This amendment may also be appropriate for sub-§ 9).

5. It may be appropriate to consider combining sub-§ 12 of § 1397 and 21 M.R.S.A. § 1575 as both sections relate to identifying the source of written political material.

6. Subsection 14 of § 1397 should be amended to have its offenses relate to a specific category of crime in the Criminal Code.

There is no constitutional problem with 36 M.R.S.A. § 5283 permitting $1 contributions to political parties through state tax returns.

The decision in Buckley v. Valeo also indicated that the makeup of the Federal Election Commission was unconstitutional because the Congressional leadership could appoint members and because of the Commission's powers, many of which were in the executive area. This violated both the Appointments Clause, Art. III, § 2, cl. 2, and the Separation of Powers doctrine of the Federal Constitution. The Separation of Powers Clause of the Maine Constitution, Art. III, § 2, would appear to raise similar problems with the Commission on Governmental Ethics and Election Practices, 1 M.R.S.A. § 1001, et seq. However, the provisions of the Maine Constitution and the Federal Constitution in these areas are not directly analogous. Therefore, a more thorough review of the legality of the Commission on Governmental Ethics and Election Practices in light of the provisions of the Maine Constitution and decisions interpreting the Maine Constitution is necessary before we can provide recommendations in that area. We would hope to provide those recommendations by the end of next week.

Very truly yours,

JOSEPH E. BRENNAN
Attorney General

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