

Sarah Palin, Governor

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July 10, 2009

Michael Nizich
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Re: Succession to the Office of Lieutenant Governor

Dear Mr. Nizich:

We are providing this legal analysis in response to questions about proper constitutional and statutory procedures when the successor to the lieutenant governor is appointed during a legislative recess and the position of lieutenant governor subsequently becomes vacant.

I. Introduction/Background

Commissioner Joe Schmidt previously was appointed and confirmed as successor to the lieutenant governor under AS 44.19.040 (hereinafter “the second-in-line” position or appointee), and therefore was in line to assume the lieutenant governor’s office if and when it was vacated. He resigned from the second-in-line position on July 6, 2009. Governor Palin then appointed General Craig Campbell to the second-in-line position – as she is clearly authorized to do under AS 44.19.040.¹ This statute states that the second-in-line appointee is subject to legislative confirmation.² However, the legislature is not in session to confirm this appointment, and with the recent announcement of Governor Palin’s resignation, Lieutenant Governor Sean Parnell is scheduled to assume the governorship on July 26, 2009, leaving a vacancy in the position of lieutenant governor.

¹ AS 44.19.040 provides that if the second-in-line appointee is removed from or vacates the appointment, “the governor shall appoint a successor subject to confirmation . . .”

² *Id.*

This situation – a second-in-line appointment during a legislative recess and a subsequent lieutenant governor vacancy – raises questions about proper constitutional and statutory succession procedures. These are important issues for the State of Alaska, requiring consideration of executive and legislative responsibilities, including the powers of appointment and confirmation, and the implementation of constitutional and statutory procedures intended to ensure that there is no gap in the line of succession for the office of governor. Moreover, while the facts giving rise to these questions are unique and of first impression for the state, it is conceivable that the issues addressed below could arise in a number of similar situations.³ Because the issues are challenging, capable of recurring, and of significant import to the lawful and smooth transition of Alaska's state government, I am issuing this advice as an Attorney General's Opinion.

II. Summary

As noted above, the issues addressed in this opinion are important for the State of Alaska, requiring consideration of executive and legislative responsibilities, including the powers of appointment and confirmation, and the implementation of constitutional and statutory procedures intended to ensure that there is no gap in the line of succession for the office of governor. In rare cases, it is conceivable that the critical public interest of ensuring continuity and a clear line of succession in the office of governor might not be aligned with the legislature's responsibilities and powers to confirm senior executive branch officials. We examine this important issue, on which there is no controlling case law, at length in this opinion. It is a close call on whether a recess appointee to the second-in-line position can assume the office of lieutenant governor when it becomes vacant without first being confirmed by the legislature. Nevertheless, we conclude in the affirmative.

Despite this conclusion, this opinion also distinguishes between what the executive branch has the legal authority to do, and what we recommend it should do. These are not always the same. In this case, it is important to seek consensus among different branches of government with regard to succession issues. Thus, the opinion examines and recommends other approaches. Specifically, it suggests that if there is no special session of the legislature to confirm General Campbell as the second-in-line appointee prior to the transition between the Palin and Parnell administrations, then he should be designated as temporary/acting lieutenant governor pursuant to Alaska statutes. We believe that this approach is consistent with Alaska's constitutional and statutory designs that clearly underscore the critical public interest of continuity in the principal executive offices of the state. It also preserves the legislature's interest and responsibilities in confirming General Campbell to the second-in-line position, at a later date.

³ A similar situation would occur any time a governor vacates the office without a legislatively confirmed second-in-line appointee.

III. Legal Analysis of the Governor's Recess Appointment Power and the Legislature's Confirmation Responsibilities

A. Alaska Law Gives the Governor Significant Authority to Make Recess Appointments

The Alaska Constitution and statutes generally provide the Governor with broad powers to fill vacancies in senior executive branch positions during a legislative recess. Article III, § 27 of the Alaska Constitution states that “[t]he governor may make appointments to fill vacancies occurring during a recess of the legislature, in offices requiring confirmation by the legislature.” Alaska Statute 39.05.080 reinforces this authority by providing that such recess appointees hold their offices with full authority pending confirmation: “[p]ending confirmation or rejection of appointment by the legislature, persons appointed shall exercise the functions, have the powers, and be charged with the duties prescribed by law for the appointive positions.”⁴ These constitutional and statutory provisions give the governor the authority necessary to keep the executive branch functioning fully when critical vacancies occur and the legislature is not in session.

