Hon. Ralph F. Gates,  
Governor of Indiana,  
206 State House,  
Indianapolis, Indiana.

Dear Governor Gates:

I am in receipt of your letter of March 9th in which you ask my official opinion as follows:

"Although we do not as yet have the official resignation of Lt. Governor Richard T. James, there is no question that it will be tendered, perhaps shortly.

"There seem to be many different views as to who will succeed to the duties of the various boards and commissions on which the Lieutenant Governor serves.

"It is my understanding that the Lieutenant Governor receives a salary of $6,000 as Lieutenant Governor, and a salary of $1,200 as President of the Senate.

"The law passed in 1941 apparently vested in the Auditor of State membership on the various boards and commissions upon which the Lieutenant Governor served. I shall want an official opinion as to who will take the place of the Lieutenant Governor on all the various boards and commissions.

"Involved in this question is also the question as to the Auditor of State's serving in more than one capacity. I doubt very much if there is any question as to additional compensation, because apparently there was no compensation to the Lieutenant Governor by reason of his serving on the various boards and commissions.

"According to the law, the Lieutenant Governor is the Commissioner of Agriculture. I will want to know whether or not I would have the power to appoint a Commissioner of Agriculture, and if so, how the compensation shall be fixed.

"I have asked Lt. Governor James to furnish me a list of the various boards and commissions on which
he serves, and I am enclosing that list with this letter. Kindly give me an official opinion on these matters at your earliest convenience."

Upon receipt of that request I entertained some doubt as to the propriety of issuing an official opinion by reason of the fact that the Lieutenant Governor acts as President of the Senate, which body has authority to judge the qualifications of its own officers and members. However, our Supreme Court has indicated that it is my duty to give an advisory opinion upon this subject.

Robertson v. State (1886), 109 Ind. 79, 156.

I

The first problem which arises upon the resignation of a Lieutenant Governor is the question as to whether the vacancy thus created may be filled by a gubernatorial appointment. Any such power of the Governor to fill such vacancy must be derived from the Constitution of Indiana, as the power to fill vacancies in elective offices is not an inherent executive function.

Tucker v. State (1941), 218 Ind. 614, 655.

The court there said that, "In the absence of an express provision, the general executive power does not carry with it the power to fill a vacancy in an elective office." It was further held there that Section 18 of Article 5 of the Constitution authorizes the Governor to fill vacancies in elective State offices. That section of the Constitution reads as follows:

"When, during a recess of the General Assembly, a vacancy shall happen in any office, the appointment to which is vested in the General Assembly; or when, at any time, a vacancy shall have occurred in any other State office, or in the office of Judge of any court; the Governor shall fill such vacancy, by appointment, which shall expire, when a successor shall have been elected and qualified."

The Tucker case also holds (page 674) that the Lieutenant Governor is an officer in the executive department of the gov-

The only Indiana case involving the applicability of the above provision of the Constitution to the office of Lieutenant Governor is the case of Robertson v. State (1886), 109 Ind. 79, where the contention in the action was that the election in an off year election of a Lieutenant Governor to fill a vacancy was void. A majority of the court rested its decision that it did not have jurisdiction of the action on the dual grounds that the case was one purely of legislative cognizance and that the case itself had been brought in a court of improper venue. A minority of the court concurred in the latter conclusion but yet proceeded to deliver a dictum to the effect that in the event of a vacancy in the office of Lieutenant Governor, the President of the Senate succeeded to the duties of that office. The primary premise of that dissenting opinion is that the only constitutional function of a Lieutenant Governor is to succeed to the office of Governor and to preside over the Senate and that the President pro tem of the Senate could and should well perform those functions.

Since the rendition of that opinion, it has been held that it is implicit in the Constitution that the Lieutenant Governor may be granted duties by the General Assembly in the administrative department of the government.


"*** necessary implications from express provisions of the Constitution are as much a part of the Constitution as the express provisions themselves; ***"

Robinson v. Moser (1931), 203 Ind. 66, 78.

Under the above cases, it is implicit in the Constitution that the Lieutenant Governor shall perform such administrative duties as may be imposed upon him by the General Assembly. To these duties, if any, the President pro tem of the Senate can not well succeed, since he is a legislative officer. Therefore, the primary premise of the dissenting opinions fails by reason of provisions found in the latter cases to be implicit in the Constitution. Furthermore, a member of the
majority of the court, in his individual opinion on rehearing, denied the propriety of any expression by the court on the merits of that case (109 Ind. 157).

