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DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

May 29, 1980

Honorable Andrew J. Redmond
State Senator
P.O. Box 805G
Madison, Maine 04950

Dear Senator Redmond:

This is in response to your inquiry as to whether the right to a referendum under art. IV, pt. 3, § 17 of the Maine Constitution has been lost by virtue of the fact that the voters seeking the referendum did not make their application to the Secretary of State within 10 days after adjournment of the legislative session at which the Act to be referred was passed. We believe that in light of the unusual facts surrounding your question, a court would conclude that the "late" filing of the application did not extinguish the electors' right to a referendum.

FACTS:

As noted above, our answer turns upon the unusual circumstances which prompted your inquiry. For that reason, those circumstances must be set out in detail.

The measure in question, "An Act to Provide for the Implementation of the Settlement of Claims by Indians in the State of Maine and to Create the Passamaquoddy Indian Territory and Penobscot Indian Territory" (hereinafter "Implementation Act"), was passed at the Second Regular Session of the 109th Legislature. That session was adjourned without day on April 3, 1980, the same day that the Governor signed the measure into law.

As non-emergency legislation, the Implementation Act would normally become effective ninety days after the final adjournment of the session in which it was passed. However, the Legislature included in the Act an additional precondition to its taking effect, namely, the enactment of certain legislation by the Congress of the United States. Thus, until Congress acts, it cannot be ascertained when, if at all, the Implementation Act will become law.

On April 10 or 11, 1980, you telephoned the Office of the Secretary of State to obtain the materials necessary to commence a petition drive to have the Implementation Act referred to the people. At the suggestion of that Office, you contacted me on the same date to determine whether the Implementation Act could be the subject of a referendum. You were ultimately advised by Deputy Attorney General Stephen Diamond that it was the view of this Office: 1) that the Implementation Act could be the subject of a referendum; 2) that the customary procedures would be applicable to such a referendum; and 3) that the deadline for filing the petitions would be July 2, 1980. Because of a series of missed telephone calls, that advice was apparently communicated to you on or about April 23, 1980.

On April 28, 1980, Pierre L. Redmond applied to the Secretary of State for a referendum petition by completing and signing the appropriate form. The Secretary of State accepted that application with the condition that there be a determination by my Office as to the propriety of filing the application after the 10-day period had elapsed. It is that conditional acceptance which gives rise to the present question.

APPLICABLE LAW:

The law governing applications for referendum petitions is 21 M.R.S.A. § 1351, which provides as follows:

> § 1351. Petitions
>
> On the written applciation of a voter, signed in the office of the Secretary of State on a form designed by the Secretary of State, the Secretary of State shall furnish enough petition forms to enable such voter to invoke the initiative procedure or the referendum procedure provided in the Constitution, Article IV, Part Third. Such application shall contain the names and addresses of 5 voters who shall receive any notices in proceedings under this chapter.

> 1. Limitation on referendum petition. An application for a referendum petition must be filed at the office of the Secretary of State within 10 days after adjournment of the legislative session at which the Act in question was passed.
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> 2. Forms at expense of voters. The person who applies for the petition forms must pay the Secretary of State for them at the time of delivery.
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> 3. Furnished within 10 days. The Secretary of State shall furnish the forms within 10 days after request and payment.
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> 4. Forms printed by voters. If a voter wishes to have the forms printed and furnished by himself, rather than by the Secretary of State, and at his own expense, he may do so provided these forms are first approved by the Secretary of State as to form and content.

Since § 1351 has not been interpreted by the Maine Law Court, the question at issue here is one of first impression.

As a preliminary matter, it should be noted that the 10-day provision might reasonably be construed as applicable only when the voter is asking that the Secretary of State furnish the requisite forms. This interpretation finds support in the language of the first paragraph of § 1351, which states that "[o]n the written application of a voter, . . . the Secretary of State shall furnish enough petition forms to invoke the . . . referendum procedure provided in the Constitution. . . . " If the term "application" in subsection 1 refers only to an application for petition forms to be supplied by the State, then the 10-day time period would presumably be inapplicable to the voter who intends "to have the forms printed and furnished by himself," pursuant to § 1351(4). This reading would dispose of your question since in the present case the voters are furnishing their own forms.