B. AS 44.19.040 Seems to Require Confirmation in All Cases for the Second-in-Line Position

The governor's ability to make recess appointments is more complicated, however, when the second-in-line position becomes vacant. Under Alaska Constitution Article III, § 13, the legislature is specifically charged with enacting laws “for the succession to the office of governor and for an acting governor in the event the lieutenant governor is unable to succeed to the office or act as governor.”

Alaska Statute 44.19.040 was one of the key laws enacted to effectuate this constitutional provision. It requires the governor to appoint a person to the second-in-line position as part of a two-step process. The governor first appoints a person to the second-in-line position. The statute then refers to the second step, confirmation:

The appointment is subject to confirmation by a majority of the members of the legislature meeting in joint session. The person designated and confirmed is next in line for succession to the office of lieutenant governor, subject to the pleasure of the governor. If the person designated and confirmed is removed from or vacates the appointment, the governor shall appoint a successor subject to confirmation in the same manner as the person initially appointed.⁵

⁴ AS 39.05.080(4).

⁵ AS 44.19.040 (emphasis added).

The language of this provision suggests that the appointee becomes second in line only after being “designated and confirmed.”⁶

Yet such a reading and interpretation of AS 44.19.040 raises an important policy concern. If the second-in-line position is not “in line for succession to the office” of lieutenant governor until such time as confirmed, then the lieutenant governor’s seat could lie vacant until the legislature convenes, meets in full session, and confirms an appointed successor. In certain circumstances, this could mean the lieutenant governor’s office would be left unoccupied for months. Such a result appears to contradict the intent of the constitutional delegates and the legislature that Alaska’s government have two principal executive officers and that vacancies be filled as quickly as possible.⁷

C. AS 44.19.040 Read in Conjunction with Its Companion Statutes Suggests that Confirmation Is Not Always Mandated If a Vacancy Occurs First and a Succession Gap is Imminent

Alaska Statute AS 44.19.040 makes clear that the legislature has important statutory responsibilities and powers in confirming the second-in-line position. The critical question, however, is whether such powers and responsibilities override the constitutional and legislative imperative to avoid gaps in the line of succession to the office of governor.

Although AS 44.19.040 seems at first blush to require that a second-in-line appointee be confirmed before he or she can become lieutenant governor, when read in conjunction with other statutes, passed contemporaneously, that interpretation does not appear to be required in every situation. Indeed, AS 44.19.040 was enacted with

⁶ It should be noted that Alaska case law calls into question whether the legislature has the authority to require confirmation for the second-in-line position. *See Bradner v. Hammond*, 553 P.2d 1 (Alaska 1976) (holding that the legislature’s authority to require confirmation of executive branch officials is limited to department heads subject to Alaska Const. art. III, §§ 25-26). However, we need not address this issue in this opinion.

⁷ Alaska Const. art. III, §§ 9-13 and AS 44.19.040 - 44.19.046 demonstrate that the legislature intended that a plan of succession be in place at all times to minimize interruption in the continuity of the highest executive branch offices. Legislative history to AS 44.19.046 confirms that the intent of the legislation was to prevent succession gaps. “Succession of the executive should not be delayed until the legislature can act.” *See H. Judiciary Comm., Report on HB 5, 1st Sess., at 1 (Alaska 1959)*. Likewise, sec.1 of SCS CSHB 5 (STA) am (Alaska 1959) demonstrates that the legislative intent was to minimize unnecessary interruptions to the activities of the state.

AS 44.19.042 and AS 44.19.046 in 1959, in the same legislative bill.⁸ Under these statutes, the ability of the second-in-line appointee to assume the lieutenant governor position differs depending upon the situation.

