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Dear Ms. Lee:

Government Code section 12519 provides that the Attorney General “shall give his or her legal opinion in writing to any Member of the Legislature,” among other state officers, “on any question of law relating to their respective offices.” Pursuant to this provision, I request an opinion on the application of existing law regarding vacancies in the United States Senate.

### **Background**

Election forecasters in the national news media have designated California’s junior Senator, Kamala Harris, as the Vice President-elect of the United States. To assume this office, Senator Harris would have to vacate her seat in the U.S. Senate. Governor Gavin Newsom has signaled an intention to fill such a vacancy by appointing a new Senator, describing the process as a “cattle call.”<sup>1</sup>

In the 229 years since the adoption of the Bill of Rights, the U.S. Constitution has been amended 17 times. One of those Amendments, ratified in 1913, established that Senators must be “elected by the people.” The Seventeenth Amendment further provides that when Senators vacate their seats in the middle of a term, Governors “shall issue writs of election to fill such vacancies.” The purpose of the Amendment was to replace “a distrusted, aristocratic regime” of appointed Senators with one of “popular enfranchisement.”<sup>2</sup>

There is, however, a proviso in the Amendment. A state’s legislature may empower its Governor “to make temporary appointments until the people fill the vacancies by election.” California’s Legislature has done this with Elections Code

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<sup>1</sup> Gov. Newsom, Press Conference, Nov. 9, 2020.

<sup>2</sup> Clopton & Art, *The Meaning of the 17th Amendment and a Century of State Defiance* (2013) 107 Northwest Law Rev. 1181, 1188.



section 10720, which enables the Governor to fill a U.S. Senate vacancy with an appointee who serves until a successor is elected and seated.

It is this coupling of federal and state law on which Governor Newsom is relying to fill Senator Harris' seat through a cattle call rather than an immediate election. Yet the Governor has given no indication he plans to set any election at all, even though the Seventeenth Amendment requires that he "shall" issue a writ of election and that any appointment be "temporary."

### **Case Law**

In *Judge v. Quinn*,<sup>3</sup> a U.S. Court of Appeals held that when a Senate seat is vacated, there must be an election for a partial term that terminates when the outgoing Senator's term was to expire. It does not satisfy the Seventeenth Amendment, the court held, to eventually carry out an election for a new term that was going to happen in any event.

This means Governor Newsom could appoint a temporary successor to Senator Harris, but that person could not serve through January 3, 2023, when Senator Harris' term was to expire. At some point before then, an elected Senator would have to take the appointee's place.

In the *Quinn* case, this played out as follows: In early 2009, Roland Burris succeeded Senator Barack Obama after being appointed by the Governor. To comply with the court's decision, Burris could not serve through the end of Obama's term on January 3, 2011; at some point before that he had to be replaced by an elected Senator. Accordingly, there were two races on the November ballot in 2010 for the same Senate seat: one to take over for Burris and complete the remaining months of Obama's term, and the other to serve a new six-year term.

### **Conflict with State Law**

Governor Newsom has no such option. Elections Code section 10720 provides that in the circumstances presented here, a person he appoints "shall hold office for the remainder of the unexpired term." That forecloses the arrangement in *Quinn*: there could not be a separate election on the November 2022 ballot to serve

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<sup>3</sup> *Judge v. Quinn* (7th Cir. 2010) 612 F.3d 537.



the final months of Senator Harris' term (alongside the election for a new term) because the statute requires the appointee to serve until the term ends.

Thus, if Governor Newsom chooses to make an appointment, he could place himself in a scenario where following the statute leads him to violate the Constitution and following the Constitution leads him to violate the statute.

Aside from foregoing an appointment altogether, there appears to be only one way to avoid this dilemma. Section 10720's command that the appointee serve the remainder of the term does not apply when "the vacancy is filled at a special election held prior to the general election." In that case, the specially elected Senator takes the baton from the appointee and serves the rest of the term. In sum:

- If Governor Newsom appoints a successor to Senator Harris who serves the rest of her term, that would violate the Seventeenth Amendment.
- If his appointee serves until a Senator is elected in November 2022 to serve the last two months of the term, that would violate California law.
- If he names a temporary appointee and sets a special election before November 2022, that could comply with both federal and state law.

