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December 28, 2020

Honorable Kevin Kiley
Room 5126, State Capitol

GOVERNOR'S APPOINTMENTS: SENATE VACANCY - #2100271

Dear Mr. Kiley:

The people of California elected Kamala Harris to the United States Senate on November 8, 2016. She assumed office on January 3, 2017, for a term of six years.¹ Senator Harris will assume the vice-presidency on January 20, 2021, leaving a vacancy in her Senate seat.² You have asked us to address a number of issues, as set forth below, relating to the laws governing Senate vacancies. You have also asked us to address the constitutionality of the relevant state law provision.

1. Legal Background

The Seventeenth Amendment of the United States Constitution (hereafter the Seventeenth Amendment) provides for a vacancy in the United States Senate as follows:

“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.”

¹ See U.S. Const., 20th amend., § 1 (“The terms of the President and the Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin”); 17th amend. (establishing 6-year terms for Senators).

² See fn. 1, *ante*.

Section 10720 of the Elections Code³ implements that amendment as follows:

“[1] If a vacancy occurs in the representation of this state in the Senate of the United States, the Governor may appoint and commission an elector of this state who possesses the qualifications for the office to fill the vacancy until his or her successor is elected and qualifies and is admitted to his or her seat by the United States Senate. [2] However, whenever a vacancy occurs within a term fixed by law to expire on the third day of January following the next general election, the person so appointed shall hold office for the remainder of the unexpired term unless the vacancy is filled at a special election held prior to the general election, in which case the person elected at the special election shall hold office for the remainder of the unexpired term. [3] An election to fill a vacancy in the term of a United States Senator shall be held at the general election next succeeding the occurrence of the vacancy or at any special election.”⁴

2. Analysis and Conclusions

2.1 Requirement to issue a writ of election when a vacancy in a Senate seat occurs

You have first asked us to address whether the Seventeenth Amendment requires the Governor to issue a writ of election to fill a Senate vacancy. If so, you have asked us to describe the requirements and procedures that apply to its issuance.

The first sentence of the Seventeenth Amendment provides that “[w]hen 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.” As a general principle of statutory construction, the word “shall” is mandatory.⁵ Additionally, the Governor is unquestionably the “executive authority” of the state.⁶ Thus, by its plain language, this sentence compels the Governor of a state to issue a writ of election to fill the vacancy.⁷ This conclusion is consistent with the understanding of the Seventeenth Amendment’s requirements expressed by the Seventh and Ninth Circuit

³ All further section references are to the Elections Code unless otherwise indicated.

⁴ § 10720. For ease of reference, we have numbered the sentences of this section.

⁵ See *Guardianship of C.E.* (2019) 31 Cal.App.5th 1038, 1051; see also *California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 933 (Courts apply similar principles when construing constitutional provisions and statutes).

⁶ See Cal. Const., art. V, § 1 (“The supreme executive power of this State is vested in the Governor”).

⁷ See *People v. Valencia* (2017) 3 Cal.5th 347, 357 (Language used in a statute or constitutional provision should be given its ordinary meaning, and if the language is clear and unambiguous there is no need for construction).

Courts of Appeals,⁸ although some question remains as to whether the obligation to issue the writ is excused if the vacancy occurs extremely close to the term's end.⁹

The Seventeenth Amendment does not address when and by what means the Governor must issue the writ. As section 10720 is silent as to the writ requirement altogether, it also offers no guidance. In contrast, section 1773 of the Government Code, which governs when a vacancy occurs in the office of Representative to Congress or in either house of the Legislature, requires the Governor to issue a writ of election “within 14 calendar days after the occurrence of the vacancy” and also to “issue the election proclamation under his hand and the Great Seal of the state, and transmit copies to the board of supervisors of the counties in which the election is to be held.” No state law similarly imposes a timing requirement on the obligation to issue a writ of election to fill a Senate vacancy, but a court would presumably find an implied requirement that the writ be issued early enough for the elections officials to administer the election properly. Also, although the above-cited Government Code provision does not apply to a Senate vacancy, it is reasonable to construe the requirement to issue a writ under the Seventeenth Amendment consistently with that provision, since both involve filling a vacancy in a congressional office.

⁸ See *Tedards v. Ducey* (9th Cir. 2020) 951 F.3d 1041, 1050 (cert. granted) (hereafter “*Tedards*”):

“The principal clause begins with a trigger: ‘When vacancies happen in the representation of any State in the Senate’ We read the word ‘when’ to denote both ‘immediately after’ and ‘every time that.’ Thus, every vacancy immediately triggers the Vacancy Clause when it happens. . . . [¶] The principal clause then directs that ‘. . . the executive authority of such State shall issue writs of election to fill such vacancies’ We interpret the word ‘shall’ as imposing a mandatory obligation on the Governor.”