Preceding that opinion, the Attorney General gave his opinion to the Governor of Indiana (O.A.G. 1886, p. 222) which is in part as follows:

"The office of Lieutenant Governor, under the Constitution of Indiana, becomes an essential factor in the proper administration of the affairs of the State. He is elected for the term of four years (R. S. 1881, sec. 128), and by virtue of his office he is President of the Senate, with a right, when in committee of the whole, to join in debate and vote on all subjects, and whenever the Senate shall be equally divided he shall give the casting vote. R. S. 1881, Sec. 147.

"Section 10 of Article IV of the Constitution provides that 'each house, when assembled, shall choose its own officers, the President of the Senate excepted.' R. S. 1881, Sec. 106. This clause of the Constitution is to be considered in connection with section 11 of Article V of the Constitution, which provides: 'Whenever the Lieutenant Governor shall act as Governor, or shall be unable to attend as President of the Senate, the Senate shall elect one of its own members as President for the occasion.' R. S. 1881, Sec. 137. This clause presupposes that there is a Lieutenant Governor.

"Under this provision of the Constitution the Senate may elect a temporary presiding officer when the Lieutenant Governor shall act as Governor, or he shall be unable to attend as President of the Senate.

"Section 10 of Article V of the Constitution provides: 'In case of the removal of the Governor from office, or of his death, resignation or inability to discharge the duties of the office, the same shall devolve on the Lieutenant Governor, and the General Assembly shall by law provide for the case of removal from office, death, resignation or inability both of the Governor and Lieutenant Governor, declaring what officer shall then act as Governor, and such officer shall act accordingly until the disability be removed or a Governor be elected.' R. S. 1881, Sec. 136."
“In pursuance of said clause of the Constitution, the General Assembly of 1867 enacted the following statute: ‘In case of the removal from office, death, resignation, or inability of both Governor and Lieutenant Governor, a vacancy occurs in the office of Governor, the President of the Senate shall act as Governor until the vacancy be filled, and if there be no President of the Senate, the Secretary of State shall convene the Senate for the purpose of electing a President thereof.’ R. S. 1881, Sec. 5559.

“This provision of the statute is operative only when there is a vacancy in the offices of both Governor and Lieutenant Governor, and in such event the President of the Senate shall become acting Governor until the vacancy be filled, and such vacancy should be filled at the next ensuing November election. R. S. 1881, Sec. 4678.

“The Lieutenant Governor is a State officer. He is elected by the whole people of the State. He presides over a branch of the General Assembly that legislates for the whole State, and upon the removal, resignation or death of the Governor he becomes acting Governor of the State. The Constitution requires him to sign all bills and joint resolutions enacted by the General Assembly. R. S. 1881, Sec. 121. He is a member of the State Board of Equalization that passes on the taxes of the State. Sargent S. Prentiss, who possessed a national reputation as an orator and lawyer, in a speech in the General Assembly of Mississippi, defined a State officer to be as follows: ‘On the other hand, I understand a State officer to be one whose jurisdiction extends over the State, and the exercise of the duties of which will operate equally upon all the citizens of the State. Thus the Governor, the Judge of the High Court of Errors and Appeals and other Circuit Courts, are all State officers, because their action is general and not confined to any particular county or portion of the State. It is not the mode of election which gives character to the office, but the duties appertaining to it and the extent of their exercise. For instance, a Judge of the Supreme Court—it will be admitted, I
presume—is a State officer, though he is elected only from a particular district, but the exercise of the duties of his office extends over the whole State.’ Life and Times of S. S. Prentiss, p. 113, 114.

“I think it may be safely assumed that a Lieutenant Governor is a State officer. * * *”

In Tucker v. State (1941), 218 Ind. 614, 653, the court makes the following statement in regard to Section 18, supra:

“Evidence that the Governor was considered the natural and logical repository of the general appointive power is seen in the provision that, in the case of vacancy in any state office, whether in the legislative, or the judicial, or the executive including the administrative department, the Governor shall appoint an incumbent to fill the vacancy until the normal constitutional appointive power may be exercised. * * *”

The court in this dictum indicates a broad interpretation of Section 18, supra.

