December 4, 1970 MEMORANDUM

To: Senator Stanley Holmquist - Majority Leader

From: Office of Senate Counsel - Bruce Campbell

ISSUE

May an elected member of the Minnesota Senate who possesses a certificate of election but who has reason to believe that his seating will be challenged by the clerk pro tem or Lieutenant Governor due to a pending unfair campaign practices charge obtain a declaratory judgment in advance that he is entitled to take the oath of office and be seated at the same time as the other members of the Senate?

CONCLUSION

Such a declaratory judgment will not issue.

DISCUSSION

The Uniform Declaratory Judgment Act, M.S. 1969, § 555.01 in relevant part provides:

> Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed.

A declaratory judgment will not be granted unless there is an actual controversy between identified parties concerning a legally justiciable question. Port Authority of City of Saint Paul v. Fisher, 269 Minn. 276, 132 N.W.2d 183 (1964). The requisites for obtaining a declaratory judgment were stated by the Minnesota court in Smith v. Haveland, 223 Minn. 89, 92, 25 N.W. 2d 474, 477 (1946):

> Among the essentials necessary to the raising of a justiciable controversy is the existence of a genuine conflict in the tangible interests of the opposing

> litigants. Complainant must prove his possession of a legal interest or right which is capable of and in need of protection from the claims, demands, or objections emanating from a source competent legally to place such legal interest or right in jeopardy. Although complainant need not necessarily possess a cause of action . . . as a basis for obtaining declaratory relief, nevertheless he must, as a minimum requirement, possess a bona fide legal interest which has been, or with respect to the ripening seeds of a controversy is about to be, affected in a prejudicial manner.

The instant case lacks the element of a justiciable controversy ripe for judicial determination. Any asserted harm or interference with a legal right is at this juncture purely speculative or illusory. In Seiz v. Citizens Pure Ice Co., 207 Minn. 277, 281, 290 N.W. 802, 804 (1940), the Minnesota court noted:

> Proceedings for a declaratory judgment must be based on an actual controversy. The controversy must be justiciable in the sense that it involves definite and concrete assertions of right and the contest thereof touching the legal relations of parties having adverse interests in the matter with respect to which the declaration is sought, and must admit of specific relief by a decree or judgment of a specific character as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. Mere differences of opinion with respect to the rights of parties do not constitute such a controversy. (Emphasis added.)

While the interest here asserted, the right to take the oath of office and be seated immediately as a member of the Senate, may be subject to some doubt or difference of opinion, no present denial of the right has been authoritatively attempted in legal contemplation. At most, the member-elect anticipates that the right may be questioned at a future time.

The instant case appears analogous to Beatty v. Winona Housing and Redevelopment Authority, 277 Minn. 76, 151 N.W.2d 584 (1967). In Beatty, supra, the plaintiff, a property owner, attempted to obtain a declaratory judgment that the urban renewal enabling statutes and various acts of the city council and redevelopment authority were unconstitutional. At the time the complaint was filed, the city had only begun advanced planning preparatory to formulating a general renewal plan. No master plan including the property of the plaintiff had been prepared. The court dismissed the complaint, holding that it presented no justiciable controversy for a declaratory judgment:

> In this case, plaintiff's action was dismissed when no renewal project had yet been planned. Under these circumstances neither plaintiff nor anyone else knows at present what that plan might be. It is clear that issues which have no existence other than in the realm of future possibility are purely hypothetical and are not justiciable. . . . He must show an injury or at least one that is imminent. . . . Since plaintiff has not done this, no justiciable controversy exists between him and any of the defendants. 277 Minn. at 85 - 86, 151 N.W.2d at 590.

Moreover, even if the Lieutenant Governor-elect were to announce publicly his intention to rule against the seating of the member in question, it is doubtful that the court would at that juncture entertain an action for a declaratory judgment. The Legislature is the sole judge of the election and qualifications of its members. Minn. Const. Art. IV, Sec. 3. If the Lieutenant Governor should threaten such an erroneous parliamentary ruling, a court would probably presume that the Senate would negate the erroneous ruling of its non-member presiding officer by a majority vote. It is doubtful that a court would become embroiled in the internal affairs of the Senate by taking cognizance of the political division of the Senate in a declaratory judgment action.

It might even be argued that the question of whether a member subject to an unfair campaign practices charge may be seated pending resolutions of that charge is a political question not subject to review by the judiciary. Minn. Const. Art. IV, Sec. 3. Nothing contained in Powell v. Mc Cormack, 395 U.S. 486 (1969), dictates a contrary result. Powell, supra, merely holds that the term "qualifications", as applied to Congressional membership denotes those requirements explicitedly stated in the

United States Constitution and Congress may not expand the requirements. See Bond v. Floyd, 385 U.S 116 (1966)

ISSUE

What powers does the Lieutenant Governor possess as president of the Minnesota State Senate?

