

[FEATURED NEWS](#)[SENATOR MICHELLE FISCHBACH](#)

Statement from Senator Michelle Fischbach regarding her becoming acting lieutenant governor

🕒 January 3, 2018

"At 12:01 a.m. this morning, in accordance with the Minnesota Constitution, I ascended to the position of acting lieutenant governor.

My primary focus will continue to be serving the citizens of Senate District 13 in the Minnesota Senate, who elected me to a four-year term.

< The position of lieutenant governor has no constitutional duties and its authority is what is provided by the governor. I have had cordial conversations with Governor Dayton and am looking forward to a positive relationship with him and his staff. I am confident I will be able to handle duties as both state senator and acting lieutenant governor through the remaining months of Governor Dayton's term. >

I have declined the salary provided to the lieutenant governor and communicated that in a letter to the governor's office."

Supporting documents:

- [Letter from Senator Fischbach dated January 3, 2018](#)
- [Email documentation from legal counsel](#)

📁 [Lieutenant governor](#)



EXHIBIT A

**Senate Counsel, Research,
and Fiscal Analysis**

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THOMAS S. BOTTERN
DIRECTOR

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.

EXHIBIT B

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

STATE OF MINNESOTA

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November 9, 1976

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.

EXHIBIT C

Senator Alec G. Olson - Page 2

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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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November 9, 1976

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



PSW:jb

DEPARTMENT ATTORNEY GENERAL

Office Memorandum

TO : THE HONORABLE ALEC G. OLSON
President of the Minnesota Senate

DATE: Dec. 17, 1976

FROM : ROBERT C. HENTGES **RCH**
Special Assistant
Attorney General

PHONE: 296-2652

SUBJECT: SUCCESSION OF THE HONORABLE ALEC G. OLSON TO THE OFFICE OF
LIEUTENANT GOVERNOR

As you are aware, when a vacancy occurs in the office of governor, the lieutenant governor becomes governor for the duration of the vacancy. Minn. Const. art. V § 5; Minn. Stat. § 4.06 (1974). In turn, when a vacancy occurs in the office of lieutenant governor, the last duly elected presiding officer of the senate becomes lieutenant governor. Id. In each case, the succeeding officer must take an oath or affirmation before entering upon the duties of the assumed office. Minn. Const. art. V § 6.

As the last duly elected presiding officer of the senate and upon taking an oath or affirmation, you will succeed to the office of lieutenant governor in the event Lt. Gov. Rudy Perpich becomes governor pursuant to the constitutional scheme of succession. Because you currently hold the office of senator in the sixty-ninth session of the legislature and are a senator-elect for the seventieth session of the legislature, it appears that you are subject to the provisions of Minn. Const. art. IV § 5.¹ That section provides:

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In the case of State ex rel. Marr v. Stearns, 72 Minn. 200, 75 N.W. 210 (1898), reviewed on other grounds 179 U.S. 223 (1900) the Minnesota Supreme Court held that the presiding officer of the senate may remain a senator when he becomes lieutenant governor by reason of a vacancy in that office. Consequently, there would appear to be authority for you to remain a senator after your succession to lieutenant governor and during your term in that office. However, the rationale of State ex rel. Marr v. Stearns, supra, is sufficiently weak to raise serious doubts as to whether it would be adopted by the Court if the issue were presented to it again.

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The Honorable Alec G. Olson - Page 2

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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. If elected or appointed to another office, a legislator may resign from the legislature by tendering his resignation to the governor.

In order to avoid the prohibition of Minn. Const. art. IV § 5 and assuming succession becomes necessary prior to the administration of oaths for the seventieth session of the legislature, it appears that you should take the following actions upon taking an oath or affirmation and entering upon the duties of lieutenant governor.

First, you should resign from the sixty-ninth session of the legislature by tendering your resignation to the governor. Minn. Const. art. IV § 5. Second, and this may be done in conjunction with your resignation from the expiring session, you should inform the governor that, as senator-elect to the seventieth session, you do not intend to take the oath for that office. This would allow the governor to call for a special election pursuant to Minn. Stat. § 202A.62 subd. 2 (Supp. 1975) and Minn. Stat. § 351.02(6) (1974).²

You may also wish to send a copy of your resignation to the secretary of the senate so that he or the temporary secretary may note your resignation in order to fill the silence that will otherwise follow announcement of District 21 during the call of the roll on January 4, 1977.