See also *Judge v. Quinn* (7th Cir. 2010) 612 F.3d 537, 547 (hereafter “*Quinn*”), opinion amended on denial of reh'g, (7th Cir. 2010) 387 Fed.Appx. 629:

“The second part of the principal clause does two jobs: it delegates responsibility for addressing the vacancy to ‘the executive authority’ of the affected state, and it tells the executive what to do—that is, to issue a writ of election and thereby assure that the replacement senator will, like the original one, be popularly elected. This clause uses the word ‘shall,’ which is normally understood as mandatory language. [Citation.] [¶] Reading the second part of the principal clause to impose a mandatory obligation on the state executive has the virtue of ensuring consistency between this provision and the counterpart language addressing vacancies in the House of Representatives.”

⁹ See *Tedards, supra*, 951 F.3d at pp. 1050-1051 (“That is, the duty to call an election might not apply if the vacancy happens so late in the term that it is not feasible to hold an orderly election quickly enough that the elected Senator will serve for more than a de minimis period of time”).

Therefore, we think that there is an implied requirement for the Governor to “issue the election proclamation [to fill a Senate vacancy] under his hand and the Great Seal of the state, and transmit copies to the board of supervisors of the counties in which the election is to be held.”¹⁰

Finally, case law establishes that the writ must set the election date.¹¹ A state legislature may exercise its discretion in further regulating when the election may occur,¹² although there is some limit to the state’s exercise of discretion in this regard.¹³ Addressing this exercise of discretion, the Ninth Circuit recently upheld a lag of 27 months between a vacancy and the election to fill that vacancy, as other courts had previously upheld a lag of 29 months.¹⁴ Here, state law requires the election to be held at the next general election or at any special election. Despite the use of the modifier “any” preceding “special election,” we read the term “any special election” as used here to mean a special election that would happen *sooner* than the next general election because the purpose of the special election would be to cut short the service of the temporary appointee.¹⁵ Therefore, pursuant to the third sentence of section 10720, the time between a vacancy and the election to fill that vacancy would always be less than two years. Under applicable case law, we think that sentence constitutes a reasonable exercise of the state’s discretion.¹⁶

¹⁰ Here, the election would necessarily be a statewide election.

¹¹ See *Quinn, supra*, 612 F.3d at p. 554 (“To summarize, the vacancy-filling provision in the second paragraph of the Seventeenth Amendment imposes [the requirement that] the executive officer of the state . . . issue a writ of election *that includes a date for such an election to take place*” [emphasis added]).

¹² *Quinn, supra*, 612 F.3d at pp. 554-555 (“To the extent that the plaintiffs argue that the governor must be able to select a date for the vacancy election of his own choosing, they are incorrect. The amendment does not disturb the power of the state legislature to confine the governor’s discretion in selecting a date”).

¹³ See generally *Tedards, supra*, 951 F.3d 1041. One could argue that a long delay is more unreasonable when a Governor does not make a temporary appointment and the seat remains unfilled, because under those facts the voters lack representation entirely. However, the courts do not seem to consider this factor relevant to the question of the reasonableness of the delay. (See *Valenti v. Rockefeller* (1968) 292 F.Supp. 851 [upholding a delay of 29 months in filling the seat of Robert Kennedy where the seat remained unfilled].)

¹⁴ See *Tedards, supra*, 951 F.3d 1041.

¹⁵ See, e.g., *People v. DeLeon* (2017) 3 Cal.5th 640, 648 (A court must harmonize the various parts of a statutory enactment by considering the particular clause or section in the context of the statutory framework as a whole).

¹⁶ As a related matter, you have asked us to address whether an appointee’s tenure for the balance of the term is “temporary” within the meaning of the Seventeenth Amendment. The Ninth Circuit has addressed the meaning of “temporary”:

“The key issue here is the word ‘temporary.’ On its face, the term ‘temporary’ is vague. In context, however, we are able to discern some meaning. First, we think the

(continued . . .)

Consequently, it is our opinion that the Seventeenth Amendment requires the Governor to issue a writ of election, as described above.

