OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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ATTORNEY GENERAL

January 25, 2011

FILE NO. 11-001

CONSTITUTION:
Affect of Senate's *Sine Die*
Adjournment on Pending
Gubernatorial Nominations

The Honorable Judy Baar Topinka
Illinois State Comptroller
201 Capitol
Springfield, Illinois 62706

Dear Comptroller Topinka:

I have your letter inquiring whether gubernatorial nominations subject to the Senate's advice and consent that are pending when the Senate adjourns a session *sine die* expire with the adjournment. For the reasons stated below, it is my opinion that a nomination pending when the Senate adjourns a session *sine die* does not expire with the adjournment. Rather, the nomination carries over into the new biennial session.

BACKGROUND

You have provided us with a copy of the letter that you received from the Office of the Senate President, dated January 14, 2011 (Senate Letter), indicating that, when the 96th

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General Assembly adjourned *sine die* on January 11, 2011, "all unfinished business before the Senate expired, including all pending gubernatorial nominations." The Senate Letter also states that "the Senate of the 97th General Assembly is without authority to act upon a gubernatorial nomination pending before the previous Senate as that body no longer exists" and that it is "unaware of any legal authority permitting the former nominees to continue to draw a salary or receive expense reimbursements, especially since none of these persons are serving pursuant to a gubernatorial nomination pending before the Senate of the 97th General Assembly." Enclosed with the Senate Letter is a listing of gubernatorial nominees whose nominations have allegedly expired.

ANALYSIS

Article V, section 9, of the Illinois Constitution of 1970 sets out the Governor's appointment powers and provides:

> (a) The Governor shall nominate and, by and with the advice and consent of the Senate, a majority of the members elected concurring by record vote, shall appoint all officers whose election or appointment is not otherwise provided for. *Any nomination not acted upon by the Senate within 60 session days after the receipt thereof shall be deemed to have received the advice and consent of the Senate.* The General Assembly shall have no power to elect or appoint officers of the Executive Branch.
>
> (b) If, during a recess of the Senate, there is a vacancy in an office filled by appointment by the Governor by and with the advice and consent of the Senate, the Governor shall make a temporary appointment until the next meeting of the Senate, when he shall make a nomination to fill such office.

> (c) *No person rejected by the Senate for an office shall*, except at the Senate's request, *be nominated again for that office at the same session* or be appointed to that office during a recess of that Senate. (Emphasis added.)

The rules of statutory construction apply to the construction of constitutional provisions. *People v. Purcell*, 201 Ill. 2d 542, 549 (2002); *Goodman v. Ward*, 397 Ill. App. 3d 875, 877 (2009). Accordingly, interpretation of a constitutional provision begins with the language of the provision. *Committee for Educational Rights v. Edgar*, 174 Ill. 2d 1, 13 (1996). If the language is unambiguous, it will be given effect without resort to other aids for construction. *Committee for Educational Rights*, 174 Ill. 2d at 13. Only if the meaning of a provision is not clear from its language is it appropriate to consult the debates of the delegates to the constitutional convention to ascertain the meaning they attached to the provision. *Committee for Educational Rights*, 174 Ill. 2d at 13; *Kalodimos v. Village of Morton Grove*, 103 Ill. 2d 483, 493 (1984). Further, each provision should be evaluated as a whole and construed in connection with every other section. *Eden Retirement Center, Inc. v. Department of Revenue*, 213 Ill. 2d 273, 291 (2004), citing *Paris v. Feder*, 179 Ill. 2d 173, 177 (1997).

