

June 11, 1998

Honorable William M. Gardner
Secretary of State
State House
107 North Main Street
Concord, New Hampshire 03301

Re: Kennedy v. Gardner

Dear Secretary Gardner:

As you know, the United States District Court issued an order on Friday in the Kennedy v. Gardner lawsuit, in which the Court expressed its opinion that the additional petition and fee requirements for candidates who do not agree to the State's voluntary spending limits is unconstitutional. Because the court found that these requirements are unlikely to survive a First Amendment claim, the Court granted a preliminary injunction.

Of particular relevance is the following language from the opinion:

New Hampshire's spending cap laws differ from the statutory schemes at issue in Buckley and Vote Choice both because the state has chosen coercive means to achieve adherence to its spending cap and because the condition those laws impose on gaining access to the ballot -- limiting the constitutional right to make campaign expenditures -- bears no reasonable relationship to any legitimate reason for controlling ballot access.

Rather than choosing to encourage compliance with a spending cap by providing incentives such as public financing or free television time, New Hampshire has opted to penalize non-complying candidates by making it more difficult for them to gain access to the ballot.

The Court rejected any claim that the petition and fee requirements served a legitimate purpose other than coercion of candidates' agreement to the "voluntary" limits. Therefore, in the Court's opinion, these requirements are unconstitutional.

We find no grounds to appeal this decision. Had the case not been mooted by legislation signed on Friday, we do not think that we could have avoided the imposition of a permanent injunction and significant fees in the Kennedy case.

We can find no fault with the approach taken to this case by Judge Barbadoro, and we feel that his legal reasoning will be followed by the United States District Court and the First Circuit Court of Appeals in any future case. For this reason, we do not feel that we can, in the future defend the additional petition and fee requirements for candidates who do not agree to the voluntary spending limits. While the law which was enacted on Friday repeals the requirement for state candidates, the reasoning of Judge Barbadoro's opinion applies with equal, if not superior, force to federal candidates as well.

The petition and fee requirements were a New Hampshire innovation and an effective one. Despite your best efforts and ours, however, the petition and fee requirements are no longer enforceable.

Nevertheless, not all of the voluntary expenditure limit law has been struck down. Candidates can still agree voluntarily to abide by the State's campaign spending law. In doing so, they promise the people of the State that they will limit their spending and all spending on their behalf; that they will cooperate with this office in our review of their compliance; and that they will pay appropriate fines if they overspend. Candidates agreeing to the cap, in other words, promise to play by a set of rules which are set forth in Chapter 664 and which have developed over the years through the actions of your office and mine.

In ensuring that they live up to this promise, we must rely on the good faith of the candidates and on the strength of public opinion. This is true to a great extent with respect to state candidates, and almost entirely with respect to federal candidates. For the State candidates, the law gives this office a number of coercive enforcement tools. As I have stated in connection with another matter, federal law makes coercive enforcement against federal candidates who voluntarily agree to the limits impossible.

In the future, those who file their declarations of candidacy may be required to indicate whether or not they agree to the State's voluntary expenditure limits. However, if they choose not to agree to the limits, they need not file additional petitions or pay additional fees.

In light of the advice we have given in this letter, there may be candidates who wish to amend their declarations. Because the legislation and the order came after the filing period opened, candidates who have already filed should be given the opportunity to amend their declarations of candidacy prior to the close of the filing period tomorrow.

Sincerely,

Philip T. McLaughlin
Attorney General