2.2 Option to call a special election prior to the general election

Second, you have asked whether the phrase “a special election¹⁷ held prior to the general election,” as contained in the second sentence of section 10720, contemplates a special election held on same day as the general election. Before answering this specific question, we note that, under California law, the Governor lacks authority to call a special election to fill a Senate vacancy. Specifically, while section 10720 permits a vacancy to be filled at a special election, it does not confer on the Governor the express authority to call a special election for this purpose.¹⁸ Additionally, there is no other source of law so authorizing the Governor.¹⁹ Therefore, section 10720 authorizes the filling of a Senate vacancy at a statewide special election only if the Governor has lawfully called such an election for another purpose or the Legislature, by statute, has called such an election.

With respect to your specific question, we do not think “special election,” as used in this context, contemplates a special election held the same day as the general election. While a

(... continued)

term must be read in relation to the six-year term of a Senator stated in the preceding paragraph. We would have difficulty reading it to approach anything nearing that full six-year term.

Second, the proviso concludes with language placing a specific limit on the duration of ‘temporary’: ‘... until the people fill the vacancies by election as the legislature may direct.’ The tenure of a Governor’s appointee is thus limited by the timing of a popular election to fill the vacancy. Without more context, however, this language does not establish the precise amount of time that may elapse before the Seventeenth Amendment compels an election by the people to fill the vacancy. Indeed, this language expressly grants the state legislature some degree of discretion regarding that timing.” (*Tedards, supra*, 951 F.3d at p. 1051.)

Since the second sentence of section 10720 only governs when the balance of the term is less than two years, and this amount of time is less than a third of the total length of the six-year term, a court would likely consider it “temporary” for the reasons set forth in *Tedards*.

¹⁷ A special election is an election for which no specific time for holding the election is prescribed by law. (§ 356.)

¹⁸ Compare with section 10700 (*requiring* the Governor to call a special election to fill a vacancy in a Congressional or state legislative office).

¹⁹ The California Constitution expressly grants the Governor authority to call a statewide special election for an initiative or referendum measure that has qualified for the statewide ballot. (Cal. Const., art. II, § 8, subd. (c), § 9, subd. (c).) It also requires the Governor to call a special statewide election on the recall of statewide officers between 60 and 80 days from the date of the certification of sufficient signatures. (Cal. Const., art. II, § 15 subd. (a); § 1003, subd. (a).)

special election called for another permitted purpose could be consolidated with a general election,²⁰ the point of the reference to a special election is to establish a mechanism by which the appointee's service could be cut short. If a successor were elected at a special election consolidated with the next general election, the special election would not be "prior to" the general election within the ordinary meaning of that phrase and would not function to cut short the appointee's tenure.

Therefore, it is our opinion that the reference to "a special election held prior to the general election" in the second sentence of section 10720 contemplates a special election held before the general election, but not a special election held on the same day as the general election.

2.3 Whether an appointee and an elected successor can be the same person

You have also asked us to address whether the appointee and the elected successor can be the same person. The Seventeenth Amendment does not use the term "successor"; rather, that amendment contemplates the existence of both a person elected to fill the vacancy and a temporary appointee, but it says nothing about whether they can be the same person. One can of course understand the word "successor" to mean a separate person who follows an appointee in office.²¹ However, nothing in the Seventeenth Amendment or the Elections Code (which does not define the term) compels the reading that an appointee cannot also be the elected successor.²² Moreover, prohibiting a Senate appointee from running for a full term would impose a qualification for the office of Senator that is not set forth in the United States Constitution—namely, that the elected successor did not serve as the appointee. This result would violate United States Supreme Court precedent establishing that states may not impose additional qualifications

²⁰ See § 1400.

²¹ Webster's Online Dict., available at <<https://unabridged.merriam-webster.com/unabridged/assembly>> (last accessed Nov. 17, 2020) (defining "successor" as "one that follows; especially : a person who succeeds to a throne, title, or estate or is elected or appointed to an office, dignity, or other position vacated by *another*" [emphasis added]).

²² Section 11384 provides that "[i]f a majority of the votes on a recall proposal are 'Yes', the officer sought to be recalled shall be removed from office upon the qualification of his successor." This use of the term "successor" contemplates that the successor is a different person than the recalled officeholder. However, this section of the Elections Code addresses a situation that is substantively different than the question before us; in the situation of a recall, there is a policy reason not to have the recalled officer immediately succeed themselves; namely, the people by their vote to recall indicated their desire to remove the officeholder from that office. Conversely, in the situation before us, the people could elect the appointee to the same seat, thereby indicating their desire for that appointee's *continued* service. Thus, this section is not illustrative in construing "successor" for purposes of section 10720.

for office not specified in the Constitution.²³ For these reasons, it is our opinion that an appointee may also serve as the elected successor.²⁴