For example, AS 44.19.042 suggests that a second-in-line appointee need not have been previously confirmed in every instance to succeed to a vacant lieutenant governor position. This statute states that when a vacancy arises, the person “designated as next successor to the office of lieutenant governor as provided in AS 44.19.040” succeeds to office for the remainder of the term.⁹ On its face, AS 44.19.042 appears to require less than AS 44.19.040 because the statutory language only mentions that the person must be “designated as next successor,” without expressly requiring legislative confirmation as AS 44.19.040 seems to do. And while the reference in AS 44.19.042 to AS 44.19.040 could be interpreted to require compliance with all aspects of .040, including legislative confirmation, that would mean that “designated” has a different meaning in AS 44.19.042 than it does in AS 44.19.040. As a general rule, Alaska law does not support such a statutory interpretation. “It is a general principle of statutory construction that ‘the same words used twice in the same act have the same meaning.’”¹⁰

Additionally, the omission of an express confirmation requirement in AS 44.19.042 reflects the different purposes of the two provisions. Read in context, the textual

⁸ Secs. 2, 3, and 5, ch. 174, SLA 1959.

⁹ AS 44.19.042 (emphasis added).

¹⁰ See, e.g., *Benner v. Wichman*, 874 P.2d 949, 957 (Alaska 1994) (quoting 2A Norman J. Singer, *Sutherland Statutes and Statutory Construction* § 46.06 (5th ed. 1992)); see also 2A Singer, *Sutherland Statutory Construction* § 47.16 (7th ed. 2008 rev) (“Where the meaning of a word is unclear in one part of a statute but clear in another part, the clear meaning can be imparted to the unclear usage on the assumption that it means the same thing throughout the statute.”).

Moreover, in AS 44.19.040, “designated” clearly refers solely to the act of appointment by the governor, as it is distinguished from the act of confirmation: “the person designated and confirmed is next in line for succession to the office of lieutenant governor....” Interpreting “designated” in AS 44.19.042 to mean both “designated and confirmed” would be inconsistent with the language of AS 44.19.040. See 2B Singer, *Sutherland Statutory Construction* § 51.2 (7th ed. 2008 rev) (stating that where a statute with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different intention existed).

discrepancy between the statutory sections is reconcilable.¹¹ Alaska Statute 44.19.040 applies when the lieutenant governor's office is not vacant and no exigent circumstances exist that would compel expediting a second in line to the lieutenant governor's office. In this situation, confirmation by the legislature provides a legislative check without leaving one of the highest state offices vacant for an open-ended period of time. Alaska Statute 44.19.042, on the other hand, describes what occurs when a vacancy arises and the need to fill the position of lieutenant governor is more compelling. In this situation, the person designated by the governor succeeds to the office without delay, whether or not confirmed.

The third of the three 1959 provisions, AS 44.19.046, further supports this interpretation. The statute mandates that "the person appointed under AS 44.19.040 succeeds directly to the office of acting governor until successors to the respective offices are elected in a special election."¹² Like AS 44.19.042, this provision refers to AS 44.19.040 and identifies an appointed successor without specifying that the successor must also be confirmed. This statute applies when vacancies occur simultaneously in the offices of governor and lieutenant governor – a situation that requires immediate action if the designated second-in-line official is unconfirmed. The legislature intended this succession to occur immediately in order to fill the leadership vacuum that would occur while the legislature convenes and confirms the second-in-line appointee. From a broad public interest standpoint, this appears to be the appropriate result. When the offices of both governor and lieutenant governor are vacant, circumstances are most compelling to expedite obtaining a successor to immediately fill the leadership void regardless of whether the successor previously has been confirmed.