In this case, the constitutional language is plain, and, accordingly, it is unnecessary to resort to any extrinsic interpretative aids. The reference to "60 session days" in subsection 9(a) can mean only one thing–that the 60 days at issue must be days in which the Senate is in "session." The qualifier "session" is needed to make clear that these are not

"calendar days," a term used elsewhere in the Constitution. *See, e.g.*, Ill. Const. 1970, art. IV, §§9(a), (b), (c); art. V, §11. The language of article V, subsection 9(a), however, does not require that the "session" days fall within the same biennial General Assembly. The delegates knew how to impose a same-session limitation, as they did just two paragraphs later in subsection 9(c), and again in article V, section 11, addressing the gubernatorial reorganization of executive agencies:

> If the General Assembly is in annual session and if the Executive Order is delivered on or before April 1, *the General Assembly shall consider the Executive Order at that annual session.* If the General Assembly is not in annual session or if the Executive Order is delivered after April 1, *the General Assembly shall consider the Executive Order at its next annual session*, in which case the Executive Order shall be deemed to have been delivered on the first day of that annual session. (Emphasis added.)

To read subsection 9(a) to do what section 11 and subsection 9(c) do expressly–i.e., limit "session days" to days in the same session–would be to rewrite subsection 9(a) to say "within 60 session days, at the same session." Implying such an unwritten limitation in subsection 9(a), when the delegates declined to include it expressly, would defy well-established canons of construction, which prohibit the addition of exceptions, limitations, or conditions to a provision's plain language. *People ex rel. Birkett v. Dockery*, 235 Ill. 2d 73, 81 (2009), citing *In re Michelle J.*, 209 Ill. 2d 428, 437 (2004). Consequently, a nomination does not expire when the Senate adjourns *sine die*. Rather, under such circumstances, a nomination not acted upon prior to the expiration of 60 session days carries over into the new biennial session.

Because the language is plain, there is no need to resort to the constitutional debates for further interpretative guidance. These debates, however, are consistent with subsection 9(a)'s plain language. When asked "what would happen if the legislature would adjourn its session prior to the expiration of the sixty days?" the following exchange among Delegates Perona, Orlando, and Young occurred:

> MR. PERONA: Mr. President, Mr. Orlando, what would happen if the legislature would adjourn its session prior to the expiration of the sixty days?
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> MR. ORLANDO: The automatic confirmation principle would apply.
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> MR. PERONA: But the sixty days would not have passed.
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> MR. ORLANDO: You are talking about an adjournment by the legislature without taking action on the governor's nominee?
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> MR. PERONA: Right.
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> MR. ORLANDO: By failure to take the action there would be a confirmation.
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> MR. PERONA: But sixty session days would not have expired, though, and that's the only wording that I can see that would cause it to become an automatic confirmation.
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> MR. ORLANDO: Perhaps I am unclear on that. I will call on Mr. Young to answer that.
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> * * *
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> MR. YOUNG: In answer to the question of *what would happen if they adjourned before sixty days had elapsed, it would simply mean that the appointment would carry over*. It would not be an automatic confirmation; but it is our understanding from the

> former members of the legislature that the average session is in the neighborhood of seventy-seven days, and so we felt that there would not be much of a chance, if any, that the legislature would adjourn prior to sixty session days.
>
> * * *
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> MR. ORLANDO: I stand corrected on my comment here, and it was my impression otherwise, ladies and gentlemen. (Emphasis added.) Remarks of Delegates Perona, Orlando, and Young, 3 Record of Proceedings, Sixth Illinois Constitutional Convention 1323.

Based on this exchange, it was the clear intent of the delegates that if 60 session days had not expired and the Senate had adjourned, the nomination would carry over from one biennial session to the next biennial session.

The Senate President's office suggests that the quoted discussion refers to the fact that the 1970 Constitution would now permit the legislature to conduct two annual sessions within the same General Assembly and that, prior to the 1970 Constitution, the legislature only had one annual session, which typically ran 77 days. Under the Illinois Constitution of 1870, the General Assembly session was for a two-year term. *See* Ill. Const. 1870, art. IV, §§2, 9. Prior to the 1970 Constitution, the General Assembly was already permitted to conduct two annual sessions within the same General Assembly. Although there seemed to be a misconception that the Constitution required a regular session to adjourn *sine die* prior to July 1 of the year in which

