



ILLINOIS STATE  
BAR ASSOCIATION

# STANDING COMMITTEE ON GOVERNMENT LAWYERS

The newsletter of the ISBA's Standing Committee on Government Lawyers

## The powers of the state legislature in filling senatorial vacancies: A federal constitutional authority

By Mitchell B. Goldberg<sup>1</sup>

### I. Introduction

In December 2008, in an unprecedented event, the sitting governor of the State of Illinois, Rod Blagojevich, was arrested at his home by Federal authorities on suspicion of, *inter alia*, trying to "sell" the Senate seat recently vacated by President-elect Barack Obama. This created a scramble

within Illinois political circles, extending from Springfield to Washington D.C., to sort out the issue of gubernatorial authority regarding the appointment of Mr. Obama's successor.<sup>2</sup> Early on, various voices called for State legislation to (a) remove the power of the governor to appoint a Senatorial successor and (b) to call a special election to appoint the successor. Prior to Gov. Blagojevich's public statements suggesting that he would sign legislation for a special election, a fear existed that without an ouster of the governor, by resignation or impeachment, Blagojevich would be able to thwart legislative action through his veto power.

This matter took on an additional twist, when Gov. Blagojevich appointed former Illinois Attorney General Roland Burris to fill the vacancy. Although controversial, most commentators agree that Gov. Blagojevich was within his rights to do this. However, in the days and weeks following that appointment, a question asked by many was whether the Illinois General Assembly possesses the authority to undo or limit such an appointment, regarded by many as "tainted" due to the allegations against Blagojevich. This matter has taken on renewed interest with new allegations that testimony offered by Mr. Burris to the Illinois House Special Investigative Committee was misleading with respect to Mr. Burris's contacts with Blagojevich, the former Governor's family,

and his aides prior to the November 2008 election and prior to his appointment to the Senate.<sup>3</sup> Yet, even now, months later, substantial confusion exists as to the authority of the Illinois General Assembly to act with respect to the powers of appointment to fill a Senatorial vacancy.

This article addresses the origins of the power of appointment to fill Senatorial vacancies. Specifically, it will address the respective powers of the Illinois General Assembly and Governor, and show that the Governor's power is extremely limited. Moreover, as will be explained, the State Legislature's power is derived from a grant of specific authority directly from the U.S. Constitution. Because the Legislature's grant of power is outside the scope of the Illinois Constitution, its power does not seem limited by or subject to the normal checks and balances created in the State's Constitution. Accordingly, under the plain language of the Federal Constitution, the Illinois General Assembly's power seems to be supreme with respect to establishing or limiting the power of appointment, enabling that body to act without fear of veto or other action by the then-sitting Governor.

### II. The Power to Appoint to Fill Senatorial Vacancies

In the opening days of the controversy surrounding Gov. Blagojevich, many opinions and news articles appeared in

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the media offering explanations of the power to appoint Senatorial successors. At the outset of any explanation of such power, it is important to first understand the source of that power. Despite comments expressed in the news media, the power of the Illinois Governor to appoint is not derived from the Illinois Constitution.

#### A. The Silence of the Illinois Constitutional Provisions Regarding Appointments to the U.S. Senate

The powers and duties of the Illinois Governor are enumerated in Article V of the Illinois Constitution of 1970. Article V, section 8 of the Illinois Constitution of 1970 recognizes that the "Governor shall have the supreme executive power, and shall be responsible for the faithful execution of the laws." Section 7 of that same article governs the ability of the Governor to appoint persons, on a temporary basis, to fill vacancies in other elective offices of the executive branch of the State, including the Attorney General, Secretary of State, Comptroller or Treasurer. Ill. Const. art. V, §7. Article V, section 9 of the Illinois Constitution addresses the power of the Governor to appoint all officers of the State for which there is no provision requiring an election. This includes the heads of the various Illinois departments. However, Article V is silent as to the filling of a vacancy in the U.S. Senate.

