



August 10, 2011

To: Commission on Governmental Ethics and Election Practices
From: Maine Citizens for Clean Elections
Re: Post-*McComish* changes to Maine law

Thank you for the opportunity to comment on possible changes to the Maine Clean Election Act.

Maine Citizens for Clean Elections (MCCE) is a nonpartisan coalition of groups and individuals that works in the public interest to advocate for, increase public support for, defend and improve the Maine Clean Election Act and related campaign finance law. We have been at this work since the 1990's. Whenever changes to this citizen-initiated law are contemplated, MCCE attempts to bring the point of view of Maine citizens to the decision-making table. We also bring the collective experience and expertise of allied legal and policy experts to help ensure that amendments are in keeping with good policy and legal precedents.

The U.S. Supreme Court decision in *Arizona Free Enterprise Club/McComish v Bennett* and Judge Singal's subsequent ruling in Maine were disappointing but not unexpected. The ruling was narrow; the constitutionality of public funding was affirmed. However, it is no longer possible for the State to distribute additional public funds to Clean Election candidates based on spending by other candidates or independent spenders. These "triggered" matching funds were declared to be unconstitutional.

One notable feature of the decision is the Court's clear rejection of "leveling the playing field" as an acceptable rationale for campaign finance laws. Although the defendants in Arizona made the case for triggered matching funds based on the prevention of corruption, the Court's majority pointed to evidence that the state had a level playing field in mind, citing language in the implementing rules that called the matching funds "equalizing funds." Thus, whatever recommendations the Commission ultimately makes to the Legislature must not be based on the desire for a level playing field.

SUCCESS OF CLEAN ELECTIONS

The Maine Clean Election Act has served the people of Maine well for more than 10 years. Strong supermajorities of Maine people support Clean Elections as evidenced in three separate polls this spring (available at <http://www.mainelections.org/polling.html>)

Member Organizations

AARP Maine, Common Cause Maine, EqualityMaine, League of Women Voters of Maine, League of Young Voters, Maine AFL-CIO, Maine Council of Churches, Maine People's Alliance/Maine People's Resource Center, Maine State Employees Association/SEIU Local 1989, Maine Women's Lobby, NAACP-Portland, Sierra Club Maine Chapter

P.O. Box 18187, Portland, ME 04112 • info@mainecleanelections.org

and by the robust participation in the program. Eighty percent of legislative candidates and four gubernatorial candidates in 2010 opted in to the Clean Election system.

For six election cycles Maine people have had the opportunity to run for state office without relying on private campaign contributions or their own bank account, and this has encouraged countless qualified Mainers to run, win, and serve.

It's a viable system, and even first time candidates can receive enough funding to run a vigorous and competitive campaign.

Candidates like it because it's pretty simple to use and understand, and it allows them to spend time making contact with voters rather than raising money from political donors. Once they successfully qualify, they do no fundraising at all.

Voters like it for those reasons, too, and they appreciate that once elected, Clean Election legislators serve without being beholden to any special interest.

It's inclusive, it's fair, and it works.

MCCE believes that all of these benefits can still be achieved and these values upheld even after the Court overturned the matching funds provision.

CLEAN ELECTIONS WITHOUT "TRIGGERED" MATCHING FUNDS

Our matching funds system attempted to provide some assurance to Clean Election candidates that they would be able to sustain a level of campaign activity sufficient to the demands of their particular race, even if that race included an extraordinarily well-funded opponent or a high level of independent spending. The idea was to encourage broad participation in the system and expand public debate while targeting funds to where they were most needed.

In this new legal landscape, Maine must pursue its objectives without using the expenditures of a non-participating candidate or an independent spender as a trigger for increased funding to the Clean Elections opponent. While the matching funds system was integral to the Clean Election program, it was far from perfect. In each election cycle, matching funds and the expenditures that triggered them were the subject of many complaints. One perennial complaint was that the funds often were distributed too late to spend effectively.

Our new system can improve upon the old one by providing more certainty to candidates about what resources are available to them, and when.

ALTERNATIVE PUBLIC FUNDING MODELS

There are other models for public funding, and the Ethic's Commission's invitation to comment dated July 18, 2011 suggests three options to consider. Each of these options is endlessly variable, and no matter which is chosen there will be many details to work out. We offer here some general insights and considerations about these options.

1. **Allow candidates to requalify for additional funds** – This idea builds on the familiar and inclusive qualifying process that has been part of Clean Elections from the beginning. With the exception of Seed Money, candidates would still not accept private donations, but they would be able to collect and submit additional Qualifying Contributions from voters in their district in order to receive limited additional distributions later in the campaign. Rather than relying on the state to decide which races receive additional funds, the candidates themselves would weigh various factors and decide whether to pursue a higher level of funding. For those who choose it, this would somewhat change the nature of a Clean Election campaign, which today involves no money changing hands between candidates and donors or voters after qualifying. Spending would still be limited for participating candidates.

We think this could be a viable option. Candidates should be able to collect the additional Qualifying Contributions early in the campaign if they prefer, but should not be prohibited from raising them later, as long as the Commission has enough time to process them.

2. **Allow candidates to raise limited private donations** – This is the hybrid model that is a feature of the proposed Fair Elections Now Act in Congress; it is not a full public funding system. This system puts a premium on gathering modest private contributions. After qualifying initially, candidates would continue to raise and spend private contributions, certain of which would be matched with public funds.

This is an attractive option for some other jurisdictions, particularly those that do not yet have a public funding option. New York City has a system like this today.