it convened, in opinion No. F-1700, issued October 19, 1966 (1966 Ill. Att'y Gen. Op. 186), this office specifically addressed whether any provision of the Constitution would prevent a General Assembly from recessing to a time in the second year of the biennium and enacting further legislation. The opinion concluded that nothing in the Constitution would prevent a General Assembly from recessing or adjourning to a time in the second year of the biennium, as long as the General Assembly does not adjourn *sine die* in the odd-numbered year in which it convenes. Subsequent to the issuance of that opinion, the Senate did in fact meet in the second year of the biennium for the 75th and 76th General Assemblies.[1] Thus, while historic custom for the Senate might have been to meet only January through June of the odd-numbered year, the practice immediately prior to and during the constitutional convention was to hold annual sessions in each year of the biennium. The delegates to the constitutional convention were aware of the Attorney General opinion and the history of this issue. *See* 4 Record of Proceedings, Sixth Illinois Constitutional Convention 2684-88. Accordingly, the facts do not support the conclusion that

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[1]A review of the Senate Journals for the 75th General Assembly indicates that the Senate was in session for the first year of the biennium for 117 legislative days and in the second year of the biennium for eight legislative days (March 4, 1968; July 15-17, 1968; July 22-25, 1968), before adjourning *sine die* on January 8, 1969. *See* Senate Journal, 75th Ill. Gen. Assem., March 4, 1968 to January 8, 1969. Similarly, a review of the Senate Journals for the 76th General Assembly indicates that the Senate was in session for the first year of the biennium for 109 legislative days and in the second year of the biennium for 34 legislative days (March 31, 1970; April 1, 1970; April 14-16, 1970; April 22-24, 1970; April 27-30, 1970; May 5-8, 1970; May 11-15, 1970; May 18-23, 1970; May 25-29, 1970; November 16-17, 1970), before adjourning *sine die* on January 6, 1971. *See* Senate Journal, 76th Ill. Gen. Assem., March 31, 1970 to January 6, 1971.

the delegates' discussions of the effect of adjournment on the 60-day confirmation period could have referred only to an adjournment between the annual sessions of a biennium.[2]

Further, when the constitutional convention's Committee on the Executive offered Proposal Number 1 (*see* 6 Record of Proceedings, Sixth Illinois Constitutional Convention 386-87), which became article V, section 9, of the Constitution, the Committee also submitted an Explanation and Commentary, which provides insight into the inclusion of the 60-session-days sentence in subsection 9(a):

> The last sentence[3] establishes a rule of automatic confirmation when the Senate has delayed, for a clearly excessive period of time, in acting formally upon a nomination submitted by the Governor. Such delay has not been a problem in Illinois in the past, but it seems desirable to guard against the appearance in this state of a tactic which has already proved troublesome in other states.

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[2]The Senate President's office also points to the Illinois Commission on the Organization of the General Assembly, Improving the State Legislature (University of Illinois Press 1967) (the COOGA Report), to provide context for the constitutional debates discussing Senate adjournment with a nomination still pending. Specifically, the Senate President's office suggests that the COOGA Report recommends annual sessions as a constitutional reform and explains that the State's complex "problems do not begin in January and end in June of each odd-numbered year; they are permanent problems that deserve the sustained attention of the Illinois Legislature. Legislative sessions that consume just six months of every twenty-four do not, in our judgment, constitute 'sustained' attention." The COOGA Report at 4. Although the COOGA Report did recommend the inclusion of specific provisions in the new Constitution for annual sessions, as noted previously, the concept of annual sessions was not new. The Senate of both the 75th and 76th General Assemblies met in the second year of their biennial sessions. The constitutional debates involving the COOGA Report focused more specifically on whether a session in the second year of a biennial session should be mandatory or permissive. Because the delegates were already aware of the 75th and 76th Senate's annual sessions and the procedures followed by the Senate chamber related thereto, it is more likely that the question regarding the effect of adjournment on a pending nomination was directed at the carry-over from biennial session to biennial session.

