June 23, 1977

Honorable James B. Longley
Governor, State of Maine
State House
Augusta, Maine 04333

Dear Governor Longley:

I am responding to your letter of June 14, 1977, in which you requested our advice concerning the constitutionality of 30 M.R.S.A. § 103. That statutory provision concerns appointment of an interim County Commissioner in the case of a mid-term vacancy in office. The pertinent part of the section reads:

> "In the case of a vacancy in the term of a commissioner who was nominated by primary election before the general election, the commissioner appointed by the Governor shall be enrolled in the same political party as the commissioner whose term was vacant."

You have questioned the constitutionality of the quoted portion on the bases of interference with the Governor's constitutional power of appointment and discriminatory aspects of this legislation. It is our opinion that the limitation on appointment of replacement of county commissioners set forth in 30 M.R.S.A. § 103 is constitutional.

The Governor's constitutional power of appointment is found in Article V, Part First, Section 8 of the Constitution, which reads, in pertinent part:

> "He [the Governor] shall nominate, and, subject to confirmation as provided herein, appoint all judicial officers except judges of probate and justices of the peace, and all other civil and military officers whose appointment is not by this Constitution, or shall not by law be otherwise provided for." (emphasis provided)

Since the county commissioners are not constitutional officers, the question becomes whether their appointment is otherwise provided for by law. There is authority for the position that the term "otherwise provided for" means those appointments in which the advice and consent of the Executive Council was not necessary. Opinion of the Justices, 72 Me. 542, 547 (1881). However, since this phrase was left in Article V, Part First, Section 8 when the section was amended by Constitutional Amendment CXXVIII to provide for new confirmation procedures, and since that same constitutional amendment abolished the Executive Council, it is our opinion that the phrase must now be construed to mean those appointments for which the Legislature has provided by statute some appointment procedure other than that expressed in the constitutional section. It is clear that 30 M.R.S.A. § 103 constitutes such statutory exception.

The Supreme Judicial Court, in discussing the constitutionality of a statute providing for appointment of a Deputy Secretary of State, has stated,

> "The Legislature may create offices and provide for the manner of appointment, tenure, and the like, subject only to the restraint of the Constitution." Ross v. Hanson, 227 A.2d 606, 611 (Me., 1967). (See also: State v. Stinson Canning Co., 161 Me. 320, 329 (1965)).

In support of this statement the Court cited the Opinion of the Justices, 137 Me. 350 (1941), for the proposition that the legislative power is absolute, subject only to such limitations as are stated in the Constitution. Article V, Part First, Section 8 of the Constitution does not limit the Legislature in providing criteria for appointment; rather, it specifically recognizes the power of the Legislature to do so in individual cases. Consequently, the Governor's power of appointment may be constitutionally constrained or subjected to conditions by legislation such as 30 M.R.S.A. § 103.

The second issue concerns the possible discriminatory effects of the portion of 30 M.R.S.A. § 103 quoted above. Stating the pertinent provisions of that section in the negative, persons who are not enrolled in the political party of the commissioner who was last encumbent in the vacant position would not be eligible for appointment by the Governor to fill the vacancy. We assume that this is the "discrimination" to which reference has been made and that the question is whether this violates the Equal Protection provisions of Article I, Section 6-A of the Constitution of Maine and the Fourteenth Amendment to the

United States Constitution. There may be some initial question as to whether the distinction made in this statutory provision even creates a "suspect classification" to which the constitutional prohibitions would be applicable. However, assuming that there is such classification, it is our opinion that the classification does not create unconstitutionally invidious or arbitrary discrimination, in the sense that there is a reasonable basis for the limiting conditions. Cf. Verreault v. Lewiston, 150 Me. 67, 71-72 (1954).

The sentence in question was added to Section 103 (and also to §§ 101 and 104 of the same title) by P.L. 1975, chapter 771, section 3 0 0. The primary goal of that legislation was the redistribution of powers of the Executive Council which had been abolished by constitutional amendment. There is no statutory history of record to indicate the intent of the Legislature in adding the conditions to § 103. However, it is reasonable to assume from the wording of the amendment itself, that the intent of the Legislature was to attempt to insure that the interim replacement for a county commissioner who was elected as a party candidate would share the same basic political philosophy as the person whom he replaces.[1/] This legislation may also reflect the fact that after the abolition of the Executive Council there would be no other body under existing law which would provide advice and consent to gubernatorial appointments in filling county commissioner vacancies. It is our opinion that sufficient intent may be implied from the wording of the amendment itself to indicate a reasonable basis for the legislation and a sufficient relationship between the goal to be accomplished and the method which was selected. Therefore, we do not believe that 30 M.R.S.A. § 103 violates constitutional Equal Protection guarantees.

Sincerely,

JOSEPH E. BRENNAN
Attorney General

JEB:mfe

1/ Title 30 M.R.S.A. § 101 applies only to those cases where the preceding commissioner was nominated by primary election. See 21 M.R.S.A. § 441, et seq. It would not apply to the situation where nomination was by nomination petition, i.e. a person who was running for the office without political party designation. See 21 M.R.S.A. § 491, et seq.