#### B. The Federal Constitutional Provisions

The origin of the Governor's power, as it currently exists, is actually derived from the Seventeenth Amendment to the United States Constitution, ratified by the States in 1913.<sup>4</sup> The Seventeenth Amendment states in relevant part:

When vacancies happen in the representation of any State in the Senate, the executive authority of each State **shall** issue writs of election to fill such vacancies: **Provided**, That [sic] 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**.<sup>5</sup> (Emphasis added.)

The wording of this Amendment is crucial to understanding the scope and power of appointment. Generally, the language of the U.S. Constitution shall be given its natural meaning.<sup>6</sup> Under its express terms, the "executive authority of each State" is directed (a mandatory requirement) to issue "writs of election."

Such a writ has been defined as a written order from the governor of a state commanding the appropriate state agency to conduct a statewide election on a day certain, as provided by law, for the purpose of electing a United States Senator for the unexpired term created by the vacancy.<sup>7</sup> However, the Seventeenth Amendment also grants state legislatures enormous latitude in directing the method of filling vacancies.<sup>8</sup> Under the express language, the Illinois Legislature has the power, in lieu of the Governor's issuance of a writ of election, to authorize the Governor to make temporary appointments to fill vacancies until an election is held "as the legislature may direct."

#### C. The Current Illinois Statute Authorizing Appointment by the Governor

Pursuant to the broad authority granted to it under the Seventeenth Amendment, the Illinois General Assembly enacted section 25-8 of the Election Code (10 ILCS 5/25-8), which empowers the Governor as follows:

Sec. 25-8. 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, at which time such vacancy shall be filled by election, and the **senator** so elected shall take office as soon thereafter as he shall receive his certificate of election. (Emphasis added.)

Section 25-8 parrots the Seventeenth Amendment's "temporary appointment" language. Thus, the power of the Illinois Governor to appoint a successor to the Senate is derived from Illinois statute, pursuant to a power given to the state legislatures through the Federal Constitution.

#### III. Term of Successor's Office

Under section 25-8 of the Election Code, the "temporary appointment" lasts "until the next election of representatives in Congress." Notably, section 25-8 does not say, "until the next regular election for Senator." The plain and ordinary meaning of term "representatives in Congress" refers to Congressional office, rather than a Senator.<sup>9</sup> Accordingly, the statute makes clear that the "temporary appointment" does not automatically serve out the entire remaining term of the Senator he or she replaces. Instead,

he or she only serves until the next Congressional election—a maximum length of two years.

However, there is no express statement as to whether this only refers to a general election. The statute merely states "until the next election." Under the plain and ordinary meaning of the statute, it would seem that even a special election satisfies the statute.<sup>10</sup> Of course, the use of "representatives" in the plural form could support an argument that the statute was meant to deal only with general elections.<sup>11</sup> This is an extremely urgent question that seems to be conveniently ignored in Springfield. As of the writing of this article, a special election has been scheduled to fill the vacancy in the 5th Congressional District created by the resignation of Congressman Rahm Emanuel, who accepted the position of White House Chief of Staff under President Barack Obama. This begs the question as to whether that special election satisfies the language of section 25-8, requiring an election for the replacement Senator as well. This question is beyond the scope of this article, however, and, given the current makeup of Illinois politics and potential costs resulting from a state-wide special election, seems unlikely to be answered in the near-term.

#### IV. Scope of the Power Granted to the State Legislature

Notwithstanding these issues, given the Federal Constitutional origins of the appointment power, it is clear that the Illinois General Assembly possesses the authority to modify the current law. One way that has been advocated is for the Legislature to pass a law modifying or revoking the power granted to the Governor. Because the Illinois Legislature's grant of the appointment power to the Governor is permissive under the language of the Seventeenth Amendment ("the legislature of any State **may** empower the executive thereof to make **temporary appointments**"), the passing of such a law would certainly fall within the broad language of the Seventeenth Amendment. Of course, absent some additional direction from the Illinois General Assembly regarding the filling of the vacancy "by election," the default would require the Governor to call a special election anyway ("the executive authority of each State **shall** issue writs of election to fill such vacancies").