2/

It appears that if you indicate your intention to refuse to take the oath of office as senator in the seventieth session, your seat will be vacant as of the time the oath would have been administered. See, Minn. Stat. § 351.02(6) and (8) (1974).



STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

December 21, 2017

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Via Email and U.S. Mail

Ms. Kimberly Slay Holmes
General Counsel to Governor Mark Dayton
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St. Paul, MN 55155

Dear Ms. Holmes:

I thank you for your letter dated December 12, 2017.

BACKGROUND

On December 7, 2017, United States Senator Al Franken announced his intention to resign as a United States Senator. Minnesota Statutes Section 204D.28, subdivision 11 provides that, in the event of a vacancy in the Office of United States Senator for Minnesota, the Governor may appoint a successor to fill the vacancy. On December 13, 2017, Governor Mark Dayton announced that he intended to appoint Lieutenant Governor Tina Smith to fill the vacancy created by Senator Franken's resignation. The appointment of Lieutenant Governor Smith would create a vacancy in the position of lieutenant governor.

Article V, Section 3 of the Minnesota Constitution states that the "last elected presiding officer of the senate shall become lieutenant governor in case a vacancy occurs in that office." Senator Michelle Fischbach is the President of the Minnesota Senate. Shortly after Governor Dayton announced his intention to appoint Lieutenant Governor Smith to the United States Senate seat, Senator Fischbach stated that she will hold both the position of senator and lieutenant governor. She refers to a recent opinion issued by Senate Counsel, which relies on an 1898 decision of the Minnesota Supreme Court discussed below. On December 13, 2017, Senator Fischbach stated: "I've been told by Senate Counsel the Minnesota Constitution allows the Senate President to serve both roles so that's what I plan to do for the remainder of Gov. Dayton's term."

In contrast, Governor Dayton argues that Senator Fischbach cannot simultaneously hold both positions. The Governor refers to a provision of the Minnesota Constitution that prohibits one person from holding two offices in different branches of government. At his December 13, 2017 news conference announcing his intention to appoint Lieutenant Governor Smith to the United States Senate seat, Governor Dayton said: "I am told by my in-house legal counsel that the constitution and the state statutes are clear that the . . . president of the senate becomes the lieutenant governor and that she cannot hold two offices simultaneously."

EXHIBIT E

Ms. Kimberly Slay Holmes
General Counsel to Governor Mark Dayton
December 21, 2017
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Senate Majority Leader Paul Gazelka states that he requested Governor Dayton to seek a legal opinion from the Attorney General's Office regarding this matter.¹ Article V, Section 3 of the State Constitution provides that the Governor "may require the opinion in writing of the principal officer in each of the executive departments upon any subject" relating to their duties. On behalf of the Governor—and in accordance with the request of the Senate Majority Leader—you ask for a legal opinion from this Office regarding two questions arising out of the Governor's appointment of the Lieutenant Governor to fill a vacancy in the position of United States Senator from Minnesota. Specifically, you ask whether under the Minnesota Constitution (1) the last elected president of the state senate becomes lieutenant governor as a result of a vacancy in the position of lieutenant governor; and (2) if she becomes lieutenant governor, the president of the senate can simultaneously serve as state senator and lieutenant governor.

LEGAL ANALYSIS

As noted above, Article V, Section 5 of the Minnesota Constitution states that the "last elected presiding officer of the senate shall become lieutenant governor in case a vacancy occurs in that office." Accordingly, the answer to your first question is that the president of the senate becomes lieutenant governor if there is a vacancy in that office.

