OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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FILE NO. 09-001

CONSTITUTION:
Senatorial Vacancy under
the Seventeenth Amendment

The Honorable John J. Cullerton
President of the Senate
State Senator, 6th District
327 Capitol Building
Springfield, Illinois 62706

The Honorable Michael J. Madigan
Speaker of the House
State Representative, 22nd District
300 Capitol Building
Springfield, Illinois 62706

The Honorable Christine Radogno
Minority Leader
State Senator, 41st District
309A Capitol Building
Springfield, Illinois 62706

The Honorable Tom Cross
House Republican Leader
State Representative, 84th District
316 Capitol Building
Springfield, Illinois 62706

Dear President Cullerton, Speaker Madigan, Leader Radogno, and Leader Cross:

The Illinois General Assembly is currently considering a number of proposals to amend the law addressing the process for filling a vacancy in the position of United States Senator (U.S. Senator). We have received a number of inquiries specifically concerning whether the General Assembly may pass a law authorizing the setting of a special election to allow the people of Illinois to elect a successor to the seat vacated by President Barack Obama. For the

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reasons stated below, it is my opinion that neither the Federal Constitution nor the Illinois Constitution prohibits such a law. Indeed, a law providing the people of Illinois with an opportunity to elect a U.S. Senator would be entirely consistent with the purpose and text of the seventeenth amendment. That amendment announces a clear preference for selecting U.S. Senators by direct popular election. It is well within the legislature's power to consider and enact changes to the current law to specify an earlier date for the election. In an effort to provide guidance as you consider this issue and how to draft such a bill, I offer the following legal analysis.

BACKGROUND

In November 2004, Barack Obama was elected to the United States Senate (U.S. Senate) from Illinois. His term of office was six years. U.S. Const. art. I, §3; amend. XVII. Following the November 2008 general election, a majority of the members of the Electoral College voted in favor of Barack Obama for the office of President of the United States. On January 20, 2009, Barack Obama was sworn in as President. In anticipation of assuming the presidency, President-elect Obama resigned his U.S. Senate seat effective November 16, 2008, thus creating a vacancy in that office. *See* 10 ILCS 5/25-2(2) (West 2007 Supp.).

Although the United States Constitution (U.S. Constitution) originally empowered state legislatures to select U.S. Senators (U.S. Const. art. I, §3), the seventeenth amendment creates a system of direct election "by the people" of each state. U.S. Const. amend. XVII. The amendment's second paragraph addresses the filling of vacancies and provides:

> When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of

> any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct. (Emphasis in original.) U.S. Const. amend. XVII.

Pursuant to this constitutional authority, the Illinois General Assembly authorized the Governor to make temporary appointments to the office of U.S. Senator. *See* 1913 Ill. Laws 307, 308, now codified at 10 ILCS 5/25-8 (West 2006). Section 25-8 of the Election Code (10 ILCS 5/25-8 (West 2006)) provides:

> When a vacancy shall occur in the office of United States Senator from this state, the Governor shall make temporary appointment to fill such vacancy until the next election of representatives in Congress[.]

On December 31, 2008, Rod R. Blagojevich, then the Governor of Illinois, exercised his authority under section 25-8 and temporarily appointed Roland W. Burris to fill the U.S. Senate seat previously held by President Obama. The Governor's certificate of appointment provides that he appointed Mr. Burris to represent Illinois in the U.S. Senate "until the vacancy * * * caused by the resignation of Barack Obama, is filled by election as provided by law."

President Obama's U.S. Senate term would have concluded in January 2011 following an election in November 2010. Under the current language of section 25-8, U.S. Senator Burris's temporary appointment will conclude in January 2011 following an election in November 2010, the next election of representatives in Congress. *See* 10 ILCS 5/2A-1.2 (West 2006).

Members of each legislative caucus have filed bills addressing special elections to fill a vacancy in a U.S. Senate seat, and we have received numerous inquires about the legislature's authority, under the U.S. and Illinois constitutions, to change the current law. The

central issue here is whether there would be any constitutional impediment to legislation setting a special election to fill the U.S. Senate seat when the Governor has already made a temporary appointment. To provide guidance to the legislature, we offer the following legal analysis.