One controversial issue that has arisen, however, in the discussion regard-

ing removing the appointment power from the Governor, has been the extent of power the Governor may have to block such action pursuant to his veto authority under the veto procedure enunciated in Article IV, section 9 of the Illinois Constitution of 1970. Pursuant to that procedure, the Governor has the right to veto any law passed by the Legislature, as well as to let it sit on his desk for up to 60 days with or without a veto.<sup>12</sup>

However, the plain and unambiguous language of the Seventeenth Amendment does not require a state legislature to pass any laws. Rather, it states that the Governor's appointment power shall last "until the people fill the vacancies by election as the legislature may direct." (Emphasis added.) There is a substantial difference between the words "as the legislature may direct" and the apparently discarded alternative of "in accordance with state law."

Black's Law Dictionary defines the word "direct" as "To point to; guide; order; command; instruct."<sup>13</sup> The Third Circuit Court of Appeals has recognized that the Seventeenth Amendment vests state legislatures with "discretion" "to direct the manner in which the vacancy election is to be conducted."<sup>14</sup> The court specifically recognized broad powers granted to state legislatures regarding the direction of vacancy elections, pointing out: "the explicit provision in the vacancy paragraph of the *Seventeenth Amendment* vesting discretion in the state legislature not once, but twice, cannot have been without significance."<sup>15</sup> Under its natural and plain meaning, the Seventeenth Amendment's use of the word "direct" gives a state legislature the right to order or command a special election, outside the normal scope of its operations under a state constitution.

Although no cases have addressed this point, there are two possible, and potentially equally valid, interpretations of the Constitution. The first is that the right granted to state legislatures by the Federal Constitution would allow for a mere declaration. In effect, the Illinois General Assembly would merely pass a resolution, pursuant to its authority under the Seventeenth Amendment, commanding the method by which an election to fill a Senatorial vacancy should take place or directing the state election authorities to do so. An argument against this is that the Illinois Constitution only allows the General Assembly to act through laws, under Article IV. However, the Legislature would not be acting pursuant to the Illinois

Constitution, but pursuant to a grant of direct authority from the Federal Constitution.

The second interpretation—which presumes that the Legislature may only act through laws—is that while the legislature would pass a "law," pursuant to the Seventeenth Amendment, that statute would be outside the authority of the Governor to veto. Pursuant to the Supremacy Clause of Article VI, Section 2 of the United States Constitution and established precedent, laws of a state, including state constitutions, cannot trump the authority of powers and rights granted by the Federal Constitution.<sup>16</sup> Thus, the provisions of Article IV, section 9 of the Illinois Constitution, regarding the veto process, would be inapplicable to any statute promulgated pursuant to the Seventeenth Amendment.

Regardless of the way the provision is effected, the Seventeenth Amendment's broad grant of power allows the Illinois General Assembly to act without fear of veto or other gubernatorial action. Any other interpretation would subvert the clear and unambiguous authority granted to state legislatures under the Federal Constitution.

## V. Conclusion

The Seventeenth Amendment offers state legislatures extraordinary power regarding the methodology by which they direct elections to fill Senatorial vacancies. But the thrust of that provision is that the ultimate authority rests with the voters. Under its terms, a legislature can choose not to act at all, requiring a special election called by the governor. State legislatures may also choose (as they did in Illinois) to grant gubernatorial power to appoint temporary successors to a Senate seat. However, the Seventeenth Amendment is clear that such appointments only last until voters are given the right to fill the vacancy permanently through an election process determined by the legislature. But even when such power is granted to a governor, state legislatures maintain broad discretion to direct a special election at any point. This discretion, being directly granted through the Federal Constitution, is not impacted or subject to state law processes, which would undermine that authority.

