



Governor Northam News Recap and Succession Information in the Event of Resignation

02.03.2019

It has been an unprecedented week of political turmoil in Virginia culminating in the revelation that Governor Northam's page in the 1984 Eastern Virginia Medical School yearbook included a photo on his page of two individuals, one in blackface and the other wearing a Ku Klux Klan costume.

The ensuing firestorm over the photos led Governor Northam to apologize on Friday for "the decision I made to appear as I did in the photo" over 30 years prior. Shortly thereafter, he met with the Legislative Black Caucus who called for his resignation. Calls for his resignation by the Democratic and Republican Caucuses in the House and Senate soon followed as did calls for his resignation from numerous national political figures and organizations.

Governor Northam announced on Saturday that he would not resign the governorship. He clarified that, upon further reflection, he did not believe he was one of the individuals in the photograph. He shared his belief that the yearbook staff erroneously included the picture on his page. During a wide-ranging press conference, Governor Northam stated, that while the yearbook photo was not of him, he did wear blackface shortly after graduating from EVMS to participate in a dance competition in San Antonio, Texas while dancing to Michael Jackson songs.

After the press conference, the Democratic National Committee, Attorney General Mark Herring and United States Senators Mark Warner and Tim Kaine joined the chorus of voices calling for Governor Northam's resignation. The Legislative Black Caucus also reiterated its call for his resignation.

The political environment in Virginia is fluid and seems to change by the minute. The Williams Mullen Government Relations team is working to determine the impact on the legislative initiatives of our clients if Governor Northam resigns. In addition, we thought it would be helpful to share information regarding what will happen if Governor Northam resigns. No governor since the Civil War has failed to complete his term in office, so Virginia will be in uncharted territory.

If Governor Northam resigns, the Constitution of the Commonwealth of Virginia (see below) mandates that the lieutenant governor assume the Office of Governor. Lieutenant Governor Justin Fairfax (D)

would become the governor. Lieutenant Governor Fairfax is an attorney from Northern Virginia and would become one of the youngest governors in the nation, at age 39, if he assumes the governorship. He would also be Virginia's second African-American governor. One interesting note is that, while a governor cannot run for re-election after completing a four-year term, Justin Fairfax would be able to complete Governor Northam's term of office and then run for and be elected to a full four-year term since his first three years in office would not have been as an elected governor.

If Lieutenant Governor Fairfax is elevated to the governorship, the Office of Lieutenant Governor would be vacant. The president *pro tempore* of the Virginia Senate, Senator Steve Newman (R), would assume the duties of the Office of Lieutenant Governor. See Va. Code § 24.2-212. Note, though, that Va. Code § 24.2-212 (see below) affirmatively declares that the Senate president *pro tempore* does not lose his vote on the Senate floor.

Under normal situations, the lieutenant governor only votes to break ties. In a situation where the president *pro tempore* has assumed the duties of the lieutenant governor, there will be no "tie-breaking" function, because the president *pro tempore* will have voted prior to the tie. Any piece of legislation that results in a tie vote would fail because there would be no tiebreaking vote available.

Virginia law provides clear guidance regarding the succession for the governor and attorney general but is less clear regarding the filling of a vacancy in the Office of Lieutenant Governor. Article V, Section 7 of Virginia's Constitution provides that the "Governor shall have power to fill vacancies in all offices of the Commonwealth..." and goes on to provide that "[i]f such office be one filled by the election of the people, the appointee shall hold office until the next general election..." But, this power vests with the governor only if the "Constitution and laws make no other provision." *Id.*

A 1984 opinion by Attorney General Gerald L. Baliles supports the interpretation that the governor has the authority to appoint the lieutenant governor. It explored this issue and counseled that "the Governor has the discretionary power to fill a vacancy in the office of the Lieutenant Governor."

The attorney general believed that the statutory provisions at the time regarding the president *pro tempore* of the Senate discharging the duties of the Office of Lieutenant Governor did not constitute filling the vacancy in the office.

Accordingly, if Lieutenant Governor Fairfax becomes governor, he could potentially appoint his successor, who would then serve until the next general election, which will occur this November.

However, an opinion of the attorney general is merely an opinion that is advisory in nature and judicial interpretation of Virginia law will likely be necessary. An argument can be made that Section 24.2-212 is the provision of law enacted by the General Assembly regarding the handling of a vacancy in the Office of Lieutenant Governor, thereby nullifying the governor's ability to fill the vacancy.