We have also reviewed 1925 Ill. Att'y Gen. Op. 331 (temporary appointment of the Director of Trade and Commerce); 1974 Ill. Att'y Gen. Op. 208 (powers of appointed members of the new State Board of Education prior to Senate confirmation); 1974 Ill. Att'y Gen. Op. 338 (filling a vacancy in the office of Superintendent of the State Fair). While each of these opinions addresses gubernatorial nominations, the opinions are not dispositive of the issue that is the focus of your inquiry.

[3]The 60-session-days sentence was the last sentence in section 21 as originally proposed. *See* 6 Record of Proceedings, Sixth Illinois Constitutional Convention 386.

Additionally, one of the reference materials used by the Committee on the Executive was *The Illinois Constitution: An Annotated and Comparative Analysis*[4] (the Constitution Annotations).[5] In discussing how other State constitutions address the Senate's role with respect to the Governor's appointment power, the authors note that the 1963 Michigan Constitution included a new provision requiring the Senate to act within 60 session days after the date of the appointment.[6] The Michigan provision conferred automatic confirmation on nominees absent legislative action within 60 session days. Additionally, Michigan's provision is substantially similar to the language of article V, section 9, of the Illinois Constitution. This provision was considered a new idea at the time.[7]

In opinion No. 6120, issued January 13, 1983 (1983-84 Mich. Att'y Gen. Op. 7), the Michigan Attorney General was asked, among other things, whether a Governor could make an appointment if less than 60 session days were available before the end of the Senate's term for the Senate to exercise its advice and consent responsibility. In reaching his conclusion that the

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[4]G. Braden & R. Cohn, The Illinois Constitution: An Annotated & Comparative Analysis (1969).

[5]*See* 6 Record of Proceedings, Sixth Illinois Constitutional Convention 411.

[6]Article V, section 6, of the Michigan Constitution of 1963 provides:

> Appointment by and with the advice and consent of the senate when used in this constitution or laws in effect or hereafter enacted means appointment subject to disapproval by a majority vote of the members elected to and serving in the senate if such action is taken within 60 session days after the date of such appointment. Any appointment not disapproved within such period shall stand confirmed.

[7]Constitution Annotations at 280-83 ("Once in a while – one is tempted to say once in a lifetime – a really new idea enters the world of constitution-drafting. The Michigan provision on advice and consent quoted above is an ingenious new idea").

60 session days extend into a new session of the legislature, whether part of the same legislature or of the ensuing legislature, the Michigan Attorney General stated:

> It is axiomatic that the constitutional authorities of the Governor to make appointments to public office and the Senate to provide advice and consent must be equally respected in light of the constitutional scheme of government reflected in Const 1963, art 5, §§ 3 and 7. The separation of powers required by Const 1963, art 3, § 2 must be observed. *Wood v State Administrative Board*, 255 Mich 220; 238 NW 16 (1931).
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> The authority of the Senate to exercise its advice and consent power conferred by Const 1963, art 5, § 7 is not afforded full meaning in the context of appointments submitted to it by the Governor less than 60 session days before final adjournment of a Legislature unless its authority to act within the ensuing Legislature is confirmed. The intent of the people expressed in Const 1963, art 5, § 6 would be frustrated if, as here, the chief executive submits appointments only a few days before final adjournment and the Senate was precluded from a full exercise of its constitutional advice and consent role. Similarly, the will of the people would be thwarted if the appointments by a Governor were to be placed in jeopardy because the Senate was unable to act before the final adjournment of the Legislature even though 60 session days to act on the appointment had not elapsed.
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> Such potential results are avoided if the provisions of Const 1963, art 5, § 6 are construed so as to provide the Senate with the full period of 60 session days to consider an appointment after it is submitted, regardless of the fact that a portion of the time span for senatorial advice and consent extends into a new session of the Legislature, whether part of the same Legislature or of the ensuing Legislature.
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> * * *
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> While Const 1963, art 4, § 13 does not carry over "legislative business" from a regular session in an even numbered year to a regular session in an odd numbered year, in *Attorney*

> *General ex rel Dust v Oakman*, 126 Mich 717; 86 NW 151 (1901), the Supreme Court recognized that the Senate is performing an executive and not a legislative function when it exercises its advice and consent power over gubernatorial appointments. It follows that legislative "business," as used in Const 1963, art 4, § 13, does not include the Senate's authority to reject appointments pursuant to Const 1963, art 5, § 6.