MCCE does not favor this system because of our concern that the injection of private money into the system and the emphasis on fundraising could lessen the impact of Clean Elections and damage the program's credibility with the public. The idea that a public funding distribution may be spent in part on fundraising later in the campaign runs counter to the spirit of our program today. And candidates in Maine tell us over and over again is that one of the best aspects of Clean Elections is that participants do not have to engage in fundraising activities throughout the campaign. Because fundraising is very limited and is over early, candidates can spend most of their campaign time with voters.

In our conversations with Maine people, candidates, and legislators we find very little support for this model for our own state races.

3. **Allow candidates an initial distribution and no additional funds** – This option has the benefit of simplicity, but is not likely to have the broad appeal of our current system. Unless the initial distributions are very high – significantly higher than now, candidates would run the risk of being a “sitting duck” for outsized spending by an opponent or independent spenders, and they would have no opportunity to access additional funds to ratchet up their campaign communications under any circumstances. And if initial distributions were raised that high across the board, the program would provide too much money in many races. This would not be a careful use of public resources.

MCCE’s biggest concern with a single distribution is that the amount will be too low, thus creating a situation where only candidates in safe seats feel comfortable opting in. One of the great successes of Clean Elections is its ability to allow challengers and first-time candidates to have a shot at winning election. Incumbents have the advantage in a private funding system, and they retain some advantages even with public funding. Our Clean Election option must provide adequate resources for challengers and others who do not begin the campaign with all of the advantages of incumbency – widespread name recognition, a basement full of yard signs, etc.

VALUE BENCHMARKS TO CONSIDER

In rethinking Clean Elections after *Arizona Free Enterprise Club/McComish v Bennett*, it’s important to preserve the fundamental value and benefits of the system as much as possible. In addition to complying fully with the Supreme Court decision, the system must also be right for Maine. Our amended system should

- Be inclusive and fair: All qualified Mainers can participate; the system treats similarly situated candidates the same way; the burdens of compliance with the rules and qualifying for funds are proportionate to the benefits of receiving public funds
- Be viable for most races: Funding is adequate to run a competitive race and win, even against an incumbent
- Be simple and have some continuity with the current system: Candidates and voters alike are able to understand and participate in the process
- Remain true to the original intent: Minimize the importance of private campaign contributions and reduce their influence, increase transparency, strengthen ties between voters and candidates, provide opportunity for Maine people to run for state office and serve without ties to special interests.
- Provide good stewardship of public money: The cost of the system must be reasonable for the state, it must provide real value, and it must include sufficient accountability.

OPPORTUNITIES FOR IMPROVEMENT

MCCE believes that the new, amended system should be at least as good as the old one. We see several opportunities to improve upon the program, and we encourage the Commission to look for similar opportunities.

First, the revised system should provide certainty to candidates about what resources are available to them, and when. One of the strengths of Clean Elections is that candidates know from Day 1 what their budget will be – the only exception to this was the chance that matching funds might become available later in the campaign. Many times those funds were triggered very late in the election – often too late to be spent effectively. And, if reports by privately funded opponents or independent spenders were not filed in a timely way, funds were delayed, exacerbating the problem. The biggest fine ever levied by this Commission was against an independent spender that failed to report on time, but many observers feel that even a large fine may not deter a deep-pocketed interest group from attempting to gain an advantage.

Second, the demise of matching funds means that our reporting laws are out-of-date since several statutory requirements were narrowly designed to make the matching funds system work. We do not view this as an opportunity to lessen the amount of disclosure, but rather a chance to craft a sensible reporting schedule that provides important and timely information to reporters, candidates, and voters. Improving and simplifying disclosure where possible should be a goal of the amended law.

DISCLOSURE

Although recent court rulings have eroded some campaign finance laws, courts at every level have upheld transparency laws. In some ways, the case for disclosure is stronger today than ever before, and Maine should make sure that its laws are as strong as they should be. We do not call for an overhaul of Maine's disclosure laws at this time, but we do ask the Commission to consider these recommendations:

1. Eliminate reporting requirements that only apply to privately funded candidates in races that include one or more Clean Election candidates.
2. Align reporting dates with any other important dates in the amended system.
3. Broaden reporting so that all candidates are providing the same information to each other and to the public at the same time.
4. Strengthen the reports of independent expenditures to provide more and timelier information to Maine people.
5. Provide adequate and appropriate information to Maine voters during the active period of campaigns so that they go to the polls as informed as possible.

KEEPING OUR PUBLIC AND PRIVATE FUNDING SYSTEMS IN BALANCE

It was suggested at the July 28th public hearing that the post-*McComish* review should include consideration of raising contribution limits for privately funded candidates. MCCE vigorously opposes this idea.

Maine has campaign finance laws that aim to protect Maine people from corruption, the appearance of corruption and the threat of undue influence. Whether we are represented by legislators who used Clean Elections or not, we should all be protected from these ills. MCCE has spent much effort over the years arguing that the two systems must be kept in balance. Clean Elections is a voluntary system, and not all candidates use it. The alternative, private funding, must include the sorts of provisions -- reasonable limits, transparency, etc -- that give Maine people confidence in their elections and their government.

Contribution limits were raised and indexed to inflation by the 124th Legislature, and there is no evidence that the current limits are too low. We urge the Commission to reject higher contribution limits as part of the post-*McComish* recommendations.

CONCLUSION

Although we believe the Court erred, and that our matching funds system was a boon to and not a burden on First Amendment values, we strongly believe that this review gives Maine an opportunity to further strengthen our excellent Clean Election system. As long as the revised system is rooted in the values that underlie Clean Elections, and as long as it is workable for candidates, administrators and others, we believe it will be successful. We look forward to working with the Commission as the process continues.

Thank you again for the opportunity to comment.