This power could very well be exercised to allow the voters to choose Illinois's successor Senator even now—months after the appointment and seating of Roland Burris as temporary

Senator and well over a year before his term would otherwise end. However, given the political environment and realities, it is far from certain that the General Assembly wishes to do so. Regardless, for the time being, the media coverage and political discourse has made for interesting reading, and has created opportunities to address otherwise obscure issues of constitutional law.\*

1. \*Editors' Note: On February 25, 2009, Attorney General Lisa Madigan issued an opinion which concluded that the Illinois General Assembly may pass a law authorizing the setting of a special election to allow the people of the State of Illinois to elect a successor to the seat vacated by President Barack Obama. See Ill. Att'y Gen. Op. No. 09-001, issued February 25, 2009. A number of bills are currently pending with the Illinois General Assembly that would, among other things, amend section 25-8 of the Election Code to address the vacancy created by the resignation of President Barack Obama. See House Bill Nos. 365, 2503, 2543, 3793, and 4113 and Senate Bill No. 285.

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2. It also triggered the unprecedented actions of the State Legislature that resulted in the first impeachment of an Illinois Governor, pursuant to the provisions of the Illinois Constitution.

3. As of the writing of this article, several Illinois House Republicans have even called for investigations as to whether Mr. Burris's omissions at the time of his testimony amount to perjury.

4. The Seventeenth Amendment, ratified by the required number of States on April 8, 1913, was designed to create a uniform method of selecting Senators. Under the Constitution, the responsibility for selecting United States Senators was placed upon the state legislators. This proved to be a controversial provision. There were numerous attempts to change the method of selection, but they were aborted by the Senate until 1911 when the Senate's earlier hostility or indifference to a constitutional amendment was finally overcome. For a detailed analysis of the historical background of this change, see *Trinsey v. Pennsylvania*, 941 F.2d 224 (3rd Cir. 1991).

5. Article XVII of the United States Constitution.

6. *Trinsey*, 941 F.2d 224 (3rd Cir. 1991) (citing prior court opinions interpreting the Seventeenth Amendment through its "natural meaning").

7. Advisory Opinion to Governor, 157 Fla. 885 (1946) (citing to Paine, Law of Elections, p.

355, par. 421; Oxford English Dictionary).

8. *Trinsey*, 941 F.2d 224 (3rd Cir. 1991) (holding that the manner in which nominees are selected has been left to the discretion of the states and further holding that the Seventeenth Amendment has invested the state legislature with discretion to direct the manner in which the vacancy election is to be conducted).

9. The term "representatives in Congress" is defined elsewhere in the Illinois Election Code. See e.g., 10 ILCS 5/7-4(5) (for purposes of making nominations by political party "The words 'congressional office' or 'congressional officer', representatives in Congress"); 10 ILCS 5/20-1(6) (for purposes of voting by absent electors in military or naval services "Federal office" means the offices of President of the United States, United States Senator, Representatives in Congress, delegates and alternative delegates to the national nominating conventions, and candidates for the Presidential preference primary). Because the General Assembly chose to use the phrase "representatives in Congress" rather than the term "Senator" (which has been specifically denoted elsewhere), the legislature chose to limit the temporary appointee to a maximum term of two years, until the next Congressional election. See *State Farm Mut. Auto. Ins. Co. v. Illinois Farmers Ins. Co.*, 226 Ill.2d 395, 402; 875 N.E.2d 1096, 1100 (2007) (The language used in a statute is always afforded its plain and ordinary meaning).

10. *Id.*; see also, *In re C.W.*, 199 Ill. 2d 198, 211 (2002) (where statutory provisions are clear and unambiguous, the court must give effect to the statute as written, without reading into it exceptions, limitations, or conditions the Legislature did not express).

11. Or, at the very least, require more than the special election for a single Congressional office.

12. Though the law would become effective thereafter without a veto. Ill. Const. 1970, art. IV, § 9.

13. Black's Law Dictionary 459 (Sixth Edition 1990).

14. *Trinsey*, 941 F.2d at 235 ("[The legislature] has been given the discretion by the Seventeenth Amendment to direct the manner in which the vacancy election is to be conducted").

