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TO: Senator Alec G. Olson, President of the Senate

FROM: Peter S. Wattson, Senate Counsel

SUBJ: President of the Senate's Succession  
to the Lieutenant Governorship

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

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

Notice that the section refers to "the last elected presiding officer of the senate", rather than to the President of the Senate. This suggests that you could not take yourself out of the line of succession by resigning your position as President of the Senate, since you would still be the "last elected presiding officer" until the Senate convenes in January and elects a new President. The Senate could not act before then without being called by the Governor to a special session.

The section says the last elected presiding officer "shall" become lieutenant governor. "Shall" is mandatory. This suggests that you could not avoid becoming lieutenant governor by declining to accept the office or by refusing to take the oath of office. If you did not wish to serve as lieutenant governor, you would be compelled instead to resign from the office.

If a vacancy occurs in the lieutenant governorship before the Senate convenes, you will become lieutenant governor "for the remainder of the term" as provided in Minnesota Statutes, Section 4.06. This suggests that you will remain lieutenant governor even if the Senate elects a different presiding officer in January. You could resign your Senate seat at any time.

The Constitution makes no further provision for filling a vacancy in the office of lieutenant governor when the last elected presiding officer is unavailable to serve, except to say that:

The legislature may provide by law for the removal, death, resignation, or inability both of the governor and lieutenant governor to discharge the duties of governor . . . . Article V, Section 5.

Notice that the section refers to "both" the governor and lieutenant governor being unable to serve, rather than to "either" of them. This suggests that the Legislature may provide by law only for a situation when there is a simultaneous vacancy in both offices and not for a single vacancy in the office of lieutenant governor. This conclusion is strengthened by the fact that the section refers to an inability "to discharge the duties of governor", and makes no mention of an inability to discharge the duties of lieutenant governor. This omission of any reference to the duties of the lieutenant governor is probably because the lieutenant governor has no constitutional duties, other than to be available to fill a vacancy in the office of governor. As long as there is someone else available to fill a vacancy in the governorship, there is no real need for a lieutenant governor.

Minnesota Statutes 1974, Section 4.06, provides a line of succession in case of a simultaneous vacancy in both the offices of governor and lieutenant governor, as authorized by Article V, Section 5, of the Constitution. It says, in part:

When a vacancy occurs, from any cause whatever, in the office of governor and in the office of lieutenant governor, the president of the senate shall become governor for the remainder of the term. If there be no president of the senate, then the speaker of the house of representatives shall become governor for the remainder of the term; or if there be none, then the secretary of state, or the auditor, or the treasurer, or the attorney general, in that order, shall upon his resignation from office, become governor for the remainder of the term.

Notice that the section refers to a vacancy in the office of governor "and" in the office of lieutenant governor, and that it names the order of succession to the office of governor, rather than to the office of lieutenant governor. There is no mention of the speaker of the house, the secretary of state, or the other constitutional officers ever succeeding to the office of lieutenant governor. I conclude that if you were to succeed to the office of lieutenant governor and then resign from that office, it would remain vacant until the Senate elected a new presiding officer, who would then become lieutenant governor.

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But why would you want to resign? If it is to keep your seat in the Senate, that may be either unnecessary or impossible.

It has been settled law since the case of State ex rel. Marr v. Stearns, 72 Minn. 200 (1898), that the president pro tempore of the Senate does not cease to be senator upon the occurrence of a vacancy in the office of lieutenant governor and his assuming the duties of the lieutenant governor. This is true notwithstanding the provisions of the Minnesota Constitution, Article IV, Section 9:

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 case contains a very full discussion of the problem, and I commend it to you for reading. See also Miller v. Holm, 217 Minn. 166 (1944), where the president pro tempore did resign upon becoming lieutenant governor. These are old cases, but they are the law of the State until overruled by a new decision. Thus, under existing law, it would be unnecessary for you to resign from the lieutenant governorship in order to remain in the Senate, since you may hold both offices at once. If you did resign from the lieutenant governorship, you would still have your seat in the Senate.

On the other hand, if someone like your opponent in the last election brought a lawsuit to challenge your continued seating in the Senate, you might find it impossible to resign the lieutenant governorship and remain in the Senate. If the case were taken all the way to the Supreme Court, the Court might decide to overrule its decision in the Stearns case. The passage of time and a number of constitutional amendments, both to Article IV, Section 9, and to the duties of the lieutenant governor, may have lessened somewhat the force of the reasoning upon which the Court's decision was based. First, at the time of the decision, Section 9 prohibited a senator from holding any other office "during the time for which he is elected". The Court had previously held, in State ex rel. Childs v. Sutton, 63 Minn. 147 (1895), that this period of disability extended to the end of a senator's four-year term, even though he resigned his seat some time prior to that. Thus, the old language of Section 9 was directly in conflict with Article V, Section 6, which provided for the president pro tempore of the Senate to become lieutenant governor in case a vacancy should occur in that office, and the Court was forced to adopt a construction that reconciled the two and permitted the president pro tempore to assume the duties of the lieutenant governor before his term as senator had expired. The prohibition in Section 9 has since been amended so that it does not extend beyond the time when a senator resigns his seat, so it is no longer directly in conflict with Article V, Section 6.