### **Appointment Power**

In addition to Governor Newsom's obligations to call an election, there is a more fundamental question: whether the conflict between the Elections Code and the Seventeenth Amendment disempowers him from making an appointment at all.

The Seventeenth Amendment does not give any Governor appointment power; that must be supplied by the Legislature. As discussed, the California Legislature's mechanism for doing so, Elections Code section 10720, appears to in part violate the Seventh Amendment itself.

This raises the question whether the portion of the statute granting appointment power can be severed from the unconstitutional portion. If it is not severable – if striking the unconstitutional portion so changes the statutory scheme that the entire law must be voided – then the Governor would be left without any



authority to appoint a U.S. Senator. Senator Harris' successor would have to be chosen by California voters in the first instance.<sup>4</sup>

### **Eligibility of Appointee**

If Governor Newsom can make an appointment and chooses to do so, the appointee may wish to become a candidate in the ensuing special election. But Elections Code section 10720 appears to preclude this: the appointee's tenure terminates once "his or her successor" is elected and seated.

The word *successor* is defined as "someone or something that comes after another person or thing."<sup>5</sup> If an appointee were to run for and win a subsequent special election, then "his or her successor" would be him or herself rather than "another person." Elsewhere in the California Elections Code, the word *successor* is used in a way that matches this plain meaning, denoting a relationship with another person.<sup>6</sup>

### **Conclusion**

In light of these issues, I request an opinion evaluating Governor Newsom's authority to make an appointment and his duty to call a special election, along with all pertinent obligations and limitations associated therewith. To guide this analysis, I have attached questions that I request be answered with specificity.

Sincerely,

A handwritten signature in black ink, appearing to read "K. Kiley".

KEVIN KILEY  
Assemblyman, 6th District

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<sup>4</sup> That the Legislature specifically added the second sentence to the statute in 1961 may evince a legislative intent not to keep in place a version of the statute that lacks it. (Stats. 1939, c. 26, p. 294.)

<sup>5</sup> Cambridge Online Dictionary (as of Nov. 15, 2020) [emphasis added].

<sup>6</sup> See, e.g., Elections Code 11384 ["If 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."].

1. Does the 17th Amendment to the United States Constitution require the Governor of California to issue a writ of election in the event of a U.S. Senate vacancy?
  - What is the process under state law for the Governor to do so?
  - How soon after a vacancy occurs must the writ of election be issued?
  - Is there any time constraint as to when an election must be held?
  - Must the Governor designate a specific date for the election?
  - Are there any circumstances where a writ of election is not required?
  
2. Does the second sentence of California Elections Code section 10720 violate the 17th Amendment by requiring that in certain circumstances an appointee to a vacant U.S. Senate seat serve the remainder of the term?
  - If Governor Newsom acts in accordance with this provision in appointing a successor to Senator Harris who serves the remainder of her term, will “the people” have filled the vacancy within the meaning of the 17th Amendment?
  - If Governor Newsom acts in accordance with this provision in appointing a person who serves the remainder of the term, will he have issued a writ of election within the meaning of the 17th Amendment?
  - If Governor Newsom acts in accordance with this provision in appointing a person who serves the remainder of the term, will his appointment be “temporary” within the meaning of the 17th Amendment?
  - If this provision is found unconstitutional, would any part of section 10720 remain valid under a severability analysis?
  
3. If Governor Newsom appoints an immediate successor to Kamala Harris, does the second sentence of section 10720 permit any remaining portion of her current term to be filled by an election appearing on the November 8, 2022 ballot?
  - Does the phrase “a special election held prior to the general election,” as used in section 10720, encompass the possibility of a special election set for the same day as the general election?
  - Does section 10720 or any other provision of law permit a person elected for a new term at a general election to, by virtue of that election, assume office prior to the beginning of the new term?
  - If an appointee completes Senator Harris’ term, would the election of a Senator to a six-year term in 2022 constitute “filling the vacancy” as used in section 10720?
  
4. If Governor Newsom appoints an immediate successor to Senator Harris, is that person eligible to be a candidate in a subsequent special election?
  - Does the definition of *successor*, as used in the first sentence of section 10720, encompass the possibility that one’s successor could be him or herself?
  - If not, is there any other interpretation of the first sentence of section 10720 that would allow an appointee to run in a special election for the remainder of Senator Harris’ term?