15. *Id.* at 234 (further stating "Not only does the proviso state that the state legislature "may" empower the executive to make temporary appointments but, in language which itself could be deemed dispositive of the issue before us [whether state law could preclude a primary election to fill a vacancy], it also states that those interim appointments will continue until filled by election "as the legislature may direct.")

16. The Supremacy Clause provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Constitution, art. VI, §2; see also, *United States v. La.*, 225 F. Supp. 353 (E.D. La. 1963) (Federal constitutional provisions regarding elections and voting trump state law, including state constitutions).

## Public sector discipline: November 2008 term of the Supreme Court, and some advice to attorneys, judges, and law students

By **Leonardo Morales\***

*In re Edwards*, Commission No. 07 CH 129, S. Ct. No. M.R. 22619 (November 18, 2008). John Joseph Edwards was employed as an Assistant State's Attorney in Cook County, Illinois between 1998 and 2006. He was arrested and charged with unlawful possession of methamphetamine and ultimately pleaded guilty to a class 3 felony charge of possession. Edwards' cooperation, recovery efforts, and acceptance of responsibility

were considered to be mitigating factors. The Illinois Supreme Court allowed the Administrator's petition to impose discipline on consent and suspended Edwards for two years and until further order of the Court, with the suspension stayed after one year by probation, subject to certain conditions, most of which related to his treatment for alcohol and substance abuse.

The *Edwards* consent petition, as

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well as the Supreme Court's final order of discipline, can be found in their entirety at the Attorney Registration and Disciplinary Commission's Web site at <[www.iardc.org](http://www.iardc.org)>, by selecting "Rules and Decisions" and inserting the case number in the appropriate search field.

Given the recent number of substance abuse cases that have been reported in this newsletter (see Standing Committee on Government Lawyers Newsletter, vol. 10, No.1 (September 2008); vol. 10 No. 2 (December 2008)), the newsletter editors suggested a reminder to all attorneys, judges, and

law students of the availability of the Lawyers' Assistance Program (LAP). LAP provides assistance to those facing challenging periods in life that may result in substance abuse, stress, and depression. Given that members of the legal profession experience such problems at a higher rate than those in other professions, LAP is a great resource which provides absolute confidentiality guaranteed by Rule 1.6 of the Illinois Rules of Professional Conduct.

LAP also will meet with you and other concerned individuals about a colleague who is in need of compassionate and

experienced assistance. LAP volunteers are available to plan and conduct an intervention that can rescue a friend who requires help.

More information can be found on LAP's Web site at <[www.illinoislap.org](http://www.illinoislap.org)>, and LAP can be contacted either by e-mail at [gethelp@illinoislap.org](mailto:gethelp@illinoislap.org), or by phone at (312) 726-6607.

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## 'Sunshine on my shoulders makes me happy' – Sunshine on my subpoenas does not: a case summary of *Better Government Association v. Blagojevich*

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By Sharon L. Eiseman

The Illinois Appellate Court recently ruled that, pursuant to the Illinois Freedom of Information Act (FOIA) (5 ILCS 140/1 *et seq.* (West 2006)), then-Governor Rod R. Blagojevich was required to turn over documents requested by the Better Government Association and Dan Sprehe (BGA) related to federal grand jury subpoenas previously served on the Governor. The ruling affirmed the trial court's order which gave plaintiffs their requested relief by compelling the Governor to disclose the subpoenas. *Better Government Association v. Blagojevich*, 386 Ill. App. 3d 808, 899 N.E.2d 382 (4th Dist. 2008) (released for publication December 19, 2008; mandate issued January 16, 2009). In a respectful nod to the Sangamon County circuit court judge who tried the matter, the opinion, in closing, "commends the trial court's thoughtful analysis and careful explanation of its findings, which we found most helpful." 386 Ill. App. 3d at \_\_\_\_, 899 N.E.2d at 393 (2008). This "thoughtful" analysis was likely motivated by the case's procedural history in the lower court, where the final order in favor of the plaintiffs followed a hearing on the Governor's summary judgment motion that was denied by the judge, and the BGA's motion for judgment on the plead-

ings that the trial judge granted.

