



February 27, 2009

The Honorable Lisa Madigan
Attorney General
Office of the Attorney General
500 South Second Street
Springfield, IL 62706

Re: Attorney General Opinion 09-011

Dear Attorney General Madigan,

I write to you as counsel for Senator Roland Burris. Yesterday, I received a copy of Attorney General Madigan's opinion, AG Opinion 09-011 dated February 25, 2009, suggesting that the General Assembly may lawfully enact legislation to set a special election for the United States Senate at a date earlier than November 2, 2010. I respectfully request that you reconsider Attorney General Opinion 09-011. Your conclusion is incorrect. The federal law on point is straightforward: No State may hold an election for a federal Congressional seat on any date other than "[t]he Tuesday next after the 1st Monday in November, in every even numbered year." 2 USCS § 7.

In *Foster v. Love*, 522 U.S. 67 (1997), the United States Supreme Court unequivocally prohibited the very action that the Attorney General sanctions here. The *Foster* Court confronted a Louisiana statutory scheme that created an "open primary" for the election of federal Senators and Representatives to take place in the month proceeding the nationally designated election date. Construing the Election Clause of the United States Constitution, as the Attorney General's advisory opinion does here, the Court struck down the Louisiana scheme, holding that the Elections Clause grants Congress the power to override state regulations by establishing uniform rules for federal elections. *Foster*, 522 U.S. at 69.

As *Foster* explains, Congress established the date for all senatorial elections through 2 U.S.C. §7 and 2 U.S.C. §1. The former statute, 2 U.S.C. §7, provides that "[t]he Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for the election, in each of the States and Territories of the United States, of Representatives and Delegates to the Congress commencing on the 3d day of

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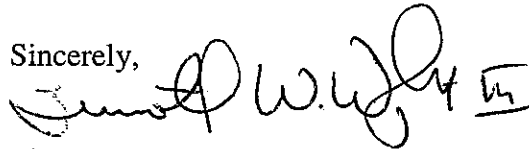
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January next thereafter.” For the election of senators under the Seventeenth Amendment, 2 U.S.C. §1 adopts the same day as prescribed under 2 U.S.C. §7. *Foster*, 522 U.S. at 69-70. The next such date is November 2, 2010, the same day that Senator Roland Burris faces re-election.

Senator Burris’s position is clear: the General Assembly will violate clearly established federal law if it creates a special election. *See Foster*, 522 U.S. at 72, fn. 4 (“if an election does take place, it may not be consummated prior to federal election day” as established by 2 U.S.C. §7 and 2 U.S.C. §1.). Additionally, a special election could cost Illinois taxpayers up to \$50 million. The public interest thus favors a reexamination of your opinion in light of *Foster v. Love*. I encourage you to take a second look at your analysis before the General Assembly wastes millions of tax dollars on an unlawful election.

Sincerely,

A handwritten signature in black ink, appearing to read "Timothy W. Wright III", with a stylized flourish at the end.

Timothy W. Wright III

Counsel for Senator Roland Burris

Cc: President Cullerton, Speaker Madigan, Leader Radogno, Leader Cross