Further clouding the issue is the historical precedent of what occurred when Lieutenant Governor J. Sargeant Reynolds died in office in 1971. Henry Howell was elected lieutenant governor in a special election to fill the remaining two years of his term.

Similarly, Lieutenant Governor Lewis Preston Collins, II, died in 1952, and A.E.S. Stephens ran in a special election to finish the unexpired term in 1952 and was then re-elected to a full term in 1953. We are attempting to determine if the governor appointed either of them prior to their special elections, but the Office of Lieutenant Governor may have remained vacant until the special elections occurred if the vacancy occurred outside of the General Assembly session.

The Williams Mullen Government Relations team will continue to monitor this situation as it continues to develop over the coming week and stands ready to navigate the fast-changing political landscape on behalf of our clients.

The constitutional and statutory provisions appear below:

Virginia Constitution

Article V. Executive

Section 7. Executive and administrative powers

The Governor shall take care that the laws be faithfully executed.

The Governor shall be commander-in-chief of the armed forces of the Commonwealth and shall have power to embody such forces to repel invasion, suppress insurrection, and enforce the execution of the laws.

The Governor shall conduct, either in person or in such manner as shall be prescribed by law, all intercourse with other and foreign states.

The Governor shall have power to fill vacancies in all offices of the Commonwealth for the filling of which the Constitution and laws make no other provision. If such office be one filled by the election of the people, the appointee shall hold office until the next general election, and thereafter until his successor qualifies, according to law. The General Assembly shall, if it is in session, fill vacancies in all offices which are filled by election by that body.

Gubernatorial appointments to fill vacancies in offices which are filled by election by the General Assembly or by appointment by the Governor which is subject to confirmation by the Senate or the General Assembly, made during the recess of the General Assembly, shall expire at the end of thirty days after the commencement of the next session of the General Assembly.

Article V. Executive

Section 16. Succession to the office of Governor

When the Governor-elect is disqualified, resigns, or dies following his election but prior to taking office, the Lieutenant Governor-elect shall succeed to the office of Governor for the full term. When the

Governor-elect fails to assume office for any other reason, the Lieutenant Governor-elect shall serve as Acting Governor.

Whenever the Governor transmits to the President pro tempore of the Senate and the Speaker of the House of Delegates his written declaration that he is unable to discharge the powers and duties of his office and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Lieutenant Governor as Acting Governor.

Whenever the Attorney General, the President pro tempore of the Senate, and the Speaker of the House of Delegates, or a majority of the total membership of the General Assembly, transmit to the Clerk of the Senate and the Clerk of the House of Delegates their written declaration that the Governor is unable to discharge the powers and duties of his office, the Lieutenant Governor shall immediately assume the powers and duties of the office as Acting Governor.

Thereafter, when the Governor transmits to the Clerk of the Senate and the Clerk of the House of Delegates his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Attorney General, the President pro tempore of the Senate, and the Speaker of the House of Delegates, or a majority of the total membership of the General Assembly, transmit within four days to the Clerk of the Senate and the Clerk of the House of Delegates their written declaration that the Governor is unable to discharge the powers and duties of his office. Thereupon the General Assembly shall decide the issue, convening within forty-eight hours for that purpose if not already in session. If within twenty-one days after receipt of the latter declaration or, if the General Assembly is not in session, within twenty-one days after the General Assembly is required to convene, the General Assembly determines by three-fourths vote of the elected membership of each house of the General Assembly that the Governor is unable to discharge the powers and duties of his office, the Lieutenant Governor shall become Governor; otherwise, the Governor shall resume the powers and duties of his office.

In the case of the removal of the Governor from office or in the case of his disqualification, death, or resignation, the Lieutenant Governor shall become Governor.

If a vacancy exists in the office of Lieutenant Governor when the Lieutenant Governor is to succeed to the office of Governor or to serve as Acting Governor, the Attorney General, if he is eligible to serve as Governor, shall succeed to the office of Governor for the unexpired term or serve as Acting Governor. If the Attorney General is ineligible to serve as Governor, the Speaker of the House of Delegates, if he is eligible to serve as Governor, shall succeed to the office of Governor for the unexpired term or serve as Acting Governor. If a vacancy exists in the office of the Speaker of the House of Delegates or if the Speaker of the House of Delegates is ineligible to serve as Governor, the House of Delegates shall convene and fill the vacancy.

