OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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February 9, 2021

FILE NO. 21-001

COMPATIBILITY OF OFFICES:
State Senator and
Assistant State's Attorney

COPY

The Honorable Don Harmon
President of the Illinois Senate
State Senator, 39th District
327 Capitol Building
Springfield, Illinois 62706

Dear President Harmon:

I have your letter inquiring whether an individual may serve simultaneously as a member of the Illinois Senate and an Assistant State's Attorney. For the reasons stated below, it is my opinion that the offices of State Senator and Assistant State's Attorney are incompatible and, therefore, one person may not hold both offices simultaneously.

BACKGROUND

In opinion No. NP-217, issued September 8, 1970, Attorney General Scott was asked whether the office of State Senator was compatible with the office of Assistant State's Attorney. In reaching his conclusion that the offices were incompatible, Attorney General Scott

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reviewed, among other things, article III of the Illinois Constitution of 1870, which incorporated the separation of powers doctrine into Illinois government, and which provided:

> The powers of the government of this State are divided into three distinct departments – the legislative, executive and judicial; and no person, or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted.

In construing article III, Attorney General Scott analyzed *Saxby v. Sonnemann*, 318 Ill. 600, 149 N.E. 526 (1925), in which the Illinois Supreme Court concluded that a member of the General Assembly (a State Senator) could not exercise the powers of a deputy of and assistant to the Attorney General of Illinois without violating the separation of powers doctrine set forth in article III of the Illinois Constitution of 1870. Ill. Att'y Gen. Op. No. NP-217 at 3. Attorney General Scott then noted that both the offices of Attorney General and State's Attorney are legal offices in the executive branch of government and that both of the offices involve the exercise of discretion. Further, he stated that both the Attorney General and a State's Attorney have the power to appoint necessary deputies or assistants to aid in carrying out their many duties. Attorney General Scott then wrote:

> The duties of an Assistant State's Attorney are more than ministerial in nature. They are legal duties which involve the exercise of discretion.[1] He acts for the State's Attorney and therefore, exercises the power of that office.
>
> Because of the foregoing, I am of the opinion that the Office of State Senator is incompatible with that of Assistant State's Attorney. Incompatibility would arise because of the

[1]*Compare to People v. Capuzi*, 20 Ill. 2d 486, 493, 170 N.E.2d 625, 629 (1960) (article III of the Illinois Constitution of 1870 does not apply in circumstances where General Assembly members hold local offices (deputy coroner, deputy bailiff and deputy clerk of the municipal court of Chicago, and village president) which do not involve exercising governmental sovereignty in the performance of their duties).

> provisions of Article III and Section 3 of Article IV of the Constitution of Illinois 1870.[2] Ill. Att'y Gen. Op. No. NP-217 at 5.

You have inquired whether the conclusion reached in opinion No. NP-217 remains valid in light of subsequent judicial opinions and opinions of this office. If opinion No. NP-217 remains valid under current Illinois law, you have also inquired whether the determination would be different if, as Assistant State's Attorney, the State Senator: (1) is paid solely out of county funds or Federal grants rather than State grants; (2) does not have his or her own caseload but only supervises Assistant State's Attorneys and their cases; or (3) is hired on individualized cases to deal with specialized needs.

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[2]While Attorney General Scott's analysis focused solely on the separation of powers provision in article III of the Illinois Constitution of 1870, he also concluded that simultaneous tenure would be prohibited under article IV, section 3, of the Illinois Constitution of 1870, which provided, in pertinent part:

> *No* judge or clerk of any court, Secretary of State, Attorney General, *State's Attorney*, recorder, sheriff, or collector of public revenue, member of either house of Congress, *or person holding any lucrative office under the United States or this State*, or any foreign government, *shall have a seat in the General Assembly*[.] (Emphasis added.)

