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STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, MAINE 04333

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Honorable Laurence E. Connolly, Jr.
Maine House of Representatives
State House Station #2
Augusta, Maine 04333

Dear Representative Connolly:

You have inquired as to whether Legislative Document 897, "AN ACT to Deny Certain State Funds to Any Person Who Refused to Register Under the United States Military Selective Services [sic] Act," is constitutional under various provisions of the United States and Maine Constitutions. For the reasons which follow, it is the opinion of this Department that the bill is constitutional.

L.D. 897 would enact a new section into the Maine Code, 20-A M.R.S.A. § 12601, which would provide in its entirety as follows:

> Any person who is required to present himself and submit to registration under the United States Military Selective Services [sic] Act, 50 United States Code, -App., Section 451, et seq., and who fails to do so is ineligible to receive any state funded grant, scholarship or loan made available to persons enrolled in post-secondary educational programs.
>
> The officials who administer those financial assistance programs may require an applicant to submit written proof of registration prior to the award of a post-secondary educational grant, loan or scholarship.

The first paragraph of the proposed legislation closely tracks a 1983 amendment to the Military Selective Service Act, 50 U.S.C. App. § 451, et seq., which provides that persons who fail to register for the Selective Service shall be ineligible for federal educational assistance. 50 U.S.C. App. § 462(f)(1), enacted by § 1113 of the Department of Defense Authorization Act of 1983, P.L. 97-252. This provision was sustained against various constitutional challenges by the United States Supreme Court in the recent decision of Selective Service System v. Minnesota Public Interest Research Group, --U.S.--, 104 S.Ct. 3348 (1984). Essentially, your questions concern whether the Maine statute would violate other provisions of the Federal Constitution not addressed by the Supreme Court in Selective Service System, as well as whether the Maine Supreme Judicial Court would reach any different result as to any of your questions under corresponding provisions of the Maine Constitution. This Opinion will respond to your questions in the order in which they were raised.

I. Federal Preemption.

Your first question is whether the State Government has been preempted by the actions of the Congress in enacting, pursuant to the power conferred upon Congress to "raise and support Armies", U.S.CONST., art. I, § 8, cl. 12, the Military Selective Service Act, as amended. The procedure by which the United States Supreme Court determines whether state law has been preempted by federal action has been repeatedly stated, most recently in Brown v. Hotel & Restaurant Employees & Bartenders International Union Local 54, --U.S.--, 104 S.Ct. 3179 (1984). First, the Court determines if

> . . . in the federal enactment, Congress has explicitly mandated the preemption of state law, or has adequately indicated an intent to occupy the field of regulation, thereby displacing all state laws on the same subject. Even in the absence of such express language or implied Congressional intent to occupy the field, we may nevertheless find state law to be displaced to the extent that it actually conflicts with federal law. Such actual conflict between state and federal law exists when "compliance with both federal and state regulations is a physical impossibility," or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Id. at 3185-86 (citations omitted).

The first inquiry, therefore, is whether the Congress, in enacting the Military Selective Service Act, expressed any intention to preempt state action of any kind. An examination of the entire Act reveals that there is no expression of preemptive intent of any kind whatever contained in it. Accordingly, the only question remaining is whether a particular state action would conflict with the Act either by making it impossible for a person to comply with both or by frustrating the policies contained in the federal statute. Here again, there is no indication that the proposed Maine law would violate either of these principles. Accordingly, L.D. 897 is not preempted by federal law.

II. Right Against Self-Incrimination.

You next ask whether L.D. 897 would violate the Fifth Amendment of the United States Constitution or Article I, § 6 of the Maine Constitution because it might be read to compel a person who has not registered with the Selective Service in a timely fashion (a criminal offense under 50 U.S.C. App. § 462) to "confess" the fact of that late registration in order to obtain financial assistance.