In reaching its conclusion, the appellate court considered and dismissed without equivocation the Governor's claims that: (1) federal grand jury subpoenas are exempt from disclosure under various sections of FOIA; and (2) the FOIA is preempted by federal law. The court also made short shrift of the Governor's equally unsuccessful attempt to convince the trial court to reverse its order based upon newly discovered evidence.

The matter arose initially after the BGA made an unsuccessful attempt to obtain the subpoenas and associated correspondence through a FOIA request. In his denial of that request, the Governor asserted that the subpoenas, if they existed, were exempt from disclosure under section 7(1)(a) of the FOIA (5 ILCS 140/7(1)(a) (West 2006)), and that sections 7(1)(f) and (n) of the FOIA (5 ILCS 140/7(1)(f), (1)(n) (West 2006)) also shielded related correspondence from disclosure.

Prior to filing its court action as authorized under the FOIA, the BGA wrote to Gary Shapiro, the First Assistant U.S. Attorney for the Northern District of Illinois, asking whether the U.S. Attorney's Office would intervene, if the BGA filed suit against the Governor seeking disclosure of the federal grand jury subpoenas.

Shapiro responded that since the lawsuit was at that time "hypothetical," a decision regarding intervention "cannot be made until a lawsuit is filed and we are in a position to analyze its specifics and the relevant law." 386 Ill. App. 3d at \_\_\_\_, 899 N.E.2d at 384-5 (2008). This communication and other contacts with the U.S. Attorney's Office ultimately became significant considerations for both the trial court and the appellate court.

Although it addresses the claimed FOIA exemptions, the appellate court's opinion focuses significantly on the lack of merit to the Governor's claim of federal preemption. Specifically, the Governor's summary judgment motion argued that Federal Rule of Criminal Procedure 6(e) (2) (Fed. R. Crim. P. 6(e)(2)) prohibits the disclosure of matters before a federal grand jury, even though, as the Governor conceded, the language in that Rule does not apply to members of the public who are served with grand jury subpoenas. Nevertheless, the Governor argued that federal courts have extended the limited protection afforded by the Rule in order to preserve the "secrecy of the federal grand jury process" and the "integrity of the government's investigation" of such records. 386 Ill. App. 3d at \_\_\_\_, 899 N.E.2d at 385 (2008). Without a 'particularized need' for the contents of a federal

subpoena (386 Ill. App. 3d at \_\_\_\_, 899 N.E.2d at 385 (2008)), disclosure would be prohibited by the Rule, and thus by section 7(1)(a) of the FOIA. In his case, the Governor argued, the BGA failed to show a particularized need.

The court tackled this issue by noting certain observations made by the trial court during the January 2008 hearings on the parties' respective motions. First, the Governor acknowledged that nothing prevents the subpoena recipient from voluntarily disclosing subpoenaed documents. Additionally, the need for continued secrecy can be trumped by evidence of a particularized need for disclosure, but in the instant case, no competent evidence was provided for continued secrecy, and so the trial court concluded that the need for the public to know outweighed the need for secrecy. The subpoena's wording that "disclosure could impede an investigation" was deemed nothing more than 'boilerplate' by the trial court (386 Ill. App. 3d at \_\_\_\_, 899 N.E.2d at 385 (2008)), which also pointed out that the U.S. Attorney's Office had taken no action whatsoever despite its knowledge of the proceedings since the fall of 2006 and an opportunity to intervene in the litigation.

