OFFICIAL OPINION NO. 7

January 29, 1958

Honorable Harold W. Handley
Governor of Indiana
206 State House
Indianapolis 4, Indiana

My Dear Governor:

This is in answer to your question concerning the eligibility of the Governor of the State of Indiana to seek and gain election to the office of Senator of the United States and hold such office subsequent to resignation as Governor and prior to the expiration of that term as Governor.

It is provided in the Constitution of the State of Indiana, Art. 5, Sec. 24, as follows:

> "Neither the Governor nor Lieutenant Governor shall be eligible to any other office, during the term for which he shall have been elected."

The qualifications for a United States Senator are provided in the Federal Constitution, Art. 1, Sec. 3 [3], and the Seventeenth Amendment, as follows:

> 3 [3]. "No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state for which he shall be chosen."
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> Seventeenth Amendment. "The senate of the United States shall be composed of two senators from each state, elected by the people thereof, for six years; and each senator shall have one vote. The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislatures.
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> "When vacancies happen in the representation of any state in the senate, the executive authority of such state shall issue writs of election to fill such vacancies: provided, that the legislature of any state may empower the executive thereof to make temporary appointments

> until the people fill the vacancies by election as the legislature may direct.
>
> "This amendment shall not be so construed as to affect the election or term of any senator chosen before it becomes valid as part of the constitution."

Assuming that you meet the eligibility requirements for the office of United States Senator as set forth in the above quoted provisions of the Federal Constitution, the question would then turn on whether the Indiana constitutional prohibition, as set out above, would invalidate your eligibility for this Federal office.

This precise question has not been directly in litigation in this state but an early Supreme Court decision and Opinion of the Attorney General do comment on one important point raised by your question. In the 1884-1886 Opinions of the Attorney General, in the course of answering the question of whether an acting justice of the peace serving under the provisions of the Indiana Constitution could continue serving after he had been appointed to the position of postmaster, the Attorney General said at page 115, "The people of Indiana have a right to declare what shall be the qualifications of officers under their government, but not of the government of the United States."

And within the same year the Supreme Court of Indiana, in passing on the question of holding a federal and state post concurrently, said in Foltz v. Kerlin (1885), 105 Ind. 221, 4 N. E. 439, at page 224: "Within the powers delegated to it the Federal government is supreme, and this necessarily carries the authority to determine upon the qualification of its officers and their right to hold office."

This early expression of the "supremacy" of the Federal Government as regards authority to determine qualifications of its officers was undoubtedly based on Article 6 of the Federal Constitution, which recites in part:

> "This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound

> thereby, any thing in the constitution or laws of any state to the contrary notwithstanding."

The statement in Art. 1, Sec. 5, of the Federal Constitution that, "Each house shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business; * * *" would seem to preclude the necessity of answering further the question you raise; however the precise question has been determined in other jurisdictions, whose Courts have clarified the position of both the state and Federal government in situations substantially indistinguishable from that presented by your question.

In 91 C. J. S. United States § 11, the general statement of the rule adopted in these cases is set out as follows:

> "The qualifications for membership in the house of representatives and in the senate are those provided in article 1, §§ 2, 3 of the federal Constitution. These qualifications are paramount and exclusive. State constitutions and laws can neither add to, nor take away from, them, and in case of a conflict the provisions of the federal Constitution prevail. Thus, subject to reasonable provisions of time and method of getting his name on the ballot, the mere possession of the qualifications prescribed in the federal Constitution makes one eligible for election to congress; and he will not be disqualified therefor by state constitutional or statutory provisions which * * * make the holders of particular offices ineligible for any other office or employment during their term of office."

In support of this general statement there is cited therein the case of State *ex rel.* Johnson v. Crane (1948), 65 Wyo. 189, 197 P. (2d) 864, which case presents a fact situation identical to that of your question. The Supreme Court of Wyoming first reviewed what the eminent jurists and authorities of constitutional law had said on the question before the bar, e.g:

> "The Constitution and the laws of the United States determine what shall be the qualifications for federal offices, and state Constitutions and laws can neither add

> to nor take away from them. This has been repeatedly decided in Congress in the case of persons elected to seats therein, when provisions in the state Constitution, if valid, would render them ineligible." (Judge Cooley's General Principles of Constitutional Law, 3d Ed., pp. 285, 290.)