ANALYSIS

Seventeenth Amendment

The seventeenth amendment generally contemplates that, upon the creation of a vacancy in a U.S. Senate office, the state's executive authority will issue a writ of election. But the seventeenth amendment also expressly authorizes state legislatures to permit the executive to make temporary appointments until the people can fill U.S. Senate vacancies by election. The amendment necessarily gives state legislatures discretion to determine the timing of these elections. If the legislature authorizes the governor to make a temporary appointment, the temporary appointee may hold office only "until the people fill the vacanc[y] by election as the legislature may direct."

Case law under the seventeenth amendment is limited, and there does not appear to be any discussion in the floor debates of the amendment regarding the filling of mid-term vacancies. *Trinsey v. Pennsylvania*, 941 F.2d 224, 231 (3d Cir. 1991), *cert. denied*, 502 U.S. 1014, 112 S. Ct. 658 (1991). However, the vacancy provision has been found to confer reasonable discretion upon the states concerning the timing and manner of conducting vacancy elections. *Valenti v. Rockefeller*, 292 F. Supp. 851 (W.D.N.Y. & S.D.N.Y. 1968), *aff'd* 393 U.S. 405, 89 S. Ct. 689 (1969).

In *Valenti*, a U.S. Senate vacancy occurred when Robert F. Kennedy was assassinated in June 1968, less than sixty days before New York's regular spring primary. State law provided that the Governor would appoint a temporary Senator until an election in

November 1970. Three consolidated suits by New York voters sought a determination that the seventeenth amendment required the U.S. Senate vacancy to be filled at the November 1968 general election. The district court rejected this argument. The court held that the delay in conducting the election was constitutional when balanced against the State's interests in conducting an election with maximum public participation. The court noted that the seventeenth amendment "grants to the states some reasonable degree of discretion concerning both the timing of vacancy elections and the procedures to be used in selecting candidates for such elections." *Valenti*, 292 F. Supp. at 856; *see also Trinsey*, 941 F.2d at 233. After reviewing the language in article I, section 4, of the U.S. Constitution, which gives state legislatures the initial power to prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives[,]" the court concluded that the drafters of the seventeenth amendment "did intend to place some limit on the discretion of the states concerning the timing of vacancy elections by specifying that a Governor may make only a 'temporary' appointment until an election is held." *Valenti*, 292 F. Supp. at 856. But nothing in the amendment suggests that once a state legislature sets a timetable for the election of a U.S. Senator to fill a vacancy, it cannot later amend that timetable.

Based on *Valenti*, the General Assembly may regulate the time, place, and manner of conducting U.S. Senate vacancy elections. We believe that a bill providing for a special election to fill a U.S. Senate vacancy would be consistent with the seventeenth amendment. Because the legislature has not previously considered this issue and a number of legal questions may arise, we will analyze the key legal issues.

Vested Right in a Temporary Appointment

A temporary appointee does not possess a "vested right" to serve as a U.S. Senator until the next congressional election. Consequently, the General Assembly may schedule a special election prior to the next congressional election without interfering with any vested rights.

Because the primary function of the legislature is to set policy, and one session of the legislature generally cannot bind a future session, there is a strong presumption that laws do not confer "vested rights" protected against subsequent modification or termination. *See, e.g., People ex rel. Sklodowski v. State*, 182 Ill. 2d 220, 231-32 (1998) ("The presumption is that laws do not create private contractual or vested rights, but merely declare a policy to be pursued until the legislature ordains otherwise"); *Envirite Corp. v. Illinois Environmental Protection Agency*, 158 Ill. 2d 210, 215 (1994) ("There is no vested right in the continuance of a law. The legislature has an ongoing right to amend a statute"); *Fumarolo v. Chicago Board of Education*, 142 Ill. 2d 54, 104 (1990); *see also National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 466, 105 S. Ct. 1441, 1451 (1985); *Choose Life Illinois, Inc. v. White*, 547 F.3d 853, 858 n.4 (7th Cir. 2008) (under Illinois law, "[i]t is axiomatic that one legislature cannot bind a future legislature"); *Village of Rosemont v. Jaffe*, 482 F.3d 926, 937 (7th Cir. 2007) (applying Illinois law). The party claiming that a statute creates a vested contractual right bears the burden of establishing that the legislature intended to do so. *Sklodowski*, 182 Ill. 2d at 232; *Fumarolo*, 142 Ill. 2d at 104. And the key factor in determining the legislature's intent is the language of the statute and, specifically, whether that language refers expressly to the existence of a contractual right. *Fumarolo*, 142 Ill. 2d at 104-05; *see also Unterschuetz v. City of Chicago*, 346 Ill. App. 3d 65, 71-72 (2004).

