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April 3, 2018

The Honorable Lawrence J. Hogan, Jr.
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401

RE: Senate Bill 687 – State Vacancy Reform Act

Dear Governor Hogan:

We have reviewed and hereby approve for constitutionality and legal sufficiency Senate Bill 687, “State Vacancy Reform Act.”

The State Vacancy Reform Act limits the amount of time an individual may serve in an office that is subject to Senate confirmation without that individual being confirmed. Senate Bill 687 also sets out prohibitions applicable to individuals who are nominated for or continue to hold office under specified circumstances outlined in the bill.

We considered whether Senate Bill 687 violates the separation-of-powers and conclude that it does not.¹ Article 8 of the Declaration of Rights does not “prevent one branch from exercising its own powers simply because they affect or even nullify the acts of another branch.” 63 *Opinions of the Attorney General* 305, 310 (1978); *see also State v. Falcon*, 451 Md. 138, 172-73 (2017) (recognizing that the General Assembly had the power to end the terms of a legislatively created commission and give the appointment power to an entity other than the Governor, even though those actions would affect the Governor’s powers). Rather, there is a separation-of-powers violation only when one branch “usurp[s] or destroy[s]” the “essential” powers of another branch. 63 *Opinions of the Attorney General* at 310 (emphasis in original) (citations omitted).

¹ Article 8 of the Maryland Declaration of Rights provides: “That the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other.”

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Senate Bill 687 does not usurp or destroy gubernatorial appointment powers. The legislation does not prevent a Governor from making appointments with the confirmation of the Senate or from using a Governor's recess-appointment power to make recess appointments to fill vacancies. Senate Bill 687 also leaves a Governor with broad discretion to select appointees of the Governor's choice. Although the qualifications for office holders specified in Senate Bill 687 constrain a Governor's discretion to select appointees to a limited degree, Maryland courts have not suggested that the General Assembly lacks authority to place those kinds of limits on gubernatorial discretion. To the contrary, the Court of Appeals has upheld provisions under which the Governor must appoint individuals from lists provided to him. *See, e.g., Stillman v. Commission on Med. Discipline*, 291 Md. 390, 411-12 (1981) (finding constitutional a statute that required governor to appoint the Board of Physicians from a list).

Moreover, we recognize that Senate Bill 687 preserves the design of the Maryland Constitution. Under the Constitution, the primary method of appointment is for a Governor to nominate an individual and for the Senate to confirm that nominee, whereas the recess-appointment power constitutes a narrow, temporary exception to that primary method. *Smoot v. Somerville*, 59 Md. 84, 87 (1882). Thus, we believe that Senate Bill 687 serves a valid purpose to deter appointments that circumvent Senate confirmation.

Accordingly, it is our view that Senate Bill 687 is constitutional and legally sufficient.

Sincerely,



Brian E. Frosh
Attorney General

BEF/SBB/kd

cc: The Honorable John C. Wobensmith
Chris Shank
Victoria L. Gruber