The contrary interpretation, namely, that § 1351(1) applies to all referendum drives, is suggested by the wording in art. IV, pt. 3, § 20 of the Maine Constitution. The relevant language provides as follows:

> Petition forms shall be furnished or approved by the Secretary of State upon written application signed in the office of the Secretary of State by a resident of this State whose name must appear on the voting list of his city, town or plantation as qualified to vote for Governor. (emphasis added.)

Since petition forms furnished by the voter must be approved by the Secretary of State under § 1351(4), it is clear that all referendum drives must commence with a written "application" to that official. Thus, if application has the same meaning in § 1351(1) as it does in the Constitution, the 10-day provision would apply to the situation which prompted your inquiry.

In the final analysis, it is unnecessary for us to choose between the above interpretations, since we believe that even the broader reading of the statute would not bar a referendum in the instant case. Thus, assuming for purposes of this opinion that § 1351(1) applies even when the voter is furnishing his or her own forms, we shall proceed to set forth the basis for our conclusion that the statute does not extinguish the right to a referendum under the facts you have presented to us.

LEGAL ANALYSIS:

Constitutional and statutory provisions dealing with the right of the people to an initiative or a referendum must be interpreted in accordance with certain well-established principles. Of fundamental importance is the notion that these provisions are to be construed so as to promote, and not to frustrate, the people's exercise of their legislative power. See, e.g., Klosterman v. Marsh, 143 N.W.2d 744, 749 (Neb. 1966). In interpreting a statute which established certain formal requirements for the signing of referendum petitions, the Supreme Court of North Dakota articulated the underlying policy considerations:

> Such statutes must be liberally construed by the courts to facilitate and not to hamper the exercise by the people of the rights reserved to the people by the Constitution. . . . All doubts as to the construction of applicable provisions pertaining to the rights so reserved to the people must be resolved in favor of upholding those rights.
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> Hunett v. Meier, 173 N.W. 2d 907, 911-12 (N. Dak. 1970).

Judicial sensitivity to the constitutional right of the people to initiate and refer legislation is evidenced by the courts' willingness to invalidate statutes which, although intended to regulate the initiative and referendum process, have the effect of limiting the underlying right to utilize that process.[1] In Wolverine Golf Club v. Hare, 180 N.W.2d 820 (Mich. App. 1970), aff'd., 185 N.W.2d 392 (Mich. 1971), the court was confronted with the constitutionality of a statutory requirement that initiative petitions be filed not less than 10 days before the start of a legislative session. After noting that the only time limit in the relevant provision of the Michigan Constitution mandated legislative action on the initiated bill within 40 session days of its submission, the court concluded that the 10-day statutory limit was unreasonably restrictive of the initiative right and thus unconstitutional. See also Colorado Project-Common Cause v. Anderson, 495 P.2d 218 (Colo. 1972).

The above discussion suggests the basic dilemma in dealing with formal statutory requirements designed to regulate the initiative and referendum process. Frequently, the courts appear to be faced with two undesirable alternatives, namely, to invalidate the statute on constitutional grounds[2] or to thwart the people's exercise of their legislative power because

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1/ As stated by the Law Court,

> The right of the people, as provided by . . . the Constitution, to enact legislation and approve or disapprove legislation enacted by the legislature is an absolute one and cannot be abridged directly or indirectly by any action of the legislature. Farris ex rel. Dorsky v. Goss, 143 Me. 227, 231 (1948).

2/ For a discussion of judicial reluctance to declare statutes unconstitutional, see State v. Vahlsing, Inc., 147 Me. 417, 430 (1952).

of a minor irregularity.[3/] Perhaps to avoid those alternatives, it is not uncommon for the courts to hold that these procedural requirements are of directory, rather than of a mandatory, nature. The consequence of such a holdling is that "substantial" compliance with the statute will be deemed sufficient. See, e.g., Palmer v. Broadbent, 260 P.2d 581 (utah 1953).