In this case, section 25-8 of the Election Code says nothing to suggest that an appointment to a vacant U.S. Senate seat gives the temporary appointee a contractual right to serve until the next congressional election. Instead, in keeping with the seventeenth amendment, the statute authorizes the State's executive to make a temporary appointment until the vacancy is filled "by election as the legislature may direct." U.S. Const. amend. XVII. The fact that section 25-8 currently schedules such an election for the "next election of representatives in Congress" does not imply that the General Assembly has relinquished its sovereign legislative power to change the law and specify an earlier election date. *See Grobsmith v. Kempiners*, 88 Ill. 2d 399, 404-05 (1981) (civil service status is not a vested right, and there is no constitutional impediment to the power of the General Assembly to change the duration of the term of the appointments or the method of fixing the time when presently existing terms would terminate). The people of Illinois retain the ultimate right to elect a U.S. Senator. Allowing the people of Illinois to elect their U.S. Senator is consistent with the U.S. Constitution. The seventeenth amendment clearly expresses a preference for selecting U.S. Senators by direct popular election. Under the seventeenth amendment, although a state legislature may permit the state executive to fill a vacancy by appointment, that appointment is only "temporary."

Due Process

The right to due process also does not prevent the General Assembly from setting an election to elect a U.S. Senator before the temporary appointee completes the term currently provided for in section 25-8 of the Election Code. Both the fourteenth amendment to the U.S. Constitution and article I, section 2, of the Illinois Constitution prevent Illinois from depriving a person of "property, without due process of law[.]" U.S. Const. amend. XIV; Ill. Const. 1970,

art. I, §2. Related provisions of the Illinois Constitution generally have the same meaning as their Federal counterparts. *People v. Colon*, 225 Ill. 2d 125, 152-53 (2007). Consequently, there is no basis to assume that Illinois' due process clause would provide greater protections than the fourteenth amendment in this situation.

Under the Federal Constitution, state law determines whether a claimed interest amounts to "property" protected by due process, and if such an interest exists, Federal law determines what process is due before a person is deprived of that interest. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538, 105 S. Ct. 1487, 1491 (1985), *cert. denied*, 488 U.S. 941, 109 S. Ct. 363 (1988), *and cert. denied*, 488 U.S. 946, 109 S. Ct. 377 (1988); *Bishop v. Wood*, 426 U.S. 341, 344, 96 S. Ct. 2074, 2077 (1976); *Miyler v. Village of East Galesburg*, 512 F.3d 896, 898 (7th Cir. 2008); *East St. Louis Federation of Teachers, Local 1220 v. East St. Louis School District No. 189 Financial Oversight Panel*, 178 Ill. 2d 399, 416-19 (1997). Thus, to challenge a statute advancing the date of an election to fill a U.S. Senate vacancy, the temporary appointee would have to establish that: (1) as a matter of State law, his or her appointment created a property interest in that appointment as specified by section 25-8 at the time of the appointment; and (2) as a matter of Federal law, legislation changing that term failed to provide the process constitutionally due. Such a challenge should fail on both grounds.

"Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property." *East St. Louis Federation of Teachers*, 178 Ill. 2d at 415. Thus, although Illinois law recognizes the existence of a property interest in a public office where the affected person may be removed only for specified reasons (*East St. Louis Federation of Teachers*, 178 Ill. 2d at 415-18), when state

law leaves an office holder subject to removal without "cause," that office holder has no property interest that due process protects against such a removal. *Willecke v. Bingham*, 278 Ill. App. 3d 4, 10 (1996); *see generally Bishop*, 426 U.S. at 344, 96 S. Ct. at 2077; *Miyler*, 512 F.3d at 898. And even when a protected property interest exists, Federal due process normally creates no independent entitlement to compliance with any specific procedures established by state law. *See Martin v. Shawano-Gresham School District*, 295 F.3d 701, 706-07 (7th Cir. 2002), *cert. denied*, 537 U.S. 1047, 123 S. Ct. 601 (2002); *see also Cleveland Board of Education*, 470 U.S. at 542, 105 S. Ct. at 1493.