Pursuant to this language, members of the General Assembly were prohibited from holding any other lucrative office. Ill. Const. 1870, art. IV, §3; *see also* Ill. Const. 1870, art. IV, §15; Ill. Att'y Gen. Op. No. 14-002, issued December 23, 2014, at 5. At the Sixth Constitutional Convention, the Committee on the Legislative Article redrafted the Constitution to clarify and combine all provisions concerning dual office-holding. 6 Record of Proceedings, Sixth Illinois Constitutional Convention 1341-44. As a result, article IV, section 2(e), of the Illinois Constitution of 1970 provides, in pertinent part:

> (e) No member of the General Assembly shall receive compensation as a public officer or employee from any other governmental entity for time during which he is in attendance as a member of the General Assembly.

Article IV, section 2(e), does not prohibit a General Assembly member from simultaneously holding a public office. *See* Ill. Att'y Gen. Op. No. 14-002 at 4; 1980 Ill. Att'y Gen. Op. 116. Rather, the provision prohibits a General Assembly member from "receiv[ing] compensation" for local government service "for time during which he is in attendance as a member of the General Assembly."

ANALYSIS

It is well established that the common law doctrine of incompatibility of offices precludes simultaneous tenure in two public offices if the Constitution or a statute specifically prohibits the occupant of either office from holding the other, or if the duties of the two offices conflict so that the holder of one cannot, in every instance, fully and faithfully discharge all of the duties of the other office. *People ex rel. Fitzsimmons v. Swailes*, 101 Ill. 2d 458, 465, 463 N.E.2d 431, 434 (1984); *People ex rel. Smith v. Brown*, 356 Ill. App. 3d 1096, 1098, 828 N.E.2d 306, 308 (2005); *People ex rel. Myers v. Haas*, 145 Ill. App. 283, 286 (1908). The positions of State Senator and Assistant State's Attorney are public offices. *See* 25 ILCS 5/2 (West 2018); Ill. Att'y Gen. Inf. Op. No. I-09-019, issued October 29, 2009, at 2 n.1 (the position of Assistant State's Attorney is a public office); Ill. Att'y Gen. Inf. Op. No. I-08-008, issued March 25, 2008, at 4-5 (same). There is no statutory provision that expressly prohibits one person from serving simultaneously as both a State Senator and an Assistant State's Attorney. It must be determined, however, whether the Constitution precludes simultaneous tenure in the indicated offices.

Article II, section 1, of the Illinois Constitution of 1970, incorporates the separation of powers doctrine into current State law and provides:

> The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another.

Where the language of a constitutional provision is unambiguous, it will be given effect as written. *Committee for Educational Rights v. Edgar*, 174 Ill. 2d 1, 13, 672 N.E.2d 1178, 1184 (1996); Ill. Att'y Gen. Op. No. 14-002 at 4. However, if, after reviewing the language of a provision, doubt remains as to its meaning, it is appropriate to consult the official documents

related to the adoption of the Constitution, including the comments of the Constitutional Convention's delegates, to ascertain the meaning they attached to the provision. *Committee for Educational Rights*, 174 Ill. 2d at 13, 672 N.E.2d at 1184; *League of Women Voters of Peoria v. County of Peoria*, 121 Ill. 2d 236, 243-44, 520 N.E.2d 626, 630 (1987).

As with article III of the Illinois Constitution of 1870, article II, section 1, of the 1970 Constitution, addresses the distribution of authority among the legislative, executive, and judicial branches of government. 1977 Ill. Att'y Gen. Op. 144, 147. While the purpose of this provision is to ensure that the whole power of two or more branches of government shall not reside in the same hands, it was not designed to achieve a complete divorce among the three branches of State government. *See In re Derrico G.*, 2014 IL 114463, ¶¶75-76, 15 N.E.3d 457, 475 (2014); *People v. Hammond*, 2011 IL 110044, ¶¶51-52, 959 N.E.2d 29, 44-45 (2011).