Admittedly, the 1959 statutes at issue here could be more clearly drafted. But our interpretation best protects what are among the most important interests of the state. When the lieutenant governor's seat becomes vacant, the second-in-line appointee will nearly always have been previously confirmed, consistent with Alaskans' interest in governmental checks and balances and the legislature's responsibility and power to confirm senior executive branch officers. However, in the rare instance where the legislature's confirmation responsibility could result in a succession gap or a vacancy in the executive branch's highest offices, the legislative intent of AS 44.19.040-.046 appears to be for a succession to be made quickly even if legislative confirmation cannot take place.

¹¹ To determine whether two statutory provisions stand in conflict, the court interprets them together, in context with other pertinent provisions, rather than in isolation, with a view toward reconciling conflict to produce "a harmonious whole." *Progressive Ins. Co. v. Simmons*, 953 P.2d 510, 516 (Alaska 1988) (quoting 2 J. Sutherland, *Statutes and Statutory Construction*, § 4703 at 336-37 (Horrack ed., 3d ed.1943)).

¹² AS 44.19.046 (emphasis added).

IV. Alternative Statutory and Constitutional Approaches Should Be Considered

The foregoing interpretation emphasizes the critical public interest of ensuring that there will always be a clear and rapid line of succession to the office of governor. Yet it is an imperfect solution to a difficult problem because the legislature has no role confirming the second-in-line successor in exigent circumstances. Moreover, while we believe our interpretation to be the correct one, there is no controlling case law to provide guidance on interpreting these statutes. For institutional and other reasons, Alaska's current legislature may disagree with this analysis and conclusion. In the present case, disagreement with the legislature on these important issues, in which it traditionally has a well-defined and important role, should attempt to be avoided because any prolonged disagreement between the executive and legislative branches has the potential to create the succession gap problem that it is in Alaska's interest to avoid.

Accordingly, alternative statutory and constitutional approaches should be considered and implemented. Alaska Statute 44.19.026 expressly authorizes the designation of a temporary/acting lieutenant governor in the event the official lieutenant governor succeeds to the office of governor. Moreover, a special session of the legislature can be convened to confirm a governor's second-in-line appointment. We discuss these options below.

A. General Campbell Can Be Appointed Temporary/Acting Lieutenant Governor Under AS 44.19.026

Pursuant to 44.19.026, General Campbell can be appointed temporary/acting lieutenant governor. This statute authorizes the lieutenant governor to designate a head of a principal executive department to assume many of the duties of the office of lieutenant governor "during such time as the lieutenant governor succeeds to the office of governor."¹³ If this appointment under AS 44.19.026 is made prior to the date when Governor Palin leaves office, General Campbell will immediately become temporary/acting Lieutenant Governor when Lieutenant Governor Parnell assumes the governorship. Consequently, Governor Palin's intention to have General Campbell serve

¹³ AS 44.19.026 provides: "The lieutenant governor may designate a head of a principal executive department, or more than one such officer in the alternative, who shall temporarily be custodian of the state seal and perform the authenticating functions of the lieutenant governor during such time as the lieutenant governor succeeds to the office of governor, acts as governor, is absent from the state, or otherwise is not available at the state capital to perform the above authenticating functions. The designation shall be in writing, signed by the lieutenant governor, and filed in the office of the lieutenant governor. The designation is effective until revoked by a later designation executed and filed in the same manner." (emphasis added).

in the office of lieutenant governor will be fulfilled – albeit in an acting and temporary capacity.¹⁴ This approach, as set out in AS 44.19.026, does not require legislative confirmation, but preserves the legislature’s interests and responsibilities in confirming General Campbell to the second-in-line position at a later date. It also safeguards against a potential succession gap in the office of governor.¹⁵

B. The Legislature Can Confirm General Campbell Under AS 44.19.040

As a second alternative approach, General Campbell can be legislatively confirmed to the second-in-line position in a special session before Lieutenant Governor Parnell assumes the office of governor. This approach would obviously moot any issues about whether General Campbell must be legislatively confirmed before he succeeds to the office of lieutenant governor under AS 44.19.042.