2.4 Constitutionality of the second sentence of section 10720

Finally, you have asked us a number of questions relating to the constitutionality of the second sentence of section 10720, which, as discussed above, prescribes the rule for filling a Senate vacancy that arises within the final two years of a Senate term.²⁵ That sentence applies to the vacancy left by Vice President-elect Harris, whose six-year term would have expired on January 3, 2023, which is the January following the next general election (November 2022). Specifically, you have asked whether the requirement in that sentence that a gubernatorial appointee hold office for the remainder of the term violates the requirement contained in the Seventeenth Amendment that an elected successor fill the vacancy because the successor will take office at the beginning of a new term, and there will be no portion of the vacated term left to serve.

Judicial precedent from the Seventh Circuit, which is not binding on courts within the Ninth Circuit, supports the conclusion that the Seventeenth Amendment requires the elected successor to serve for some portion of the unexpired term (i.e., before January 3, 2023). Specifically, the Seventh Circuit in *Quinn* held that, when a Senate vacancy occurs, a Governor must issue a writ of election and the state must hold an election to fill the vacancy, even if the Governor also made an appointment to fill the vacancy temporarily.²⁶ Modifying its initial decision in the case, the Seventh Circuit directed the state to permit the elected successor to fill the vacancy as soon as possible after the election:

“However Illinois conducts its election for the vacancy, the state should endeavor to certify the results of that election as soon as possible, so that the replacement senator may present his or her credentials to the Senate and take

²³ *U.S. Term Limits, Inc. v. Thornton* (1995) 514 U.S. 779.

²⁴ This conclusion applies whether the seat is filled at a special or general election.

²⁵ Again, that sentence reads:

“However, whenever a vacancy occurs within a term fixed by law to expire on the third day of January following the next general election, the person so appointed shall hold office for the remainder of the unexpired term unless the vacancy is filled at a special election held prior to the general election, in which case the person elected at the special election shall hold office for the remainder of the unexpired term.” (Emphasis added.)

²⁶ *Quinn, supra*, 612 F.3d at p. 554 (“The temporary appointment ends when the people fill the vacancy in an election”).

office promptly. The senator elected to begin service with the 112th Congress will take office as the Constitution provides on January 3, 2011.”²⁷

This directive supports the conclusion that, consistent with the Seventeenth Amendment, a state must certify the election results in a manner that ensures the person elected in the vacancy election takes office *before* the end of the existing term. Applying this directive to the facts before us would require that a person elected to fill the vacancy in November 2022 be seated during the lame-duck period between the election and January 3, 2023, which means that the appointee could not serve the unexpired balance of the term.²⁸

As to Ninth Circuit precedent in this regard, the court in *Tedards* found that the phrase “to fill such vacancies” contained in the Seventeenth Amendment contemplates the elected successor serving “for the remainder of the term *in which the vacancy occurred*.”²⁹ Under this interpretation, a state must hold a vacancy election that would allow the elected successor to take office before the expiration of the term in which the vacancy occurred. However, the court acknowledged that this assumption would not always hold depending on how close to the end of the term it was.³⁰ The Senate vacancy addressed in that case did not occur in the last two years of the term and the vacancy election was scheduled to occur approximately two years before the term was to expire. Thus, it can be argued that the court’s interpretation of the Seventeenth Amendment does not apply to the circumstance in which a vacancy election, under state law, would occur within three months of the expiration of the term in which the vacancy occurred.³¹

In our view, case law interpreting the requirements of the Seventeenth Amendment in this context is relatively scarce and does not definitively resolve this issue. However, considering these cases on the whole, it is our opinion that existing case law casts doubt on the validity of the second

²⁷ *Judge v. Quinn* (2010) 387 Fed.Appx. 629, 630.

²⁸ Presumably, the state would have to hold a second concurrent election to fill the seat for the next term, but the mechanics of how this would work are beyond the scope of this opinion.

²⁹ *Tedards, supra*, 951 F.3d at p. 1050, emphasis added.

³⁰ *Tedards, supra*, 951 F.3d at pp. 1050-1051 (“This language appears to assume that a non-de minimis period of time remains in the term, and that an orderly election is capable of filling it. . . . This language may also suggest that the State *should* leave some non-de minimis period of the vacancy for the people to fill by election” [italics in original]); see also fn. 9, *ante* (discussing whether the obligation to issue the writ is excused under these facts). The court in *Tedards* also noted precedent from other circuits suggesting that the lame-duck session was not a *de minimis* period of time. (See *Tedards* at p. 1054, fn. 21, citing *Jackson v. Ogilvie* (7th Cir. 1970) 426 F.2d 1333 and *ACLU v. Taft* (6th Cir. 2004) 385 F.3d 641.) Those decisions are admittedly outside of the Ninth Circuit and are not binding, and they dealt with the House Vacancy Clause and not the Senate vacancy provisions in the Seventeenth Amendment; however, *Tedards* does not seem to view them unfavorably.