Turning to authorities from other states, we first mention State, ex rel. v. Nash (1902), 66 Ohio St. 612, 64 N. E. 558, which was an action in mandate to require the Governor to make an appointment to fill a vacancy in the office of Lieutenant Governor. The Constitution of Ohio, Article 2, Section 27; 11 Page’s Ohio General Code, page 201, provided as follows:

“The election and appointment of all officers, and the filling of all vacancies, not otherwise provided for by this constitution, or the constitution of the United States, shall be made in such manner as may be directed by law; but no appointing power shall be exercised by the general assembly, except as prescribed in this Constitution, and in the election of United States senators; and in these cases the vote shall be taken ‘viva voce.’ ”

Pursuant to this authority, the General Assembly adopted the following Act:
“A vacancy occurring in an elective state office other than that of a member of the general assembly or of governor, shall be filled by appointment by the governor until the disability is removed, or a successor is elected and qualified. Such vacancies shall be filled by election at the first general election for the office which is vacant, that occurs more than thirty days after the vacancy shall have occurred. The person elected shall fill the office for the unexpired term. (Cons. Art. XVII, Sec. 2; R. S. Sec. 81.)”

The Court held that the general terms of the constitutional provision and of the statute passed pursuant thereto imposed a mandatory duty upon the Governor to fill the vacancy in the office of Lieutenant Governor. The court said:

“The substance of this proceeding appears to us to be confined within a very limited compass. We are not disposed to speculate upon imaginary cases, nor to indulge in discussion concerning contingencies for which possibly sufficient provision may not have been made. We are content to dispose of the case presented to us, and to dispose of it according to the parts of the constitution and of the statutes which are pertinent to it, without resolving ourselves into a legislature or a constitutional convention. We find no provision in the constitution specifically providing for filling a vacancy in the office of lieutenant governor. It is argued that the words 'until the vacancy is filled' refer to a vacancy in the office of lieutenant governor. If that construction is correct,—and we are inclined to think that it is not,—still it is not provided how or by whom the vacancy shall be filled. The only provision in the constitution controlling the case in hand is the one already adverted to (Article 2, Sec. 27); and the legislature having, by a plain, unambiguous, and mandatory enactment, directed the governor to fill the vacancy by appointment it is, in our judgment, his clear duty to do so.”

In People ex rel. v. Budd (1896), 114 Cal. 168, 45 Pac. 1060, 34 L.R.A. 46, a vacancy caused by the death of the Lieutenant Governor had been filled by the Governor by appointment:
"But it is conceded by the parties that upon the death of the lieutenant governor the governor may fill the vacancy by appointment. This is unmistakably within the language of Sec. 8, Art. 5, which reads as follows: 'When any office shall from any cause become vacant, and no mode is provided by the Constitution and law for filling such vacancy, the governor shall have the power to fill such vacancy by granting a commission, which shall expire at the end of the next legislature or at the next election by the people.' An office has become vacant, and there is no other mode provided by the Constitution or laws to fill it. * * *" 

In State v. Day (1871), 14 Fla. 9, 16, the court had under consideration the following article of the Florida Constitution (Art V, Sec. 7: 

"When any office from any cause shall become vacant, and no mode is provided by this Constitution or by the laws of the State for filling the vacancy, the Governor shall have the power to fill such vacancy by granting a commission which shall expire at the next election.' * * *" (Our emphasis.) 

On page 19, speaking of a statute, the court says: 

"* * * The language is quite as comprehensive as that used in the 7th Section of Article V of the Constitution, which, it is considered, when it refers to 'any office,' includes that of Lieut.-Governor as among those in which a vacancy may be filled by an appointment." 

The court held that the Governor had validly filled a vacancy in the office of Lieutenant Governor. It must be noted that this was a subsidiary issue and was not the principal point in the case.

It appears from these decisions from other jurisdictions that the courts find no ambiguity in constitutional language essentially similar to Section 18 of Article 5, above quoted. 

"In construing the meaning of a constitution, its language should be taken in its general and ordinary
sense, for 'the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.' Gibbons v. Ogden (1824), 9 Wheat. (U. S.) 1, 188.

"If the Courts venture to substitute for the clear language of the instrument, their own notions of what it should have been, or was intended to be, there will be an end of written constitutions." Greencastle Township v. Black (1854), 5 Ind. 566, 570. A constitution is an instrument of a practical nature, made and adopted by the people themselves, adapted to common wants and designed for common use. When words are used therein which have both a restricted and general meaning, the general must prevail over the restricted unless the nature of the subject-matter of the context clearly indicates that the limited sense was intended. 1 Storey, Constitution, Sec. 451; 1 Cooley, Constitutional Limitations (8th ed.) 130, 171; Commonwealth v. Nickerson (1920), 236 Mass. 281, 128 N. E. 273, 10 A.L.R. 1568; Busser v. Snyder (1925), 282 Pa. St. 440, 128 Atl. 80, 37 A.L.R. 1515; People, ex rel. v. Emmerson (1922), 302 Ill. 300, 134 N. E. 707, 21 A.L.R. 636. External aids and arbitrary rules applied to instruments of this popular character are of uncertain value and should be made use of with hesitation and circumspection. 1 Cooley, Constitutional Limitations (8th ed.) 171."