Turning then to case authority the Wyoming Supreme Court said at page 869, "The attempts of states to require qualifications for the office of the United States Senator other than those named in the third clause of Section 3 of the United States Constitution, *supra,* have been uniformly rejected by the state courts * * *." Supporting this statement the court sets forth the following pertinent excerpts from these state courts:

> "Neither by a constitutional provision nor legislative enactment can the state of Wisconsin prescribe qualifications of a candidate for nomination for the office of United States Senator in addition to those prescribed by the constitution of the United States." (State *ex rel.* Wettengel v. Zimmerman, Secretary of State, 249 Wis. 237, 24 N. W. (2d) 504.)

> "The authorities are uniform that where the qualifications for Federal offices are set out in the Federal Constitution a State may not change those qualifications or add others thereto. This is true even though the State regulation be according to the Constitution of the State." (Buckingham v. State *ex rel.* Killoran, 42 Del. 405, 35 A. 2d 903.)

Other decisions reviewed by the court in reaching its decision include the following, all of which contain facts and language pertinent to your question, but not set out in detail to avoid duplicity:

> State *ex rel.* Eaton v. Schmahl, Secretary of State, 140 Minn. 219, 167 N. W. 481;
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> State *ex rel.* Chandler v. Howell, Secretary of State, 104 Wash. 99, 175 P. 569;
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> Ekwall v. Stadelman, Secretary of State, 146 Ore. 439, 30 P. (2d) 1037;

State *ex rel.* O'Sullivan v. Swanson, Secretary of State, 127 Neb. 806, 257 N. W. 255;

In re O'Connor, 173 Misc. 419, 17 N. Y. S. (2d) 758, 759;

Stockton v. McFarland *et al.*, 56 Ariz. 138, 106 P. (2d) 328;

State *ex rel.* Sundfor v. Thorson, Secretary of State, 72 N. Dak. 246, 6 N. W. (2d) 89, 90.

The court then concluded at page 874, that, "Under the decisions reviewed above, the holdings of both Houses of Congress, the persuasive utterances of lawyers, statesmen, judges, and legal authors of the most eminent authority, we conclude that the result to be reached in the case at bar can not be at all in doubt."

It is of interest to also note that Governor Oliver P. Morton of Indiana became a United States Senator in 1867 under circumstances identical to those propounded in your question. There was no court action or legal opinions of the Attorney General regarding his action which I can find, but the newspapers of the day indicated that he acted in accordance with a recent decision by the members of the United States Senate which had seated Judge Trumbull of Illinois in the face of a similar prohibition in the Constitution of that state. In the Crane Case, *supra,* referring to the seating of the Judge it was reported that there was a long and exhaustive debate on the question in the Senate, and the following speech made by a Mr. Crittenden on March 3, 1856:

> "The whole object of the Constitution of the United States could not be more completely subverted by eradicating from the Constitution the positive qualifications which it requires, than, it would be in substance, and virtually, by superadding qualifications. If the Constitution has not thought proper to make further qualifications, what is the reason of it? It is because its framers did not desire any other to be made. Did they intend carefully to make these qualifications, and then leave it to the States to make any which, according to their casual will, or wish, or caprice, they might, from time to time, make?"

It was this view that the Senate adopted in the subsequent seating of the Judge and it was in the light of this action by the Senate that Governor Morton determined to run for the Senate, and if elected, hold such office, after resignation as Governor.

Therefore, assuming you are eligible under the Federal Constitution for the office of United States Senator it is my opinion that the provisions of the Indiana Constitution cannot deny to you the right to hold such office nor in any manner add to or take away from the eligibility qualifications set out in the Federal Constitution.

OFFICIAL OPINION NO. 8

February 4, 1958

S. T. Ginsberg, M. D.
Mental Health Commissioner
Division of Mental Health, State of Indiana
1315 West Tenth Street
Indianapolis, Indiana

Dear Dr. Ginsberg:

Your letter dated January 13, 1958, requesting my Opinion reads as follows:

> "Does the term 'parent of any patient' as used in the definition of a responsible relative in Section 1 (5), Chapter 339, Acts 1955 include the parents of an adult patient who became a patient after his or her emancipation?
>
> "Parents liable for payment of the charge for care and treatment of patients in our hospitals frequently submit the adulthood of their 'child' as a defense against the liability. We want to decide these cases in the light of a professional interpretation of the law."

Acts of 1955, Ch. 339, Sec. 2, as found in Burns' (1957 Supp.), Section 22-4217, provides in part:

> "Each patient in a psychiatric hospital of this state, the estate of the patient, the guardian of the patient,