³¹ The vacancy arose from the death of Senator John McCain in August 2018; he was elected to a term beginning in January 2017. (See *Tedards, supra*, 951 F.3d at pp. 1044-1045.)

sentence of section 10720 to the extent that it requires an appointee to a vacant Senate seat to serve out the balance of the term.³²

Finally, as a general matter, we note that a court will endeavor to preserve the constitutionality of a state statute.³³ Even if a court were to find the second sentence of section 10720 to be unconstitutional, the remainder of the section would continue to be valid if that sentence were severable from the rest of the section. To be severable, an invalid provision of a statute must be grammatically, functionally, and volitionally separable from the other provisions of the statute.³⁴ To be grammatically separable, “the valid and invalid parts of a statute can be separated by paragraph, sentence, clause, phrase, or even single words.”³⁵ To be functionally separable, “the remainder after separation of the invalid part must be ‘complete in itself’ and ‘capable of independent application.’”³⁶ To be volitionally separable, the remainder “‘is complete in itself and would have been adopted by the legislative body had the latter foreseen the partial invalidation of the statute’ [or that remainder] ‘constitutes a completely operative expression of the legislative intent.’”³⁷

Here, the second sentence is a complete sentence, so it is grammatically separable. The remaining sections are capable of independent application; the first sentence permits temporary appointments, “as the legislature may direct,” and the final sentence governs the required election to fill the seat. The Legislature certainly had the prerogative to further dictate what happens in the scenario described in the second sentence, but nothing compelled it to speak to this circumstance at all. There is no reason to assume that the Legislature would not have wanted the rest of the statute to remain; on the other hand, striking down the rest of the section would *subvert* the Legislature’s intent to permit temporary appointments. As a point of comparison, the Attorney General has opined that the reference to “electors” in the predecessor

³² We do not find the second sentence of section 10720 to offend the Seventeenth Amendment’s requirement that “the people” fill a vacancy. The reference to “the people” in the Seventeenth Amendment is a reference to “the people” filling the vacancy “by election.” The question of how long the appointee can serve before that election happens is unrelated to the people’s ultimate ability to vote on a successor. As a practical matter, it appears that, like California, other states provide for an appointee filling the balance of the term. (See, e.g., Nev. Rev. Stat. 304.030 (2019) [“In case of a vacancy in the office of United States Senator caused by death, resignation or otherwise, the Governor may appoint some qualified person to fill the vacancy, who shall hold office until the next general election and until his or her successor shall be elected and seated”].) However, we have found no case law directly addressing the constitutionality of such a provision.

³³ See, e.g., *People v. Buza* (2018) 4 Cal.5th 658, 682.

³⁴ *Gerken v. Fair Political Practices Com.* (1993) 6 Cal.4th 707, 714.

³⁵ *Abbott Laboratories v. Franchise Tax Bd.* (2009) 175 Cal.App.4th 1346, 1358 (hereafter *Abbott*).

³⁶ *Abbott, supra*, 175 Cal.App.4th at p. 1358.

³⁷ *Abbott, supra*, 175 Cal.App.4th at p. 1358.

section to section 10720 was unconstitutional because it imposed an additional qualification on Senators that the United States Constitution does not otherwise require.³⁸ However, the Attorney General found the provision severable such that the rest of the section stood.³⁹

In our view, therefore, the second sentence of section 10720 is completely separate from the other provisions of that section. On that basis, we think a court would likely find it to be severable, thus preserving the validity of the first and third sentences of section 10720.

Very truly yours,

Cara L. Jenkins
Legislative Counsel



By
Alyssa R. Kaplan
Deputy Legislative Counsel

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³⁸ 44 Op. Atty. Gen. 30, 32 (1964) (addressing the predecessor section to section 10720) (“To the extent that [this section] requires [an appointee] to be an elector, *i.e.*, a resident of the state for one year, it is enlarging upon the United States constitutional qualifications for office and is invalid”).

³⁹ 44 Op. Atty. Gen. 30, 32 (1964) (“Thus, in a case such as this, where a portion of the statute is clearly contrary to the provisions of the United States Constitution, that portion must be declared invalid”).