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February 13, 1976

Honorable James B. Longley
Governor of Maine
State House
Augusta, Maine

Dear Governor Longley:

I appreciate the concern expressed by your request for reconsideration of my recent opinion that the Freedom of Access Law applies to the work of the Council, including pardon and commutation hearings. I have reviewed the opinion in light of your comments and conclude that they do not offer a basis to revise my prior conclusion.

You argue that pardon hearings are not "public proceedings" within the meaning of 1 M.R.S.A § 402 because the pardon power has a constitutional source, and you point to language in 1 M.R.S.A. § 402 that defines the term "public proceeding" as transacting functions with which a governmental body "is charged under any statute or under any rule or regulation."

The courts have typically held, however, that the term "statute," as used in § 402 for descriptive purposes, includes the constitution. American Federation of Labor v. Watson, 327 U.S. 585, 592-593, 66 S.Ct. 761, 766 (1946); Sincock v. Duffy, 215 F. Supp. 169, 171 (Del., 1963), affirmed Roman v. Sincock, 337 U.S. 695, 84 S.Ct. 1449 (1964); Keppel v. Donovan, 326 F. Supp. 15, 16 (Minn., 1970); Wilson v. Beebe, 99 F. Supp. 418, 421 (Del., 1951) (holding that 28 U.S.C.A. § 2281, requiring a three judge court to enjoin enforcement of state "statutes" on the ground of federal unconstitutionality, also applies to state constitutions); Griffin v. Cole, 60 Ariz. 83, 131 P.2d 989, 991 (1942) (The phrase "liability created by statute" as used in a statute of limitations is broad enough to include liability created

by the constitution); Board of Education of Hall County v. Shirley, 226 Ga. 770, 177 S.E. 2d 711, 712 (1970) (the word "statute" in a declaratory judgment action provision requiring service of process upon the Attorney General also means the state constitution); Litsinger Sign Co. v. American Sign Co., 11 Ohio St. 2d 1, 227 N.E. 2d 609, 614 (1967) ("statutes" in a judicial notice law includes other state constitutions).

Other parts of § 402 confirm that the legislature intended to use the term "statute" in its usual comprehensive sense and to include constitutional functions. Section 402 expressly refers to functions performed by "legislative" bodies, and these bodies derive their powers from the constitution just as the Governor and Council derive the pardon and commutation powers.

You also argue that Baston v. Robbins, 153 Me. 128, 135 A. 2d 279 (1957) compels the conclusion that the Governor and Council may vote secretly on pardon and commutation matters. The question before the Court in Baston was whether a legislative enactment could limit indirectly the discretion of the Governor and Council to fix the terms of commutation, a power expressly granted by the pardon clause. Clearly it could not, as the Law Court held. There is no suggestion in the Baston case that the Legislature is powerless to affect procedures incidental to the conduct of pardon or commutation hearings, as is the Freedom of Access Law. Legislation has a similar impact on many constitutional powers of the Executive, such as the power to command the militia.

The Freedom of Access Law affects only the forum in which the Council votes upon its advice and consent to the Governor. It is neither a control, a regulation, nor an interference of any kind with the power of the Governor to "grant reprives, commutations and pardons. . upon such conditions. . .as may be deemed proper." Consequently, neither Baston v. Robbins nor Section 11 of Article V, Part 1, requires making an exception of the Council's advice on pardons.

In reality, the statutory requirement that final votes in public proceedings be taken in public is consistent with and only restates in substance what the constitution itself expressly requires of the

Governor and Council. Art. V, Pt. 2, § 3, provides as follows:

> "The resolutions and advice of Council shall be recorded in a register, and signed by the members agreeing thereto, which may be called for by either House of the Legislature; and any Councillor may enter his dissent to the resolution of the majority."

Art. V, Pt. 1, § 11, provides that the Governor shall have the power to grant reprieves, commutations and pardons "with the advice and consent of the Council." The Council's "advice" on pardons is no different from its other "advice" and must be recorded in the register and signed by the majority Councillors. Since either House of the Legislature may call for the register, necessarily it is within the power of the Legislature to provide that its contents are open to the public. Taking the actual votes in open session differs from this constitutional requirement only in immaterial detail.

In the closing paragraphs of your letter, you suggest that there are "substantive reasons" for the present Council procedure. I am sure you are aware that juries pronounce their verdict in public and are polled in public. Prosecutors recommend sentences in public. Judges pronounce sentence in public. Appellate courts vote to affirm or reverse sentences and convictions on the public record, and courts rule on habeas corpus petitions in public. For the reasons set forth above, we can find no legal justification under existing laws for concluding that final votes of the Governor and Council in pardon matters may be taken in secret.

If you feel that the public interest would be served by legislative adoption of a pardon hearing exception to the Freedom of Access Law, that alternative is, of course, open to you as pointed out in my January 29, 1976, opinion.

If I may be of any further assistance, please do not hesitate to call upon me.

Very truly yours,

Joseph E. Brennan

JOSEPH E. BRENNAN
Attorney General

JEB:we
cc: Honorable members of the Executive Council