In the event of an emergency or enemy attack upon the soil of Virginia and a resulting inability of the House of Delegates to convene to fill the vacancy, the Speaker of the House, the person designated to act in his stead as prescribed in the Rules of the House of Delegates, the President pro tempore of the Senate, or the majority leader of the Senate, in that designated order, shall serve as Acting Governor until such time as the House of Delegates convenes to elect a Governor.

§ 24.2-212. Discharge of duties when office of Lieutenant Governor vacant.

When a vacancy occurs in the office of Lieutenant Governor, the duties of that office shall be discharged by the President pro tempore of the Senate, but he shall not by reason thereof be deprived of his right to act and vote as a member of the Senate.

Chapter 2. Federal, Commonwealth, and Local Officers

- **Article 1. General Provisions**

[§ 24.2-200](#)

When terms to begin

[§ 24.2-201](#)

When term of officer elected to fill vacancy commences and expires

- **Article 2. Federal Officers**

[§ 24.2-202](#)

Electors for President and Vice President

[§ 24.2-203](#)

Convening of electors; filling vacancies; how electors required to vote

[§ 24.2-204](#)

Election of electors and meeting when Congress prescribes a different day

[§ 24.2-205](#)

Pay of electors

[§ 24.2-206](#)

Election and term of United States Senators

[§ 24.2-207](#)

Filling vacancies in Senate

[§ 24.2-208](#)

Election and term of members of House of Representatives

[§ 24.2-209](#)

Filling vacancies in House of Representatives

• **Article 3. Statewide Offices: Governor, Lieutenant Governor, and Attorney General**

[§ 24.2-210](#)

Election and term of Governor, Lieutenant Governor, and Attorney General

[§ 24.2-211](#)

Discharge of duties when office of Governor is vacant or Governor is disabled

[§ 24.2-212](#)

Discharge of duties when office of Lieutenant Governor vacant

[§ 24.2-213](#)

Filling vacancy in office of Attorney General

• **Article 4. General Assembly**

[§ 24.2-214](#)

Election and term of Senators

[§ 24.2-215](#)

Election and term of members of the House of Delegates

[§ 24.2-216](#)

Filling vacancies in the General Assembly

- **Article 5. Constitutional and Local Officers**

[§ 24.2-217](#)

Election and terms of constitutional officers

[§ 24.2-218](#)

Election and term of county supervisors

[§ 24.2-219](#)

Alternative for biennial county supervisor elections and staggered terms

[§ 24.2-220](#)

Reversion to quadrennial elections

[§ 24.2-221](#)

Time and frequency of referenda on election and term of supervisors

[§ 24.2-222](#)

Election and terms of mayor and council for cities and towns

[§ 24.2-222.1](#)

Alternative election of mayor and council at November general election in cities and towns

[§ 24.2-223](#)

Election and term of school board members

[§ 24.2-224](#)

Local elections not otherwise provided for

- **Article 6. Vacancies in Elected Constitutional and Local Offices**

[§ 24.2-225](#)

Applicability

[§ 24.2-226](#)

Election to fill vacancy

[§ 24.2-227](#)

Interim appointment by court until vacancy filled by election for certain offices

[§ 24.2-228](#)

Interim appointment to local governing body or elected school board; elected mayor

[§ 24.2-228.1](#)

Election to fill vacancy in constitutional office

[§ 24.2-229](#)

Appointees to qualify and give bond in thirty days

[§ 24.2-229.1](#)

Legitimacy of votes by appointees

- **Article 7. Removal of Public Officers from Office**

[§ 24.2-230](#)

Applicability of article; certain exceptions

[§ 24.2-231](#)

Forfeiture of office by person sentenced for commission of certain crimes

[§ 24.2-232](#)

Vacancy occurring when officer determined "mentally incompetent" (incapacitated)

[§ 24.2-233](#)

Removal of elected and certain appointed officers by courts

[§ 24.2-234](#)

Removal of officer appointed for a term certain

[§ 24.2-235](#)

Procedure

[§ 24.2-236](#)

Suspension from office pending hearing and appeal

[§ 24.2-237](#)

Who to represent Commonwealth; trial by jury; appeal

[§ 24.2-238](#)

Costs

Related People

- Hon. David B. Albo – 703.760.5210 – dalbo@williamsmullen.com
- Matthew M. Cobb – 804.420.6390 – mcobb@williamsmullen.com

Related Services

- Government Relations