Douglas F. Gansler
Attorney General

Katherine Winfree
Chief Deputy Attorney General

John B. Howard, Jr.
Deputy Attorney General

Dan Friedman
Counsel to the General Assembly

Sandra Benson Brantley
Bonnie A. Kirkland
Kathryn M. Rowe
Assistant Attorneys General

The Attorney General of Maryland

Office of Counsel to the General Assembly

April 15, 2008

The Honorable Martin J. O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

Re: House Bill 1627 and Senate Bill 1014

Dear Governor O'Malley:

We have reviewed and hereby approve the constitutionality and legal sufficiency of House Bill 1627 and Senate Bill 1014, both of which concern a special election in the event of a vacancy in the office of Representative in Congress. The bills were occasioned by the resignation of the Honorable Albert Wynn, member of congress from the 4th congressional district. While the bills are substantially similar, they are not identical due to different amendments adopted to each bill. House Bill 1627 and Senate Bill 1014 each were passed by both the House and the Senate. If you sign both bills, the provisions of the last bill signed will govern to the extent that any provision directly conflicts with the earlier signed bill.

The bills change Maryland law governing the special election process for the limited circumstance of a vacancy in the Office of Representative in Congress after the date of the regular primary election. Under current primary schedules, such a vacancy would occur in the second year of a member's term, after the major political parties have selected nominees to run in the general election by primary election. Under the United States Constitution, the vacancy must be filled by an election rather than a gubernatorial appointment or some other mechanism. U.S. Const., Art. I, §2, cl.4. If a vacancy occurs before the primary date, the State could hold a special primary election to coincide with the regular primary election. EL § 8-710.

In the situation of a vacancy that occurs after the primary, however, the current law gives the Governor the option only of leaving the seat vacant for a number of months, or holding two additional elections, before the regular general election, at a substantial cost to State and local government. Leaving the seat vacant for a number of months could raise constitutional concerns. *See ACLU v. Taft*, 385 F.3d 641 (6th Cir. 2004) (holding that it is unconstitutional for a Governor to decline to hold a special election to fill a congressional vacancy unless the period for which the seat would be

unfilled would be "*de minimis*"). House Bill 1627 and Senate Bill 1014 both give the Governor a third option in this situation to issue a proclamation declaring that one special general election shall be held but no special primary election. Both bills provide for a sunset after enactment. House Bill 1627 sunsets on December 31, 2008; Senate Bill 1014 sunsets one year from date of enactment. Both bills are emergency bills and will become effective upon your signature. In these respects the bills are nearly identical.

Each bill provides that the central committees of political parties shall make nominations for candidates for the office in the special general election. Additionally, each bill provides that nominations of persons not seeking nomination through a political party shall be made in accordance with Election Law Article § 5-703 (i.e., by petition). The bills differ, however, regarding which central committee shall make the nomination. The Senate bill provides that the State central committee shall make the nomination, "after consideration of the recommendation of the local central committee of the political party in each county that is included in the district of the office." The House version, on the other hand, provides that the local central committees, if any, in each of the counties included in the congressional district shall vote to recommend a candidate. If all local central committees agree on a candidate, the State central committee must nominate that person. If they do not, the State central committee picks one of the candidates recommended by the local central committees.

While we believe that either method is constitutional, there is case law to suggest that under the constitutional requirements relating to an election of a Representative in Congress, the method in SB 1014 may be susceptible to a constitutional challenge because the State central committee makes the nomination. *See Montano v. Lefkowitz*, 575 F.2d 378, 386 (2d Cir. 1978). In *Montano*, the United States Court of Appeals for the Second Circuit analyzed a state statutory procedure for nominating candidates for consistency with the Equal Protection Clause of the Fourteenth Amendment as well as the federal constitutional provisions relating to the election of the House of Representatives. The court explained,

> It is simply inconsistent with the concept of election of Representatives by districts that a candidate should be chosen in part by persons outside the district elected to these posts as such... It may well be that nomination for such special elections could validly be placed in persons previously chosen to constitute the party hierarchy in a unit which includes but is larger than the particular congressional district, or by some combination of such persons and delegates elected by some district, or with such persons having some kind of veto power over the candidate selected by the delegates of the district... We recognize that the party itself has an interest

> in the choice of a candidate, and that arrangements other than designation solely by persons elected by the district to represent it on a county committee may be constitutionally permissible. indeed that there may be a variety of constitutional permissible methods.

