

N.D.A.G. Letter to Sinner (March 25, 1987)

March 25, 1987

Honorable George A. Sinner
Governor
State Capitol
Bismarck, North Dakota 58505

Dear Governor Sinner:

Your office has asked for our opinion as to who will assume the powers and duties of the office of Governor while you are out of state. We conclude that when there is a vacancy in the Lieutenant Governor's office, the Secretary of State shall act as Governor during the Governor's absence from the state.

There is an apparent conflict in the constitutional provisions and statutes relating to this issue.

Under N.D. Const. Art. V, § 2, when the Governor is absent from the state, the Lieutenant Governor acts as Governor:

Section 2. A lieutenant governor shall be elected at the same time and for the same term as the governor. In case of the death, impeachment, resignation, failure to qualify, absence from the state, removal from office, or the disability of the governor, the powers and duties of the office for the residue of the term, or until he shall be acquitted or the disability be removed, shall devolve upon the lieutenant governor.

N.D. Const. Art. V, §2 (emphasis supplied). If the office of the Lieutenant Governor is vacant when the Governor is absent or unable to perform his duties, the constitution provides that the Secretary of State shall act as Governor. N.D. Const. Art. V, §7, provides:

Section 7. The powers and duties of the lieutenant governor shall be to serve as president of the senate, and he may, when the senate is equally divided, vote on procedural matters, and on substantive matters if his vote would be decisive. Additional duties shall be prescribed by the governor. If, during the vacancy in the office of governor, the lieutenant governor shall be impeached, displaced, resign, or die, or from mental or physical disease, or otherwise become incapable of performing the duties of his office, the secretary of state shall act as governor until the vacancy shall be filled or the disability removed.

(Emphasis supplied.) Under these two constitutional provisions, in the Governor's absence, the Secretary of State shall act as Governor when the Lieutenant Governor is unable to do so. Therefore, under these circumstances, that is, when there is a vacancy in the Lieutenant Governor's office and the Governor is absent from the state, these two provisions provide that the Secretary of State shall act as Governor.

Yet, N.D.C.C. §54-08-02 states that in the case of the disability of the Lieutenant Governor, the Lieutenant Governor's powers and duties devolve upon the president pro tempore of the Senate:

54-08-02. DISABILITY OF LIEUTENANT GOVERNOR-WHO SHALL ACT. In case of the death, impeachment, resignation, failure to qualify, absence from the state, removal from office, or the disability of the lieutenant governor, the powers and duties of his office for the residue of the term, or until he shall be acquitted or the disability removed, shall devolve upon the president pro tempore of the senate, except that the president pro tempore of the senate shall not succeed to the office of governor by virtue of his having the powers and duties of the office of lieutenant governor. When presiding over any meeting of the senate, all the powers and duties of the office of lieutenant governor shall devolve upon the president pro tempore of the senate.

Based on N.D.C.C. §54-08-02, it could be argued that until the vacancy in the Lieutenant Governor's office is filled, the president pro tempore is the Lieutenant Governor and, under N.D. Const. Art. V, §2, would assume the Governor's duties while the Governor is out of state.

However, N.D.C.C. §54-08-02 only gives the president pro tempore the authority to serve as the Acting Lieutenant Governor. It does not give the president pro tempore any authority to act as Governor simply because he is acting as Lieutenant Governor. Indeed, the statute specifically states that the president pro tempore, in his role as Acting Lieutenant Governor, may not succeed to the office of Governor. Therefore, the statute does not authorize the president pro tempore to assume the Governor's duties, even temporarily, despite the fact that the Lieutenant Governor's office is vacant.

In view of the clear language of the cited constitutional provisions and the restriction contained within N.D.C.C. §54-08-02, it is our conclusion that when there is a vacancy in the Lieutenant Governor's office, the powers and duties of the office of the Governor devolve upon the Secretary of State during the Governor's absence from the state.

Sincerely,

Nicholas J. Spaeth