The Michigan Attorney General's analysis and the policy reasons behind his opinion are equally applicable to the Illinois Constitution's provisions.[8]

Similarly, the last sentence of article V, subsection 9(a), of the Illinois Constitution of 1970 provides that "[t]he General Assembly shall have no power to elect or appoint officers of the Executive Branch." Based on this language, it is clear that the appointment of executive officers is not a legislative function. *See generally Schweicker v.*

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[8]I have also reviewed the Colorado Attorney General opinion cited in the Senate Letter (1987 Colo. Att'y Gen. Op. No. OHR8705084/AQE). The opinion addresses whether four specific individuals appointed by the Governor to serve both full and unexpired terms of office must receive the consent of the State Senate before they may serve as voting members of the University of Northern Colorado's Board of Trustees. After reviewing the status of each of the trustees and determining that two of the four board members did not require Senate confirmation, that a third member was in a holdover status, and that the fourth member required confirmation, the Colorado Attorney General noted, without analysis or citation, that "[i]n the event the Legislature adjourns sine die without the Senate having acted upon Ms. Hazelrigg's nomination, she would lack authority to act as a trustee unless and until she is reappointed by the Governor to serve on an interim basis." The language of article IV, subsection 6(1), of the Colorado Constitution of 1876, is different from that of the Illinois Constitution. The Colorado Constitution contains no reference to "session days" and places no time limit on the Senate's consent authority:

> The governor shall nominate, and, by and with the consent of the senate, appoint all officers whose offices are established by this constitution, or which may be created by law, and whose appointment or election is not otherwise provided for, and may remove any such officer for incompetency, neglect of duty, or malfeasance in office. If the vacancy occurs in any such office while the senate is not in session, the governor shall appoint some fit person to discharge the duties thereof until the next meeting of the senate when he shall nominate and, by and with the consent of the senate, appoint some fit person to fill such office.

Based on the difference in the language, I do not find an interpretation of Colorado's Constitution applicable to the question under review.

Husser, 44 Ill. App. 566, 572 (1892), *aff'd*, 146 Ill. 399 (1893) ("It has never been supposed that the appointment by the executive of the United States, or of a State, of an officer to whose appointment the consent of the Senate is necessary, is a legislative act by either the executive or the Senate").

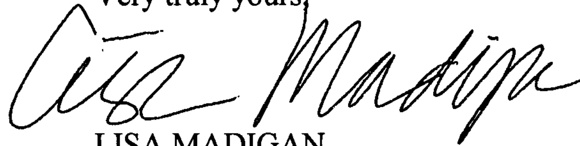
The Senate President's office also suggests that the Illinois Supreme Court has long provided great deference to a uniform, continued, and contemporaneous construction of the Constitution given by the legislature and that the Senate's construction of article V, section 9, as evidenced by its conduct, that of the Governor, and that of other appointing bodies, is entitled to great deference. This concept is commonly referred to as the doctrine of contemporaneous and practical construction. It is well established, however, that where there is no ambiguity in a statute, the doctrine of contemporaneous and practical construction is without force. *State v. Illinois Central R.R. Co.*, 246 Ill. 188, 289-91 (1910). As discussed above, the language of article V, subsection 9(a), is plain; there is no ambiguity in the constitutional language. Accordingly, the doctrine of contemporaneous and practical construction does not apply here.

CONCLUSION

Based on the language of article V, subsection 9(a), of the Constitution, it is my opinion that the term "session days" as used in subsection 9(a) extends beyond the biennial session. Additionally, while the clear language of the Constitution makes it unnecessary to review the history of the provision and the debates of the delegates, both the history and the

debates further support this conclusion. Accordingly, a nomination pending prior to the expiration of 60 session days when the Senate adjourns a session *sine die* does not expire with the adjournment. Rather, the nomination carries over into the new biennial session.

Very truly yours,



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