As to your second question, in 1898, the Minnesota Supreme Court considered whether an individual may simultaneously serve as a state senator and lieutenant governor. *State ex rel. Marr v. Stearns*, 75 N.W. 210 (Minn. 1898), *rev'd on other grounds sub nom. Stearns v. State of Minn.*, 179 U.S. 223 (1900). The case involved Governor Knute Nelson who resigned to become a United States Senator. *Id.* at 211. Pursuant to the provisions of the Minnesota Constitution in effect at that time, Lieutenant Governor David Clough became governor, and the president pro tempore of the senate, Senator Frank Day, became lieutenant governor. *Id.* For the remainder of the legislative session, Mr. Day simultaneously served as lieutenant governor and state senator. *Id.*

In 1898, the position of lieutenant governor had no executive branch responsibilities. *Id.* at 213. Rather, as ex officio president of the senate, the lieutenant governor's sole constitutional duties were "to preside over the senate" and "to authenticate by his signature the bills passed by the senate." *Id.* at 211, 213.

A lawsuit was filed challenging Mr. Day's ability to be a state senator at the same time he was lieutenant governor. The Court concluded that Mr. Day could serve simultaneously in both positions. *Id.* at 212–14. The Court found no language in the Minnesota Constitution that "imperatively require[d]" Mr. Day to vacate his senate seat. *Id.* at 213. The Court reasoned that a contrary conclusion "cannot be sustained without disregarding both the letter and spirit of the

¹ Minnesota Senate Republicans (@mnsrc), Twitter (Dec. 14, 2017, 2:27 p.m.), <https://twitter.com/mnsrc/status/941434602614415361> (video of Senate Majority Leader Gazelka stating, "I think Senator Fischbach has the right to do both just like it's been done in the past, but that's what we're gonna have to wait and see. I did ask the Governor to get an opinion from the Attorney General, he agreed that that's a good idea. We're waiting for that.")

Ms. Kimberly Slay Holmes
General Counsel to Governor Mark Dayton
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constitution, when considered as a whole, and without adopting a construction well calculated, when party strife and spirit are intense, to disturb the public peace and order.” *Id.* at 212.

The Court also determined that the Minnesota Constitution recognized “the fact that a senator may be a lieutenant governor” because the Constitution prohibited the lieutenant governor from acting “as a member of the court” during an impeachment trial against a governor. *Id.* at 214 (citing Minn. Const. art. XIII, § 4). The Court reasoned that only senators can act as members of the court in an impeachment trial, so “[t]his prohibition would be wholly unnecessary, except upon the assumption that a senator did not vacate his office on becoming lieutenant governor.” *Id.* The provision referred to by the Court was removed from the State Constitution in 1974 because it was believed to be “obsolete” and/or “inconsequential.” *See* Minn. Const. art. VIII (1976); Minnesota Constitutional Study Commission, Final Report at 14, 47, <https://www.leg.state.mn.us/docs/2012/mandated/120607.pdf> (last visited December 21, 2017); Statement of Purpose and Effect of Amendment No. 1 - Revise Organization and Language of Constitution, Finance and Commerce, Oct. 18, 1974 at 5 (same); *see also* 1974 Minn. Laws ch. 409 at 801 (legislation placing constitutional amendment on ballot).

You note that Article IV, Section 5 of the Minnesota Constitution states that “[n]o 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.” This or a similar provision has been in the **State Constitution** since its ratification by **Congress** in 1858.² The **1898** opinion of the Supreme Court concluded that this provision was not violated by the state senator who simultaneously served as lieutenant governor. In so doing, the Court reasoned in part as follows:

It is obvious that this section of the constitution does not, explicitly or otherwise, make the offices of lieutenant governor and senator incompatible, or a senator ineligible to the office of lieutenant governor during the term for which he was elected; for it is otherwise expressly provided by the constitution, —that a senator who is president pro tempore shall become lieutenant governor in case of a vacancy. Indeed, this particular section has but little relevancy to the question under consideration, except to emphasize the necessity of construing the several provisions of the constitution as a harmonious whole, and not each section by itself.

Marr, 75 N.W. at 214.

² In 1858, as well as at the time of the *Marr* decision, the Constitution stated in relevant part:

No senator or representative shall, during the time for which he is elected, hold any office under the authority of the United States, or the state of Minnesota, except that of postmaster

Minn. Const. art. IV, § 9 (1858); *Marr*, 75 N.W. at 211, 214.