This concern was discussed at length by the United States Supreme Court in Selective Service System, supra at 3358-59. There, the Court first noted that the federal statute, which is identical in pertinent respect to the proposed bill, does not compel anyone to disclose anything. Such disclosure is only required if persons seek financial assistance, and even in that case, the statute does not require an applicant for assistance to disclose whether he has complied with the Selective Service Registration Law in a timely fashion. All that is required is that he submit proof that he is in fact registered.

The Court then considered whether the federal statute would violate a non-registrant's Fifth Amendment rights by requiring him to register and thereby disclose to the Selective Service that he has failed to comply with the registration requirement in a timely fashion. On this point, the Court pointed out that the parties before it had made no effort to register and thus have not been required to assert their Fifth Amendment privilege when asked to disclose their date of birth to the Selective Service, which disclosure could result in prosecution for registering late. Thus, the Court found that the question of whether the federal statute violates the Fifth Amendment rights of late registrants was not ripe for review.

In the view of this Department, however, were the Court to face the issue, it would find that the rights of late registrants were not violated. Neither the federal benefit

statute nor the proposed bill compels a person to register with the Selective Service. Thus, if a person chooses to refuse to register, nothing in the proposed bill would require him to do so. The problem only arises when a person who has failed to register does so as a result of the unavailability to him of educational assistance if he does not. A question might then arise, if such a person were prosecuted for registering late, whether his disclosure of his late registration was coerced by the proposed bill. The two dissenting Justices in Selective Service System thought that such coercion in the constitutional sense would be found and consequently voted to invalidate the statute.

It would appear to this Department that since this position did not persuade the majority of the Justices in Selective Service System, it is not likely to persuade them should a case of an actual prosecution of a late registrant reach the Court. Throughout its discussion of the application of the Fifth Amendment to this problem, the Court, as indicated above, did not appear to be troubled by the fact that non-registrants may lose educational benefits by their non-registration. That being the case, it is difficult to see how the majority of the Court would be persuaded that a person who decided to change his mind with regard to registering as a result of a desire to obtain educational benefits, and was prosecuted for late registration as a result, should be treated any differently than a person who simply does not register and determines to sustain the loss of educational benefits. Had the Court felt any differently, it would seem that it would have adopted the position of the dissenters in Selective Service System and struck down the federal statute in that case.

With regard to the Maine Constitution, the Supreme Judicial Court of Maine has on several occasions indicated that the State constitutional right against self-incrimination is coextensive with that in the Federal Constitution. State v. Vickers, 309 A.2d 324 (Me. 1973); Gendron v. Burnham, 146 Me. 387 (1951). Accordingly, there is no indication that the Law Court would read the State constitutional provision against self-incrimination any more broadly than the United States Supreme Court has read the Fifth Amendment in Selective Service System.

III. Due Process.

You next suggest that L.D. 897 might violate the rights of an applicant for financial assistance to due process of law in that it would deprive him of "property" within the meaning of the Fifth and Fourteenth Amendments to the United States Constitution or Article I, § 6-A of the Maine Constitution,

without notice and hearing. As in the case of the right against self-incrimination, the Supreme Judicial Court of Maine has read the two due process clauses coextensively. Penobscot Area Housing Development Corp. v. City of Brewer, 434 A.2d 14, n. 9 (Me. 1981).

The principal question raised by this inquiry is whether the expectation of a person to an educational benefit constitutes "property" within the meaning of the two clauses. In the opinion of this Department, it does not. While the United States Supreme Court has indicated that the termination of certain public benefits without notice and hearing may constitute a violation of due process, Goldberg v. Kelley, 397 U.S. 254 (1970), it has never indicated that a person has a constitutionally protected property interest in a government benefit which has yet to be awarded to him. Nor is it clear that the Court would treat an educational benefit in the same fashion as it has treated public assistance benefits, such as those at issue in Goldberg. Thus, this Department cannot conclude that a property interest and the due process protections which attach to it would be found to exist in an education benefit . Cf. Gregory v. Town of Pittsfield, 479 A.2d 1304 (Me. 1984), aff'd. --U.S. -, 53 U.S.L.W. 3616 (Feb. 25, 1985).