The appellate court was also not persuaded by the federal district court decisions relied on by the Governor as evidence that Rule 6(e)(2) has been expanded beyond its stated prohibitions. Although the cases cited reflect the deference some federal district courts have expressed for the secrecy of grand jury proceedings, the BGA court underscored the fact that, in the more than

200 years that the federal government has been issuing subpoenas, "Congress has not seen fit to specifically restrict the behavior of subpoena recipients." 386 Ill. App. 3d at \_\_\_\_, 899 N.E.2d at 388 (2008). Thus, those decisions expanding the Rule have "taken it upon themselves" to correct this perceived oversight by judicially amending the Rule, an action the BGA court declined to follow. 386 Ill. App. 3d at \_\_\_\_, 899 N.E.2d at 389 (2008).

In its consideration of the cited decisions, the Court also took into account the intent of section 1 of the FOIA, that "all persons are entitled to full and complete information regarding the affairs of government." 5 ILCS 140/1 (West 2006). This public policy of expansive disclosure by necessity and the application of strict statutory construction do not support exemptions to disclosure that are not specifically stated in the statute. Since Rule 6(e)(2) does not specifically prohibit recipients from disclosing federal grand jury materials, the court declined to judicially amend the Rule.

The court also rejected the Governor's assertion that the records requested by the BGA were exempt under several sections of the FOIA. Unlike Rule 6(e)(2) which gives a private citizen the discretion as to whether to reveal federal grand jury subpoena information, FOIA provides no such discretion to a public official who is indeed subject to the FOIA requirements. It is not surprising that government entities generally "prefer" not to make their activities known to the public. 386 Ill. App. 3d at \_\_\_\_, 899 N.E.2d at 391 (2008). If it were otherwise, the court commented, there would be no

need for a law like the FOIA which has become necessary to facilitate "transparency" in government. Illinois courts must therefore enforce the legislative policy that "the sunshine of public scrutiny is the best antidote to public corruption[.]" 386 Ill. App. 3d at \_\_\_\_, 899 N.E.2d at 391 (2008). With this global view of public policy in mind, the court summarily dismissed the Governor's claims of exemption under each of the several specified sections.

Last, the court affirmed the trial court's denial of the Governor's motion to reconsider its ruling based upon newly discovered evidence. Interestingly, such "evidence" came in the form of a letter dated February 5, 2008, from the U.S. Attorney's Office that was sent three weeks after the trial court issued its order denying the Governor's motion for summary judgment. Moreover, the letter was in response to an inquiry from the Governor, and was "conclusory and filled with bureaucratic vagueness." 386 Ill. App. 3d at \_\_\_\_, 899 N.E.2d at 392 (2008). Under these circumstances, the court concluded that the Governor's post-ruling motion was merely a "frantic attempt to show that the court had erred" (386 Ill. App. 3d at \_\_\_\_, 899 N.E.2d at 392 (2008)), rather than for the purpose of presenting newly discovered evidence that was not available at the time of the hearing. Accordingly, the court held that the February 5, 2008, letter was insufficient to call into question the trial court's ruling, and that the trial court had properly exercised its discretion in denying the Governor's motion to reconsider.

## In-Sites

This month, we cover broad topics, in the hopes that spring will soon come!

### TAXES

It's tax time, so here is the definitive site that might be worth visiting, especially if you think you'd like to be a presidential nominee: <<http://www.irs.gov/individuals>>.

The IRS provides a wide array of information, from what's new this year and highlights of tax changes to information for farmers, those in the military, and

parents.

### SPRING PLANTING

<<http://www.gardenguides.com/how-to/tipstechniques/basicstechniques/springplanting.asp>>.

This site contains many tips and techniques to prepare your garden for the thaw. The how-to guide covers many topics and will help you grow where you've planted.

### ILLINOIS HISTORIC SITES

<[http://www.illinoishistory.gov/hs/](http://www.illinoishistory.gov/hs/sites.htm)

[sites.htm](http://www.illinoishistory.gov/hs/sites.htm)>.

The wonderful Illinois history sites are enumerated and described on the Web site of The Illinois Historic Preservation Agency. Pay careful attention to the site hours, as some have limited openings.

### WATER PARKS

<<http://themeparks.about.com/cs/waterparks/a/ILwaterparks.htm>>.