CONCLUSION

Unless augmented by legislative rule, the Lieutenant Governor, acting in the capacity of president of the Minnesota State Senate, possesses only the historically circumscribed authority of a non-member presiding officer enumerated at page 8 herein.

DISCUSSION

A. The Legislature as the repository of sovereign power.

Except as expressly limited by the Minnesota and United States Constitutions, the Legislature possesses absolute sovereign power. Bridgie v. Koochiching County, 227 Minn. 320, 35 N.W.2d 537 (1948). Hence the Minnesota Constitution does not grant power to the Legislature but is a mere limitation on that power in the strictest sense of the term. In State ex rel. Simpson v. City of Mankato, 117 Minn. 458, 463-464, 136 N.W. 264, 266 (1912) the doctrine was expressed as follows:

> We must not forget that the voice of the legislature is the voice of the sovereign people, and that, subject only to such limitations as the people have seen fit to incorporate in their Constitution, the legislature is vested with the sovereign power of the people themselves. In other words the provisions of a state constitution do not and cannot confer upon the legislature any powers whatever, but are mere

> limitations in the strict sense of that term, and the legislature has all the powers of an absolute sovereign of which it has not been divested by the Constitution. (Emphasis added.)

The necessary corollary to the axiom of legislative sovereignty is that the executive and judicial branches possess only the authority expressly granted or necessarily implied in a specific constitutional grant of power.

Moreover, the doctrine of separation of powers strictly limits the extent to which one department may exercise power either reserved to or residuary in another branch of government. Article III, section 1 of the Minnesota Constitution provides:

> The powers of government shall be divided into three distinct departments - legislative, executive and judicial; and no person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others, except in the instances expressly provided in this constitution.

The doctrine of separation of powers is most stringently applied to the authority of the Legislature to manage the conduct of its internal affairs, a right specifically guaranteed by the Minnesota Constitution. Article IV, section 3 in relevant part provides:

> Each house shall be the judge of the election returns and eligibility of its own members . . . .

Article IV, section 4 in relevant part provides:

> Each house may determine the rules of its proceedings sit upon its own adjournment . . . .

Hence, any constitutional provision authorizing the Lieutenant Governor to participate in the internal affairs of the Minnesota State Senate must be strictly construed.

B. Constitutional authority of the Lieutenant Governor.

Article V, section 5 provides:

> The Lieutenant Governor shall be ex officio president of the Senate . . . .

The phrase "ex officio" means "by virtue of his office." The court in Rouse v. Johnson, 234 Ky. 473, 481, 28 S.W.2d 745, 749 (1930), defined the meaning of the phrase "by virtue of his office."

> Let us observe for a moment the exact application of the phrase "by virtue of his office." It is one extensively and immemorially applied to an office or officer when the Legislature or a constitutional convention sees proper to annex to the duties of an independent officer, or to confer additional powers upon him, and it is accomplished by saying that "by virtue" of being such an officer the powers being dealt with, or the performance of the duties under consideration, shall be conferred upon him, or annexed to the duties of his office.

Hence, the Minnesota Constitution renders the Lieutenant Governor, an executive officer, the president of the State Senate "by virtue of his office" as such executive officer. The Lieutenant Governor remains, however, primarily an executive officer. Minn. Const. Art. V, sec. 1.

The term "president" as used in Article V, section 6 of the Minnesota Constitution denotes a person with presiding authority. Rouse v. Johnson, 234 Ky. 473, 28 S.W.2d 745 (1930). In Fitzsimmons v. International Association of Machinists, 125 Conn. 490, 494, 7 A.2d 488, 451 (1939), the court defined the term "presiding officer:"

> A presiding officer is one who occupies the place of authority, as of president, chairman, moderator etc., to direct, control or regulate proceedings as chief officer.

The court in Drake v. Drake, 187 Ga. 423, 425, 1 S.E.2d 573, 575 (1939), gave an identical definition to the word "preside:"

> The word "preside" means to occupy the place of authority or of president, chairman or moderator to direct, control or regulate proceedings as chief officer or to preside at public meetings, to preside over the senate.

In recognizing the presiding authority of the Lieutenant Governor, it should be noted that he is in no sense a member of the legislative house over which he presides:

> The threshold question is whether the Lieutenant Governor, as President of the Senate, is a "member" of the Senate within the meaning of the above mentioned constitutional provisions. It is our opinion that he is not. Opinion of the Justices, 225 A.2d 481, 483 (1966).
>
> We conclude, therefore, that the office of Lieutenant Governor in this commonwealth is chiefly and primarily an executive and not a legislative one.
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> . . .
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> As hereinbefore noticed, the Lieutenant Governor cannot be classified as a member of the General Assembly . . . . Rouse v. Johnson, 234 Ky. 473, 483-484, 28 S.W.2d 745, 750-751 (1930).