IV. Equal Protection.

Your next question is whether the proposed bill would violate the Equal Protection Clauses of the United States (Fourteenth Amendment) and Maine (Article I, § 6-A) Constitutions because it would have the effect of discriminating without rational basis against wealthy non-registrants. This argument was rejected by the United States Supreme Court in Selective Service System, supra at 3359, n. 17. In addition, the Supreme Judicial Court of Maine has adopted the same analytical framework for examining statutes under the Maine Equal Protection Clause as that used by the United States Supreme Court under the federal clause. Beaulieu v. City of Lewiston, 440 A.2d 334, 338-42 (Me. 1982), citing, inter alia, Schweiker v. Wilson, 450 U.S. 221, 230 (1981). Thus, it is clear that the proposed bill would present no equal protection problem.

V. Freedom of Religion.

Your next inquiry is whether the proposed bill would violate the right to free exercise of religion guaranteed by the First Amendment to the United States Constitution and Article I, § 3 of the Maine Constitution in that it would penalize persons who refuse to register for the Selective Service on religious grounds. The short answer to this

question is contained in the recent decision of the United States District Court for the Northern District of Indiana in Garman v. United States Postal Service, 509 F. Supp. 507-509 (N.D.Ind. 1981);

> A requirement that all eligible persons register for the draft infringes on the rights of those who oppose military service based on religious or other convictions have been uniformly rejected for the past several decades. Richter v. United States, 181 F.2d 591, 593 (9th Cir. 1950), cert. den. 340 U.S. 892 (1950). The courts have squarely held that "the requirement (of selective service registration) does not infringe or curtail religious freedom since registering is not religious interference. . . ." United States v. Bertram, 477 F.2d 1329, 1330 (10th Cir. 1973) (other citations omitted).

Your inquiry implies, however, that it might make a difference constitutionally that since the decision in these cases, the regulatory system for determining whether a registrant is eligible for conscientious objector status has changed to permit such a determination only after a notice of induction. 32 C.F.R. §§ 1624.5(a), 1633.2(h), 1633.3. These provisions, however, would not appear to affect the constitutionality of cutting off educational assistance for a person who fails to register. The only fact of relevance under the proposed bill for the termination of eligibility for educational assistance is whether the person has registered. Since it is not an infringement upon religious freedom to require such registration, an expansion of the consequences for that failure does not violate the First Amendment either.

With regard to the Maine Constitution, it should be noted that the text of the Maine Free Exercise Clause differs substantially from that of the First Amendment of the United States Constitution. This Department is not aware of any express determination by the Supreme Judicial Court of Maine that these two clauses should be read as coextensive, determinations which the Court has made with regard to other clauses which appear in both Constitutions as discussed above. On the other hand, the Law Court has given no indication that it will interpret the Maine Free Exercise Clause more broadly than the federal clause. Thus, the authority concerning the constitutionality of Selective Service registration requirements set forth above is likely to be controlling in Maine.

VI. Maine Human Rights Act.

Your final inquiry is whether the proposed bill would "contradict" the strong legislative mandate against sex discrimination in education found in the Maine Human Rights Act. The answer to this question is simply that, whether the bill is inconsistent with a prior statute or not, such a fact is irrelevant for purposes of assessing its constitutionality. The issue therefore resolves into a question whether a policy embodied in past legislation should be altered. Since this determination is clearly within the legislative province, our Office offers no opinion as to its merits.

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I hope the foregoing answers your questions. Please feel free to reinquire if further clarification is necessary.

Sincerely,

JAMES E. TIERNEY
Attorney General

JET/ec
cc: Hon. Larry M. Brown
Hon. Eugene J. Paradis
Hon. Ernest C. Greenlaw
Hon. John McSweeney