Although the specific text of article II, section 1, of the Illinois Constitution of 1970 is not identical to that of article III of the Illinois Constitution of 1870, the Committee on General Government of the Sixth Constitutional Convention proposed the language of article II, section 1, to "modif[y] and modernize[ ]" the separation of powers article in the Illinois Constitution of 1870 and did "not intend in any way to change the purport of the article." Remarks of Delegate Davis, 2 Record of Proceedings, Sixth Illinois Constitutional Convention 1067. Furthermore, the information disseminated to the voters in anticipation of their vote to adopt the proposed Illinois Constitution of 1970 provided that article II, section 1, "is self-explanatory, and is derived from Article III of the 1870 Constitution." 7 Record of Proceedings, Sixth Illinois Constitutional Convention 2691. Thus, the delegates of the Sixth Constitutional

Convention did not intend to effectuate a substantive change to the separation of powers provision set forth in article III of the Illinois Constitution of 1870.

State's Attorneys are State officers and State officials. *See Ingemunson v. Hedges*, 133 Ill. 2d 364, 369, 549 N.E.2d 1269, 1271 (1990); *Bianchi v. McQueen*, 2016 IL App (2d) 150646, ¶34, 58 N.E.3d 680, 691 (2016), *appeal denied*, 65 N.E.3d 839 (2016); *see also* Ill. Att'y Gen. Inf. Op. No. I-07-042, issued August 2, 2007, at 5. As officers who perform the general duties of the State's Attorney's office, Assistant State's Attorneys are considered to be State officers in appropriate circumstances. *See, e.g., Biggerstaff v. Moran*, 284 Ill. App. 3d 196, 200, 671 N.E.2d 781, 784 (1996) (concluding that the county was not vicariously liable for the negligent acts of an Assistant State's Attorney under the *respondeat superior* doctrine); *Burger v. County of Macon*, 942 F.3d 372, 375 (7th Cir. 2019), quoting *Office of the Cook County State's Attorney v. Illinois Local Labor Relations Board*, 166 Ill. 2d 296, 303, 652 N.E.2d 301, 304 (1995) (finding that when exercising the State's Attorney's internal control authority over the operations of the office, Assistant State's Attorneys "are in essence surrogates for the State's Attorney").

The constitutional provision authorizing the office of State's Attorney is located in the Judicial Article of the Illinois Constitution of 1970. Ill. Const. 1970, art. VI, §19.[3] In addition, the Illinois Supreme Court has consistently concluded that the office of State's Attorney is considered part of the executive branch of government, as a State's Attorney exercises executive powers. *People v. Ringland*, 2017 IL 119484, ¶18, 89 N.E.3d 735, 741 (2017); *Nelson*

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[3]The office of State's Attorney was similarly located in the Judicial Article of the Illinois Constitution of 1870 at the time that opinion No. NP-217 was issued. *See* Ill. Const. 1870, art. VI (amended 1964), §21.

v. Kendall County, 2014 IL 116303, ¶¶27, 31, 10 N.E.3d 893, 900, 901 (2014). Because Assistant State's Attorneys are, in essence, surrogates for the State's Attorney and possess the power of the State's Attorney in the same manner and to the same effect as the State's Attorney (*Office of the Cook County State's Attorney*, 166 Ill. 2d at 303, 652 N.E.2d at 304; 1979 Ill. Att'y Gen. Op. 21, 22; Ill. Att'y Gen. Inf. Op. No. I-09-019 at 2), Assistant State's Attorneys also exercise executive powers.

The legislative power of the State is vested in the General Assembly. *See* Ill. Const. 1970, art. IV, §1. An Assistant State's Attorney who serves simultaneously as a member of the State Senate would thus be in a position to exercise the authority and powers of two separate branches of State government–the executive and legislative branches–in violation of article II, section 1, of the Illinois Constitution of 1970. Accordingly, under the reasoning of *Saxby v. Sonnemann* and Attorney General opinion No. NP-217, the offices of State Senator and Assistant State's Attorney are incompatible, and one person may not hold both offices simultaneously. Nothing in the subsequent case law or opinions of this office leads to a contrary conclusion.[4]

Because the separation of powers doctrine would be violated if an individual were to serve simultaneously as an Assistant State's Attorney and a member of the Illinois Senate, it is