Ms. Kimberly Slay Holmes
General Counsel to Governor Mark Dayton
December 21, 2017
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A related and longstanding common law doctrine in Minnesota prohibits a public official from holding two offices that are factually “incompatible” with each other. *See, e.g., Kenney v. Goergen*, 31 N.W. 210, 211 (Minn. 1886). Public offices are incompatible under the common law “when their functions are inconsistent, their performance resulting in antagonism and conflict of duty, so that the incumbent of one cannot discharge with fidelity or propriety the duties of both.” *State ex rel. Klitzke v. Indep. Consol. Sch. Dist. No. 88*, 61 N.W.2d 410, 419 (Minn. 1953). In *Marr*, the Supreme Court reasoned that its opinion (that the state senator could simultaneously serve as lieutenant governor) was “further supported by the character of the duties of lieutenant governor and the president pro tempore,” which at that time were “identical.” *Marr*, 75 N.W. at 213. As noted above, the lieutenant governor’s sole constitutional duties in the 1890s were to preside over the senate and to authenticate the bills passed by the senate. *Id.* The Court stated that the lieutenant governor’s classification as an executive branch official “is simply one of convenience” as “*he is not authorized to exercise a single power or perform a single duty . . . properly belonging to the executive department.*” *Id.* (emphasis added).

The duties of the lieutenant governor have changed since 1898. In 1972, the State Constitution was amended to provide that the lieutenant governor is no longer the ex officio president of the senate. *See* Minn. Const. art. V, § 6 (1973); *see also* 1971 Minn. Laws ch. 958, § 2, at 2034 (legislation placing constitutional amendment on ballot). An Executive Branch Committee Report in November, 1972 stated that if the constitutional amendment was adopted (which it was), “the lieutenant governor would become a purely executive officer without legislative functions.” Minnesota Constitutional Study Commission, Executive Branch Committee Report at 3, <https://www.leg.state.mn.us/docs/2012/mandated/120607.pdf> (last visited Dec. 21, 2017). The Report further stated that “[t]he lieutenant governor would then be in a position to be a full-time member of the executive branch of state government” and “the duties of the office could be substantially increased by the legislature or by the governor through executive order.” *Id.* at 5.

It is no longer the case today, as the Supreme Court found it was in 1898, that the lieutenant governor performs no duties “belonging to the executive department.” Although the lieutenant governor still calls the senate to order at the beginning of each session, Minn. Stat. § 3.05, the senate now elects its own presiding officer. Minn. Const. art. IV, § 15. In 1973, the lieutenant governor was designated as a member of the Executive Council,³ 1973 Minn. Laws ch. 394, § 1, at 858 (codified as Minn. Stat. § 9.011), and in 1974 was made the chair of the Capital Area Architectural and Planning Board, 1974 Minn. Laws ch. 580, § 4, at 1442 (codified as Minn. Stat. § 15B.03). In addition, a law enacted by the Legislature in 1971 states that “[t]he governor may delegate to the lieutenant governor such powers, duties, responsibilities and functions as are prescribed by law to be performed by the governor” as long as they are not specifically imposed upon the governor by the Constitution. 1971 Minn. Laws ch. 949, § 1, at 1981 (codified as Minn. Stat. § 4.04, subd. 2).

³ The other members of the Executive Council are public officials in the executive branch of government: the Governor, Attorney General, Secretary of State, and State Auditor. Minn. Stat. § 9.011, subd. 1.

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Subsequent to these changes in Minnesota law, in 1976 Lieutenant Governor Rudy Perpich filled a vacancy in the office of the governor, and in turn, the then-presiding officer of the senate, Alec Olson, became lieutenant governor. In a memorandum dated December 17, 1976, the Minnesota Attorney General's Office advised Mr. Olson to resign from the Senate upon taking the oath of office as lieutenant governor, noting that the "rationale of [*Marr*] is sufficiently weak to raise serious doubts as to whether it would be adopted by the Court if the issue were presented to it again." *Id.* at 1 n.1. Mr. Olson then resigned from his position as a state senator upon becoming lieutenant governor. Minnesota Legislative Reference Library, *Minnesota Lieutenant Governors, 1858-present*, <https://www.leg.state.mn.us/lrl/mngov/lrgov> (last visited Dec. 21, 2017).⁴