Here, the General Assembly possesses inherent authority, derived directly from the Federal Constitution, to specify the timing and manner of elections to fill a U.S. Senate vacancy. As a result, it is difficult to conceive of how a temporary appointee could claim a property interest in the term of the appointment made pursuant to a law enacted during any particular legislative session. Moreover, even if a temporary appointee had a property interest in the initially anticipated duration of the appointment, the General Assembly's decision to reduce the appointment term would not constitute a deprivation of that interest without due process. With respect to procedural due process rights, courts have repeatedly held that the legislative process itself "provides all the process that is due[.]" *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433, 102 S. Ct. 1148, 1156 (1982); *see also Flemming v. Nestor*, 363 U.S. 603, 609-11, 80 S. Ct. 1367, 1371-73 (1960), *reh'g denied*, 364 U.S. 854, 81 S. Ct. 29 (1960); *Gattis v. Gravett*, 806 F.2d 778, 781 (8th Cir. 1986) ("While the legislative alteration or elimination of a previously conferred property interest may be a 'deprivation,' the legislative process itself provides citizens with all of the 'process' they are 'due'") (citing *Atkins v. Parker*, 472 U.S. 115, 131, 105 S. Ct.

2520, 2530 (1985), and *Logan*, 455 U.S. at 433, 102 S. Ct. at 1155-56). That principle is dispositive here. Because the seventeenth amendment expressly authorizes a state legislature to set an election as it "may direct" to fill a U.S. Senate vacancy, a legislative determination to hold that election at a particular time would not unconstitutionally deprive a temporary appointee of any supposed property interest.

Equal Protection, Bill of Attainder, and Special Legislation

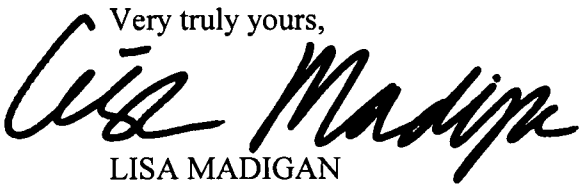
Finally, neither the equal protection clauses of the U.S. or Illinois constitutions, the bill of attainder prohibition in the U.S. Constitution, nor the special legislation clause of the Illinois Constitution would be violated by a generally applicable law governing elections to fill all U.S. Senate vacancies. These provisions restrict government's authority to single out individuals or groups for punishment or disparate treatment. *See Wauconda Fire Protection District v. Stonewall Orchards, LLP*, 214 Ill. 2d 417, 434 (2005) (equal protection); *United States v. Lovett*, 328 U.S. 303, 315, 66 S. Ct. 1073, 1078-79 (1946) (bill of attainder); *Crusius v. Illinois Gaming Board*, 216 Ill. 2d 315, 325 (2005) (special legislation). But a law that applies to all U.S. Senate vacancies does not single out or improperly classify any individual or group. Additionally, such a bill may include language addressing logistical concerns surrounding the bill's initial implementation, but so long as it creates a new rule that applies equally to all U.S. Senate vacancies, it should not violate the equal protection, bill of attainder, or special legislation provisions.

CONCLUSION

The seventeenth amendment clearly expresses a preference for allowing the people of Illinois to elect a U.S. Senator to fill a vacancy. Moreover, the U.S. Constitution grants states broad authority to determine the time, place, and manner of elections to fill U.S. Senate

vacancies. By enacting a law to set a special election for the U.S. Senate, the General Assembly would be acting in a manner that is consistent with the seventeenth amendment. A temporary appointee to the U.S. Senate has no right that prevents the General Assembly from passing legislation to enable the people to elect their U.S. Senator. The constitutional right to equal protection of the laws and the prohibitions against bills of attainder and special legislation, do not prohibit the General Assembly from passing a bill changing the date of an election to choose a new U.S. Senator.

Very truly yours,



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