Although it might be preferable for such a confirmation to occur before the transition of power between Governor Palin and Lieutenant Governor Parnell, AS 44.19.026 – the temporary/acting lieutenant governor statute – does provide some degree of flexibility in the timing of such a session. That is, if a special session cannot be held before Lieutenant Governor Parnell becomes governor, General Campbell can be appointed as temporary/acting lieutenant governor under AS 44.19.026 and can serve in that capacity until the legislature convenes a special session to take up his confirmation.¹⁶

¹⁴ General Campbell would retain his current position as Commissioner of Military and Veterans Affairs, pending his confirmation by the legislature as the second-in-line appointee. A temporary appointment under AS 44.19.026 avoids the prohibition against dual office holding. *See* Alaska Const. art. III, § 6.

¹⁵ While by design the designation is temporary, many of the duties of the office of lieutenant governor would be covered by the designation without interruption. The statute states that the designee will temporarily be custodian of the state seal and “perform the authenticating functions of the lieutenant governor....” AS 44.19.026. This opinion does not analyze precisely what functions of the lieutenant governor might be characterized as “authenticating,” but we believe the intent of this statute was to ensure that many of the significant duties of the office will be covered. In the event that certain duties are not covered, those can be delegated or assumed by the Governor. The Department of Law is continuing a detailed analysis of this issue.


¹⁶ See Attachment 1 for procedural details of how such a process would work in a hypothetical case.

C. The Foregoing Ensures No Succession Gap

The benefit of these approaches is that succession is safeguarded, and the legislature's confirmation responsibilities can still be exercised. More broadly, it is important to note that Alaska statutes cover any future succession contingency regardless of whether General Campbell is: (a) designated as the second-in-line appointee, but not confirmed by the legislature (not the recommended approach of this opinion); (b) designated as the second-in-line appointee and is confirmed by the legislature; or (c) designated as temporary/acting lieutenant governor and is confirmed at a later date.¹⁷

Please contact me if we can be of further assistance with this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Daniel S. Sullivan", with a long horizontal flourish extending to the right.

Daniel S. Sullivan
Attorney General

Enclosure: Attachment 1

¹⁷ Under any of these circumstances, if the office of governor would somehow become vacant during the Parnell Administration, Alaska statutes would mandate that General Campbell would succeed to "the office of acting governor" but only until a special election is held to fill the offices of governor and lieutenant governor. See AS 44.19.044 and AS 44.19.046.

Hypothetical Timeline

1. Commissioner Joe Schmidt is appointed and confirmed to the second-in-line position during the previous regular legislative session pursuant to AS 44.19.040.
2. Commissioner Schmidt resigns from the second-in-line position on July 6, 2009, pursuant to AS 44.19.040.
3. Governor Palin appoints General Campbell to the second-in-line position on July 7, 2009, pursuant to AS 44.19.040.
4. Governor Palin notifies legislative leadership of her appointment of General Campbell to the second-in-line position on July 7, 2009.
5. General Campbell is designated to fill the temporary/acting Lieutenant Governor position pursuant to AS 44.19.026. This designation, which is administratively performed by Lieutenant Governor Parnell, should occur prior to the Palin/Parnell administration transition. This designation only becomes effective when Lieutenant Governor Parnell succeeds to the office of governor.
6. Lieutenant Governor Parnell succeeds to the office of governor on July 26, 2009, pursuant to Alaska Constitution Article III, § 11. At that time, General Campbell immediately becomes temporary/acting Lieutenant Governor pursuant to AS 44.19.026.
7. A special session is called and convenes to confirm temporary/acting Lieutenant Governor Campbell to the second-in-line position pursuant to AS 44.19.040.
8. Temporary/acting Lieutenant Governor Campbell is confirmed by the legislature to the second-in-line position pursuant to AS 44.19.040.
9. Temporary/acting Lieutenant Governor Campbell immediately succeeds by operation of law to the lieutenant governor position pursuant to AS 44.19.040.
10. Lieutenant Governor Campbell simultaneously revokes the previous designation as temporary/acting Lieutenant Governor pursuant to AS 44.19.026.
11. Governor Parnell then appoints a new second-in-line appointee pursuant to AS 44.19.040.