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# Senate

State of Minnesota

TO: Senator Michelle Fischbach

FROM: Thomas S. Bottern, Senate Counsel 

DATE: December 13, 2017

RE: Succession of the President of the Senate to the Lieutenant Governorship

You have asked for guidance regarding the succession of the President of the Senate to the Lieutenant Governorship in the event that Governor Dayton appoints the current Lieutenant Governor, Tina Smith, to succeed Senator Franken in the United States Senate.

The Minnesota Constitution, Article V, Section 5, provides in part that:

The last elected presiding officer of the senate shall become lieutenant governor in case a vacancy occurs in that office.

Minnesota Statutes, section 4.06, paragraph (a), clarifies that a Senate president succeeding the Lieutenant Governor under this provision serves for the “remainder of the term.”

This presents the question of whether you would be required to resign your Senate seat or the Lieutenant Governorship in order to avoid a conflict with the provisions of Article IV, Section 9, of the Minnesota Constitution, which provides that:

No senator or representative shall hold any other office under the authority of the United States or the State of Minnesota, except that of postmaster or of notary public.

The Minnesota Supreme Court has considered and decided this exact question, and determined that it is compatible with the Minnesota Constitution for a sitting Senate president to remain in office as a Senator and to serve simultaneously as Lieutenant Governor. See State ex rel. Marr v. Stearns, 72 Minn. 200 (1898) (reversed on other grounds, 179 U.S. 223 (1900)). I believe this case is still good law, and that you could therefore serve as both Lieutenant Governor and as a Senator for the remainder of the current Lieutenant Governor’s term. Although there have been several changes made to some of the provisions in the Minnesota Constitution that were cited by the court in Stearns, I think the core reasoning used by the court remains applicable.

The Stearns decision focused on the applicability of the provision requiring the president of the Senate to assume the Lieutenant Governorship both temporarily and permanently. The court reasoned that in a case where the Senate president temporarily assumes the Office of the Lieutenant Governor (in situations where the Governor is temporarily incapacitated, such as in the event of impeachment, and the Lieutenant Governor must assume the duties of the Governor) it would be not be proper to assume that the president of the Senate could not continue serving as a Senator once the Governor resumed the duties of the office. The court further reasoned that since the constitution did not provide different procedures for a temporary assumption of the duties of the Lieutenant Governor and a permanent assumption of those duties, it would be unreasonable to require the resignation of a Senator serving as president from the Senate seat in order for the Senate president to assume the duties of the Lieutenant Governor: **“Such being the case, the president..., when he becomes lieutenant governor for the time being, during such a vacancy, ought not to be held no longer a senator, unless the express words of the constitution imperatively require such a construction.”** (Stearns at 214.) The court went on to find that there was no such express language in the Minnesota Constitution: “There is no language in the constitution requiring or justifying the conclusion that the senatorial office of the president pro tempore becomes vacant when he becomes lieutenant governor by reason of, and during, a vacancy in the office of governor.” (Stearns at 214.) In effect, the Stearns court held that since the constitution established the requirement for the Senate president to assume the Office of Lieutenant Governor in the event of a vacancy in that office, without explicit language in the constitution to vacate the president’s Senate seat in the event of succession, the court would not supply that requirement.

The court also reasoned that the character of the duties of the Lieutenant Governor and of the president pro tempore were identical, finding that “neither of them has any power or duty belonging to the executive department.” (Stearns at 215.) To support this assertion, the court noted that the Lieutenant Governor was not “authorized to exercise a single power or perform a single duty, as lieutenant governor, properly belonging to the executive department.” This remains true today. When time permits, I will provide you with a listing of the roles currently assigned to the Lieutenant Governor, none of which qualifies as an executive function. It is significant that the court noted that the Lieutenant Governor is not included among the officers subject to impeachment, and cited this as proof that “it was not intended by the constitution to confer executive powers upon the lieutenant governor.” It is still true today, even after the reforms made to the Minnesota Constitution in 1972, that the Lieutenant Governor is not subject to impeachment.

Based on the foregoing analysis, I believe you could serve as both Lieutenant Governor and as a Senator if you succeed the current Lieutenant Governor by virtue of your status as the last elected president of the Senate. There is historical precedent for this:

- From 1929 to 1931, Senator Charles Adams served as Lieutenant Governor while serving in the Senate.
- From August 1936 to January 1937, Senator William Richardson served as Lieutenant Governor while serving in the Senate.

I am researching the historical precedents and may be able to provide more when time permits.

Bear in mind that it is possible that your seating as a Senator could be challenged, both by another member by motion made in the Senate, or through a court challenge. It is my belief that a legal challenge would not prevail, although that is difficult to predict.

I will follow up with an expanded version of this memorandum. I have prepared this version within the limited time available so that you are prepared for questions that may follow from Governor Dayton's announcement today.

TSB/rdr