It is apparent that the framers of the Minnesota Constitution fashioned the office of the Lieutenant Governor after the office of Vice-President of the United States. With reference to the duties of the Vice-President as president of the Senate, one commentator noted:

> As a question of constitutional right and duty, it is difficult to perceive any reason for doubting, when the constitution declares expressly, that the vice-president of the United States shall be president of the senate, that it intended to invest him with the ordinary powers of a presiding officer. Cushing, The Law and Practice of Legislative Assemblies, 112 (1856).

One must conclude, therefore, that the framers of the Minnesota Constitution intended the Lieutenant Governor to possess, as President of the State Senate, the ordinary powers of a non-member presiding officer.

The ordinary powers of a non-member presiding officer, or president, remains for definition. Words in a constitution must be given their ordinary and popular meaning as of the date of their introduction into the instrument. State ex rel. University of Minnesota v. Chase, 175 Minn. 259, 220 N.W. 951 (1928). A text contemperaneous with the drafting of the Minnesota Constitution enumerates the ordinary powers of a presiding officer:

> The duties of the presiding officer of a legislative assembly, are manifold and various, corresponding in some sort with the different functions in which the assembly may be engaged.
>
> In its ordinary capacity of a legislative body his duties are: to open the sitting of each day, by taking the chair and calling the assembly to order; to announce the business before the assembly, in the order in which it is to be acted upon; to receive and submit in the proper manner all motions and propositions presented by the members; to put to vote all questions properly submitted and announce the result; to restrain the members when engaged in debate within the rules of order; to enforce the observance of order and decorum among the members; to receive messages and other communications from other branches of the government and announce them to the assembly; to authenticate by his signature, when necessary, all the acts, orders, and proceedings, of the assembly; to inform the assembly, when necessary, or when referred to for the purpose, in a point of order or practice; . . . to decide, in the first instance, and subject to the revision of the house, all questions of order, that may arise, or be submitted for his decision; to issue his warrant, when directed, for the execution of the orders of the assembly, in the arrest of offenders, or the summoning of witnesses. Cushing, The Law and Practice of Legislative Assemblies, 112-113 (1856).

Robert's Rules of Order, a recognizes treatise on parliamentary law enumerates the following ordinary duties of the presiding officer:

(1) To open the meeting at the appointed time by taking the chair and calling the meeting to order, having ascertained that a quorum is present.

(2) To announce in proper sequence the business that comes before the assembly or becomes in order in accordance with the prescribed order of business, agenda, or program, and with existing orders of the day.

(3) To recognize members who are entitled to the floor.

(4) To state and put to vote all questions that legitimately come before the assembly as motions or that otherwise arise in the course of proceedings, and to announce the result of each vote; or, if a motion that is not in order is made, to rule it out of order.

(5) To protect the assembly from obviously frivolous or dilatory motions by refusing to recognize them.

(6) To enforce the rules relating to debate and to order and decorum within the assembly.

(7) To expidite business in every way compatible with the rights of members.

(8) To decide all questions of order, subject to appeal — unless, when in doubt, he prefers to submit such a question himself to the assembly for decision.

(9) To respond to inquiries of members relating to parliamentary procedure or factual information bearing on the business of the assembly.

(10) To authenticate by his signature, when necessary, all acts, orders, and proceedings of the assembly.

(11) To declare the meeting adjourned when the assembly so votes or — where applicable— at the time prescribed in the program or at any time in the event of a sudden emergency affecting the safety of those present.

Robert's Rules of Order, 376-377 (1970 Ed.)

Considering the doctrines of separation of powers and the Legislature as the repository of non-delegated sovereign power, the Lieutenant Governor, as president of the State Senate must possess only the normal, administrative authority of a presiding officer previously enumerated. That conclusion apparently comports with the understanding of the Senate. 1969 Senate Rule 3.

C. Legislative grant of authority.

The Senate may confer on the Lieutenant Governor legislative duties in addition to his inherent authority as presiding officer where not prohibited by the Constitution. The Senate may expand or contract such duties as it sees fit. The Kentucky State Senate, for example, authorized the Lieutenant Governor, as presiding officer, to appoint all committees. Rouse v. Johnson, 234 Ky. 473, 482, 28 S.W.2d 745, 750 (1930). The Minnesota State Senate, absent objection, has permitted the Lieutenant Governor to refer bills to the appropriate standing committee. 1969 Senate Rule 35. The Lieutenant Governor also has the ministerial duty to appoint a clerk pro-tem to receive the election certificates of members prior to the organization of the Senate. M.S. 1969, § 3.05.

A grant of authority in excess of the inherent powers of the Lieutenant Governor, as presiding officer, whether made by rule or statute, must be strictly construed and limited by the terms of the grant. The Lieutenant Governor, in executing such authority, acts as the mere ministerial agent of the Senate; he acts without discretionary power.