Although the question of whether a provision is directory is ultimately one of legislative intent, the cases provide some guidance. In State v. Superior Court, 143 P. 461 (Wash. 1914), the Supreme Court of Washington indicated certain factors to be considered. First, a statute may generally be regarded as directory if it relates to a matter of convenience rather than substance, or where the directions of the statute are given merely with a view to the proper, orderly, and prompt conduct of business. Second, the fact that the statute is in affirmative, rather than negative, words and relates to the time and manner of doing the acts which constitute the chief purpose of the law is evidence that it was intended to afford direction and not as an absolute mandate. Finally, it is well established that election laws are frequently viewed as directory. Quoting from Duncan v. Shenk, 9 N.E. 690, 692 (Ind. 1887), the court stated:

> It is. . . a well-recognized principle of statutory construction that election laws are to be liberally construed when necessary to reach a substantially correct result, and to that end their provision will, to every reasonable extent, be treated as directory rather than mandatory. 143 P. at 469.

As noted above, an initiative or referendum will not be invalidated if there has been substantial compliance with a directory statute. Various cases have upheld the people's exercise of their legislative power despite the failure to comply with the literal terms of a formal requirement. See, e.g., Palmer v. Broadbent, supra, (wrong size type on petition;

3/ See, e.g., Kiernan v. City of Portland, 111 P. 379 (Ore. 1910), in which the Supreme Court of Oregon stated:

> Courts should hesitate to disfranchise 10,000 voters because of the neglect of an officer to comply with a technical and comparatively unimportant provision of the law, unless it can be seen that the effect of such negligence might have been to change the result of the election. 111 P. at 382.

no recorder's certificate; and validating checkmarks made after, instead of before, the names); State v. Anderson, 147 P. 526 (Ore. 1915) (irregularities in the form of the ballot and in the ordinance calling the election); State v. Superior Court, supra, (use of pencil instead of ink by authenticating officers; and inclusion of too many names on individual petition sheets); and Kiernan v. City of Portland, supra, (failure to include certain words on the ballot, and mistake in numbering). The propensity of the courts to treat as legally insignificant minor deviations from procedural requirements is particularly strong when the noncompliance involves some act or omission by a governmental official. For example, in State v. Carter, 165 S.W. 773 (Mo. 1914), the court refused to invalidate a referendum because of the failure of the Secretary of State and Attorney General to perform certain duties within the time fixed by statute. Declaring the statute to be directory as to the voters, the court held that there was compliance with the provision as long as the acts were carried out in ample time to permit a vote.

Applying the above analysis to the situation you have raised, we believe that the 10-day limit in 21 M.R.S.A. § 1351(1) should be treated as a directory provision.[4/] Accordingly, your question is governed by the following principle of law, as articulated by the leading commentator on statutory construction:

> . . . [I]f the act is performed but not in the time or in the precise manner directed by the statute, the provision will not be considered mandatory if the purpose of the statute has been substantially complied with and no substantial rights have been jeopardized. Sands, 1-A Sutherland Statutory Consruction § 25.03 (4th ed. 1972) (emphasis added.)

4/ Since each election statute must be considered individually, paying particular attention to its underlying purpose, it should not be assumed that we would reach the same conclusion with respect to other laws enacted to regulate initiatives and referenda. For example, we would be far more reluctant to treat as directory a law which was designed to prevent fraud or abuse of the electoral process.

Turning to the problem at hand, it seems clear that there has been substantial compliance with the statutory time period found in 21 M.R.S.A. § 1351(1). We base this conclusion on the following facts: 1) Your initial inquiry to the Secretary of State was made within the 10-day limit; 2) the subsequent delay was apparently occasioned by your understandable belief that formal application for a referendum petition should await advice from the Attorney General as to whether the bill in question was subject to referendum; 3) formal application was made shortly after that advice was received; and 4) the delay was neither inordinate nor does it appear to have interfered with the State's ability to conduct the referendum. Finally, we can discern no substantial rights which have been, or will be, jeopardized by the minor deviation from the literal terms of 21 M.R.S.A. § 1351.

In summary, based on the facts available to us, it is our conclusion that a referendum on the Implementation Act is not precluded because the application for the referendum petition was made more than ten days after the adjournment of the legislative session at which the act was passed.

I hope this information is helpful. Please feel free to contact me if I can be of any further service.

Sincerely,

RICHARD S. COHEN
Attorney General

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