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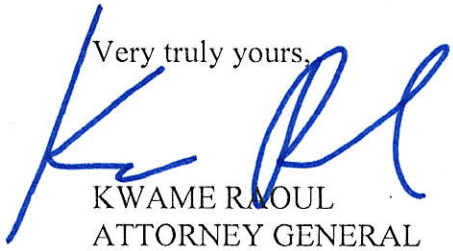
[4]Subsequent to the issuance of opinion No. NP-217, this office issued three opinions addressing whether a member of the General Assembly may simultaneously hold other public offices. Ill. Att'y Gen. Op. No. 99-015, issued July 9, 1999 (General Assembly member and community college board trustee); 1980 Ill. Att'y Gen. Op. 116 (State Representative and township supervisor); 1976 Ill. Att'y Gen. Op. 49 (General Assembly member and county board member). In two of the opinions, this office cited to an Illinois Supreme Court case which was issued 10 years prior to the issuance of opinion No. NP-217 (*People v. Capuzi* (*supra* note 1)) in concluding that the separation of powers doctrine was inapplicable. *See* 1980 Ill. Att'y Gen. Op. at 117; 1976 Ill. Att'y Gen. Op. at 49 (noting that the doctrine "has never specifically been applied by the court to offices at different levels of government"). The third opinion (opinion No. 99-015) did not address separation of powers. The offices in the three opinions are clearly distinguishable from the office of Assistant State's Attorney, which is established by the Judicial Article to exercise executive powers in State government.

not necessary to review the duties and powers of each office to determine whether the duties of the two offices might conflict so that the holder of one cannot, in every instance, fully and faithfully discharge all of the duties of the other office.[5] Consequently, the source of the Assistant State's Attorney's salary or the exact role of the Assistant State's Attorney in a specific State's Attorney's office would not affect the conclusion reached in this opinion.

CONCLUSION

Based on the foregoing, it is my opinion that pursuant to article II, section 1, of the Illinois Constitution of 1970, the offices of State Senator and Assistant State's Attorney are incompatible. Therefore, one person may not hold both offices simultaneously.

Very truly yours,



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[5]I note that there may be at least one instance where the duties of the two offices in question may conflict such that the holder of one office could not, in every instance, fully and faithfully discharge all of the duties of the other office. Illinois courts have held that common law incompatibility may be established where a public officer in one position has authority to act upon the appointment, salary, and budget of his or her superior in a second position. *Swailes*, 101 Ill. 2d at 465-66, 463 N.E.2d at 434; *People ex rel. Teros v. Verbeck*, 155 Ill. App. 3d 81, 83-84, 506 N.E.2d 464, 465-66 (1987). Pursuant to section 4-2001 of the Counties Code (55 ILCS 5/4-2001 (West 2018)), "[t]he State shall furnish 66 2/3% of the total annual compensation to be paid to each state's attorney in Illinois based on the salary in effect on December 31, 1988, and 100% of the increases in salary taking effect after December 31, 1988." Subject to appropriations, these amounts furnished by the State shall be payable monthly by the Department of Revenue out of the Personal Property Tax Replacement Fund or the General Revenue Fund to the county in which each State's Attorney is elected. 55 ILCS 5/4-2001 (West 2018). Accordingly, an Assistant State's Attorney who also serves in the Illinois State Senate would be placed in the position of voting to appropriate a portion of the salary for his or her superior. *See* 55 ILCS 5/4-2003(a) (West 2018) ("[s]uch assistant State's Attorneys are to be named by the State's Attorney of the county * * * and shall be under the supervision of the State's Attorney"). In addition, a vote on appropriations legislation may also include amounts appropriated to State's Attorney's offices for other purposes. *See, e.g.*, Public Acts 101-637, art. 12, §1, effective June 10, 2020; 101-007, art. 12, §1, effective June 5, 2019; 100-586, art. 14, §1, effective June 4, 2018; 100-021, art. 23, §5, effective July 6, 2017.