Second, the decision noted that the lieutenant governor's duties were not properly executive in character, but rather were identical to those of the president

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pro tempore, i.e., to preside over the deliberations of the Senate and to authenticate by his signature the bills passed by the Senate. Thus, there was nothing incompatible about a member of the Senate exercising the duties of the lieutenant governor. This has been changed somewhat by the 1972 constitutional amendment taking the lieutenant governor out of the Senate chamber. He has been given no more constitutional executive duties, but he has since been made a statutory member of the Executive Council and Capitol Area Architecture and Planning Board. The governor, pursuant to Minnesota Statutes, Section 4.04, and Executive Order No. 53, has also delegated to the lieutenant governor a number of the governor's executive duties relating to the LEAP program, Rural Development, Human Services Council, aesthetic environment programs, Indian Affairs Commission, State Employees Insurance Benefit Board, and other state agencies. In view of this change in the character of the lieutenant governor's duties, the Minnesota Supreme Court, if again faced with the question, would have some justification for ruling that the presiding officer of the Senate can no longer retain his Senate seat upon the occurrence of a vacancy in the office of lieutenant governor. (If you wanted to take that justification away, you might try to convince the Legislature to pass an act eliminating these executive duties of the lieutenant governor, and you might try to convince the governor to rescind Executive Order No. 53.)

If the Court did decide to overrule the Stearns case, it might find that your Senate seat became absolutely vacant upon your succession to the lieutenant governorship, making it impossible for you to retain your Senate seat. If you had already resigned the lieutenant governorship, you would be out of office entirely. This would not seem to be a very wise ruling, since it would require a special election to fill your Senate seat, and you would be one of the candidates. A special election is one of the things that the Court in the Stearns case wanted to avoid. See 72 Minn. 200, at 214. The Court would be wiser to say that, even if the offices were incompatible, your Senate seat did not become vacant automatically, but rather that you were allowed a reasonable amount of time to choose which one to resign. The Court could rely on some of its earlier reasoning. In the Stearns case the Court placed primary emphasis on the proposition that the Constitution must have contemplated both permanent and temporary vacancies; that in the case of a temporary vacancy in the office of governor, such as when the governor has been impeached and before his trial is over, the lieutenant governor temporarily assumes the office of governor and the president pro tempore of the Senate assumes the office of lieutenant governor; that to say that the Constitution then required the president pro tempore to give up his seat in the Senate would be to prevent him from assuming the seat again if the governor were acquitted at trial, a result which would not be reasonable. The Court seemed to reason that if Section 9 did not operate to prohibit a temporary holding of the office of lieutenant governor by the president pro tempore, it did not apply to him at all. It would be possible for the present Court to modify its former ruling, adopt the distinction between temporary and permanent vacancies, and hold that in the case of a temporary vacancy in the office of lieutenant governor, such as one caused by an impeachment of the governor, the President of the Senate

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need not resign his seat in the Senate upon assumption of the office of lieutenant governor, but that in the case of a permanent vacancy, as when the governor resigns, the President of the Senate must resign either his seat in the Senate or his position as lieutenant governor. There is no way to be sure that the Court would be so kind as to allow you this choice. In order to avoid finding yourself out on the street, it might be better to retain both offices until after a court challenge had determined your rights to each.

If you are sure you would rather be a state senator than lieutenant governor, there may be a way to resign the lieutenant governorship without losing your Senate seat. Since your present term is about to expire, and your succession to the lieutenant governorship is likely to occur before your new term as Senator begins, you might resign from the lieutenant governorship before the start of your new term, January 4. You might lose your seat for the current term, but that should not prevent you from taking the oath to start your new term on January 4. The Senate could elect another person as presiding officer, who would then become lieutenant governor. He could resign his seat in the Senate (assuming he did not want to try to keep both offices), and you could be elected presiding officer.

Another possibility, suggested by John Ellefson of this office, in order to avoid leaving a vacancy in both the lieutenant governorship and the presidency of the Senate and allowing someone to argue that the Speaker of the House should move up to fill the vacancy in the lieutenant governorship, would be to stand aside on January 4 while the other senators were being sworn in and a new President of the Senate was being elected, then resign from the lieutenant governorship, and then take the oath to start your new term as senator. You could then be elected President. One problem with this procedure is that Minnesota Statutes, Section 3.05, provides a very specific timetable and sequence of events for the swearing in ceremony, and someone might object to your failure to join the others as "All whose certificates are so presented shall then stand and be sworn." It brings back memories of the challenge to seating Senator Palmer in 1971.

To sum up, if a vacancy occurs in the lieutenant governorship before a new President of the Senate is elected in January, you will become lieutenant governor by operation of law, without the need for any positive action on your part. That office will be yours until the expiration of the term in January 1979, unless you choose to resign before then. If you do resign, and there is no President of the Senate, the lieutenant governorship will remain vacant until a new President of the Senate is elected. You may be able to retain both the lieutenant governorship and your seat in the Senate, but your attempt to do so might result in a legal challenge in which you were either declared to be no longer a senator or directed to choose which office to resign. If you are sure you want to remain a senator, and don't mind giving up the lieutenant governorship, you may wish to resign from the lieutenant governorship before taking your new oath of office as a senator on January 4.

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If I can be of further assistance, please contact me.

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