With great hope for warmer weather, see information on Illinois' water parks.



# Summary of recent decisions

By Edward Schoenbaum\*

## Administrative Law

**Morgan v. Department of Financial and Professional Regulation, No. 1-07-1058 (1<sup>st</sup> Dist. February 13, 2009). Affirmed.**

Determination of Department of Professional Regulation to suspend plaintiff's clinical psychologist license for a period of five years based on sexual misconduct with several patients, and failure to maintain proper records, even though the witnesses suffered from mental illness, gave inconsistent statements, and took medication that could cause confusion, is not against the manifest weight of the evidence; findings were sufficiently specific to afford meaningful review. Further, failure to include specific dates of alleged incidents of sexual misconduct in charges did not violate plaintiff's due process rights, nor did delay of 222 days between end of testimony and entry of final administrative decision and after *ex parte* temporary suspension.

## Pensions

**Ryan v. Board of Trustees of the General Assembly Retirement System, No. 1-07-1601 (1<sup>st</sup> Dist. February 6, 2009). Reversed.**

Pension Board erred when it interpreted section 2-156 of the Pension Code to direct that former Governor, who was convicted of felonies committed during his service as Governor and Secretary of State, also forfeited pension benefits accrued during the period of time he served as member of the General Assembly and Lieutenant Governor. Section 2-105 of the Code limits the definition of member to the period of service in each office.

## School Law

**G.I.S. Venture v. Novak, No. 2-07-0934 (2d Dist. February 6, 2009). Affirmed in part, reversed in part, remanded.**

Trial court erred when it granted summary judgment in favor of school district dismissing taxpayer complaint challenging levy for educational fund at the maximum rate, after it had permanently transferred funds from working cash fund, established with proceeds from issuance of bonds, to operations and manage-

ment fund. Section 20-5 of School Code does not allow for the general permanent transfer of funds from working cash fund to any other fund except educational fund, whether through abatement or otherwise. However, because there remains material issue of fact with regards to whether transfer of disputed funds to educational fund would result in excess accumulation, it was not error to deny full summary judgment to taxpayers.

## Sovereign Immunity

**People v. Excavation and Lowboy Services, Inc., No. 1-07-3345 (1<sup>st</sup> Dist. February 13, 2009). Affirmed.**

After Environmental Protection Agency sued individuals and city for operating illegal dump and public nuisance, trial court did not err when it granted motion to dismiss city's third party complaint against Illinois Department of Transportation and its Director based on a lack of jurisdiction. Because provisions of Environmental Protection Act do nothing to override either the State Lawsuit Immunity Act or Court of Claims Act, circuit court lacks jurisdiction over third party complaint.

## Special Prosecutors

**In re Appointment of Special Prosecutor, No. 3-07-0553 (3d Dist. January 29, 2009). Reversed and remanded.**

Former Assistant State's Attorneys, who successfully petition to have court

appoint the Attorney General's office as special prosecutor to investigate the State's Attorney, but whose case was dismissed after the Attorney General found no basis for further investigation, lacked standing to participate in the consolidated case filed by State' Attorney, petitioning for the appointment of a special prosecutor to investigate current and former employees of State's Attorney's and Sheriff's offices. Further, appointment of special prosecutor, and injunction against State's Attorney is overly broad, in that it allows a special prosecutor to investigate all current and former officers and employees and has no provision for termination. However, to remand case with directions that trial court enter order approving proposed agreement between States Attorney Appellate Prosecutor's office, State's Attorney, and Special Prosecutor, would be an exercise of supervisory powers, which Appellate Court lacks.

\*These summaries were prepared by Adrienne W. Albrecht for the ISBA Illinois E-Mail Case Digests, which are free e-mail digests of Illinois Supreme and Appellate Court cases and which are available to ISBA members soon after the decision is released, with a link to the full text of the slip opinion on the Illinois Reporter of Decision's Web site. These summaries have been downloaded and reorganized according to topic by Ed Schoenbaum for Government Lawyers, with permission.

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