The current responsibilities of the lieutenant governor are therefore materially different than they were in 1898 and involve powers exercised by the executive branch of government. Unlike in 1898 when *Marr* was decided, the lieutenant governor is now expressly charged by statute with executive branch functions, including service on the Executive Council, and may be delegated executive branch responsibilities directly by the governor. *See supra* at 4–5. *See also State v. Victorsen*, 627 N.W.2d 655, 662–63 n.2 (Minn. App. 2001) (concluding that "changes in relevant statutes" warranted a different conclusion from the one rendered in the court's prior precedent). Under the current constitutional and statutory framework, potential conflicts exist if the same individual were to fulfill both executive and legislative responsibilities (*e.g.*, if the lieutenant

⁴ Prior to the changes in the duties of the lieutenant governor, some state senators who filled a vacancy in the office of lieutenant governor or took the title "acting lieutenant governor" continued to simultaneously serve as a state senator, at least briefly. For example, President Pro Tempore of the Senate Charles Adams became lieutenant governor in late June or early July 1929, when Lieutenant Governor William Nolan resigned after being elected to the United States House of Representatives. Mr. Adams continued to serve as a state senator, but the senate never met in session during Mr. Adams's term as lieutenant governor. *Id.*; Minnesota Legislative Reference Library, *Adams, Charles Edward "Chas., Charlie,"* <https://www.leg.state.mn.us/legdb/fulldetail?ID=10842> (last visited Dec. 21, 2017).

President Pro Tempore of the Senate William Richardson served as "Acting Lieutenant Governor" from late August 1936 to early January 1937, after Governor Floyd B. Olson died, and Lieutenant Governor Hjalmar Petersen became governor. Mr. Richardson was never sworn in as lieutenant governor and voted as a member of the senate throughout an extra session that was convened in December 1936. *Minnesota Lieutenant Governors, 1858-present*; Sen. Journal, Extra Sessions 1936-1937, December 17–23, 1936, at 4–98.

President Pro Tempore of the Senate Archie Miller was sworn in as lieutenant governor on May 6, 1943, after Governor Harold Stassen resigned, and Lieutenant Governor Edward Thye became governor. Mr. Miller resigned from the senate four days after being sworn in as lieutenant governor. The senate was not in session during this four-day period. *Id.*; Minnesota Legislative Reference Library, *Sessions of the Minnesota State Legislature and the Minnesota Territorial Legislature, 1849-present*, <https://www.leg.state.mn.us/lrl/history/sessions> (last visited Dec. 21, 2017).

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governor in a legislative capacity considers whether to vote in favor of legislation proposed by the governor or whether to override the governor's veto of legislation).⁵

The simultaneous discharge of executive and legislative branch functions implicates the incompatibility doctrine, as well as principles of separation of powers. Any dispute regarding the lieutenant governor exercising these dual functions under current law can ultimately only be resolved by judicial decision. Having said that, for the reasons discussed above, a strong argument can be made that the 1898 decision of the Minnesota Supreme Court in *Marr* does not control the outcome of this dispute in light of the subsequent changes to the duties of the lieutenant governor.⁶

Very truly yours,



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cc: The Honorable Paul Gazelka, Senate Majority Leader, *via Email and U.S. Mail*
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The Honorable Thomas Bakk, Senate Minority Leader, *via Email and U.S. Mail*

⁵ I also note that the vacancy in the office of lieutenant governor in this particular situation is not "temporary." *See Marr*, 75 N.W. at 214 (recognizing that vacancy in the office of lieutenant governor could be "temporary"). It is publically reported that Governor Dayton expects to appoint Lieutenant Governor Smith to the United States Senate in early January 2018, at which time the vacancy in the office of lieutenant governor would occur. Thus, the remaining term of the lieutenant governor's position will be for a time period of approximately one year during which the entirety of the 2018 legislative session will take place. Sen. Journal, May 22, 2017, at 6101; House Journal, May 22, 2017, at 7022 (providing that 2018 legislative session commences on February 20, 2018).

⁶ A similar conclusion was reached in an opinion that Senate Counsel provided to the then-President of the Senate Alec Olson in November 1976. Senate Counsel recognized that subsequent to the Supreme Court's 1898 decision, changes had been made to the lieutenant governor's duties. He therefore concluded that "[i]n 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." *Id.* at 4.