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September 6, 1991

Honorable G. William Diamond
Secretary of State
State House Station #29
Augusta, ME 04333

Dear Secretary of State Diamond:

You have advised this Department that you have been requested to provide forms, pursuant to 21-A M.R.S.A. § 901 and § 906, for a petition to initiate legislation, pursuant to Article IV, Part 3, Section 18 of the Maine Constitution, which would place limits on the ability of members of the Maine Senate and House of Representatives and members elected from Maine of the United States Senate and House of Representatives to serve in those bodies for more than a specified number of years. You have inquired of this Department whether the enactment of such initiated legislation would be constitutional. For the reasons which follow, it is the Opinion of this Department that it would not be constitutional for the voters of the State (or the Legislature itself) to pass legislation limiting the terms of State or Federal legislators.

Under the Maine Constitution, members of the Maine Senate and House of Representatives are elected for two-year terms. Me. Const. art. IV, pt. 2, § 1 (Senate); art. IV, pt. 1, § 3 (House of Representatives). Similar provisions exist in the United States Constitution. U.S. Const. art. I, § 3; amend. XVII (Senate); art. I, § 2 (House of Representatives). All of these provisions are silent on the issue of the continued eligibility of incumbents for election to additional terms. The question which you present is whether such limits may be

imposed by ordinary legislation on these constitutionally created offices.

Research does not disclose any instance in the history of the United States in which legislation was passed purporting to limit the terms of members of the United States Congress or of any state legislature and the constitutionality of such legislation was determined by a court. Nonetheless, the Supreme Judicial Court of Maine has set forth, in the context of legislation regarding the tenure of a legislatively created office, the general principle which applies.

> When the Constitution fixes the tenure of a civil office, it is beyond the power of the Legislature to affect the tenure. Persons holding such constitutional offices, therefore, may be removed only by methods authorized by the Constitution itself.
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> * * *
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> It does not follow, however, that the same principle governs as to civil offices the tenure of which is fixed by statute. As to such offices it has been held that, in the absence of a constitutional prohibition to the contrary, it is "undisputed" that
>
> > "[o]nly the legislature can establish a public office (other than a constitutional office) as an instrumentality of government. Whether the creation of the office is necessary or expedient, its duties, its powers, its beginning, its duration, its tenure, are all questions for the legislature to determine and be responsible to the people for their correct determination." State v. Butler, 105 Me. 91, 96, 97, . . . (1909).

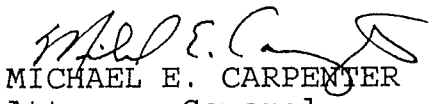
Opinion of the Justices, 343 A.2d 196, 203 (Me. 1975). It is clear, therefore, that when an office is created by the Constitution, restrictions on the ability to hold that office may be imposed only by amendment to the Constitution.

As indicated above, the offices on which the legislation which has been presented to you for approval for submission to the voters seeks to impose limits are created by the State and Federal Constitutions. The proposal, therefore, directly

violates the principle outlined above.[1] For this reason, therefore, it is the Opinion of this Department that it would be within your authority under 21-A M.R.S.A. § 901 and § 906 to decline to develop a form permitting the persons submitting the proposal to you to circulate petitions seeking to have it presented to the Legislature and to the general electorate.

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

Sincerely,



MICHAEL E. CARPENTER
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MEC:sw

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[1] The proposal suffers from the additional disability of attempting, in part, to limit eligibility for service in federal legislative office by State statute.