Id. at 385-86 (citations omitted). Thus, we think HB 1627's vesting of the recommendation with local committees is preferable.

The special election provisions of both bills are triggered when "[a]n office of Representative becomes vacant..." The Senate Bill further provides an additional trigger when "the Governor accepts a written notice *of* the Representative announcing a future date of resignation." (Emphasis added.) The House bill uses the language when "the Governor accepts a written notice *from* the Representative announcing a future date of resignation." (Emphasis added.) You may prefer the Senate's formulation to address a situation where the member of Congress did not submit the resignation directly to you. Under the language of either bill, a resignation would be deemed irrevocable once "accepted" by the Governor. *See Hinds' Precedents* at §1213; 62 *Opinions of the Attorney General* 823, 825 (Jan. 11, 1977) ("The dominant rule, nonetheless. appears to be that a prospectively operative resignation may not be withdrawn once it has been accepted by the appropriate authority, even though withdrawal of the resignation is attempted prior to its intended effective date."). *See also Letter to the Honorable Robert R. Staab from Robert A. Zarnoch, Counsel to the General Assembly* (Dec. 10, 1987) (advising that a prospective resignation was irrevocable and that the local central committee may act to fill the vacancy before the effective date).

Another difference between the two bills is the time limitation to hold the special election. Both mandate that the election shall be at least 36 days after the date of the proclamation. House Bill 1627 further adds that the special election may not be more than 60 days after the date of the proclamation. (HB 1627, page 6, lines 21 – 22.)

The two bills also have different language regarding any conflict between the bill language and other provisions of election law. Both bills provide that "as to any conflict between this Act and any other provision of the Election Law Article, the provisions of this Act shall prevail." Senate Bill 1014, however, adds "or of any regulation adopted in accordance with the Election Law Article." Even without the additional Senate language, the provisions of either HB 1627 or SB 1014 should be read to prevail over any conflicting statutory or regulatory provision established in or under the authority of current Election Law. *See Dept. of Motor Vehicles v. Greyhound Corp.*, 247 Md. 662, 666-67 (1967) ("While two or more statutes in *pari materia* are to be given full effect whenever possible, where the provisions of such statutes are unreconcilable, the later statute governs to the extent of the conflict.") (citations omitted).

Both bills, for example, expressly grant to the Administrator of the State Board of Elections the discretion to "reduce the amount of time required or allowed for any election-related action relating to the special general election." (HB 1627, page 7, lines 11 – 15; SB 1014, page 7, lines 8 – 12). Thus, under the explicit language of either the House or Senate bill, the Administrator is empowered to shorten a time period for an election-related act, even if there is a preexisting regulatory provision providing a longer time period. Therefore, this difference between the two versions should not have legal consequence.

Based on this review of the differences, you may choose to sign either bill alone, or make one effective over the other by signing it second, if you prefer to sign both. Of course, it is worth noting that each version will sunset within the year and have no effect on future elections after that time. You may wish to consider proposing a more permanent solution in next year's legislative session.

In accordance with the foregoing, we hereby approve the constitutionality and legal sufficiency of both House Bill 1627 and Senate Bill 1014.

Very truly yours,

Douglas F. Gansler
Attorney General

DFG/SB/mlh

cc: The Honorable Thomas V. Mike Miller, Jr.
The Honorable Michael E. Busch
The Honorable Dennis Schnepfe
Joseph Bryce
Karl Aro