In Greencastle Township v. Black (1854), 5 Ind. 566, 570, the court said:

"Thus it was urged in argument, and so held by the judges, that the discretion of Courts is more restricted in applying the rules of construction to a plan of government contained in a written constitution, than in the construction of statutes. And the reason is conclusive. Statutes are often hastily and unskilfully drawn, and thus need construction to make them sensible. But constitutions import the utmost discrimination in the use of language. 'They are the permanent will of the people, intended for the guidance of posterity.' ** *"
If, as the above cases indicate, Section 18 is clear and unambiguous, we are not authorized to limit its meaning by construction and the power granted is coextensive with the general and unlimited terms employed and would include the power to fill a vacancy in the office of Lieutenant Governor.

Lest it be argued that Article 5 of Section 10 conflicts with Section 18 of the same article, brief reference must be made to the former section, which reads as follows:

“In case of the removal of the Governor from office or of his death, resignation, or inability to discharge the duties of the office, the same shall devolve on the Lieutenant Governor; and the General Assembly shall, by law, provide for the case of removal from office, death, resignation, or inability, both of the Governor and Lieutenant Governor, declaring what officer shall then act as Governor; and such officer shall act accordingly, until the disability be removed or a Governor be elected.”

This article provides only for the contingencies where there is a dual vacancy in both the office of Governor and Lieutenant Governor.

1886 Ind. O. A. G. 222;
State, ex rel. v. Olcott (1920), 94 Ore. 633, 187 Pac. 286, 288-289.

It must be noted that the only instance where Section 18 of Article 5 could not operate if it stood alone would be where the appointive power was itself vacant by reason of the death or incapacity of both the Governor and the Lieutenant Governor. Section 10 was necessary to encompass that possibility. If Section 10 be given an interpretation broader than is justified by the common and ordinary meaning of the language employed, it would create a conflict within the Constitution and not resolve one. That section refers to the devolution of the office of Governor and not that of Lieutenant Governor.

I have examined the debates of the constitutional convention and find no clear indication of the intent of the framers except as expressed in the language of the Constitution. Moreover, in view of the unanimity of the authorities upon the subject, as the Ohio court indicated it is not for this
office to assume the duties of a constitutional convention, I am of the opinion that it is the power and duty of the Governor to fill by appointment the vacancy now existing in the office of Lieutenant Governor.

I am further of the opinion that an appointee to such office assumes all powers and duties imposed thereon by the constitution and statutes.

II

However, since you have specifically mentioned Chapter 183 of the Acts of 1941, and until an appointment is made there will be a vacancy in the office of Lieutenant Governor, it is necessary to discuss that act. It reads as follows:

"AN ACT providing for the substitution of the auditor of state for the lieutenant governor as a member of boards or commissions of which the lieutenant governor is a member in event of vacancies in the office of lieutenant governor; and declaring an emergency.

"VACANCY IN OFFICE OF LIEUTENANT GOVERNOR—AUDITOR OF STATE SUBSTITUTE.

"Section 1. Be it enacted by the General Assembly of the State of Indiana, That in event there is at any time a vacancy in the office of lieutenant governor, the auditor of state is for the period, or periods of such vacancy hereby substituted for the lieutenant governor as a member of any board or commission of which the lieutenant governor is a member. In all such cases the auditor of state shall perform the duties of a member of any such board or commission until a lieutenant governor is elected and qualified.

"* * *"

In connection with a consideration of that statute the following constitutional provisions should be considered.

Section 1 of Article 3:

"The powers of the Government are divided into three separate departments; the Legislative, the Executive including the Administrative, and the Judicial;
and no person, charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided.”

Section 1 of Article 4:

“The Legislative authority of the State shall be vested in the General Assembly, which shall consist of a Senate and a House of Representatives. The style of every law shall be: ‘Be it enacted by the General Assembly of the State of Indiana’; and no law shall be enacted, except by bill.”

Section 1 of Article 5:

“The executive power of the State shall be vested in a Governor. He shall hold his office during four years, and shall not be eligible more than four years, in any period of eight years.”

Section 18 of Article 5:

“When, during a recess of the General Assembly, a vacancy shall happen in any office, the appointment to which is vested in the General Assembly; or when at any time, a vacancy shall have occurred in any other State office, or in the office of Judge of any court; the Governor shall fill such vacancy, by appointment, which shall expire, when a successor shall have been elected and qualified.”

With respect to the first three constitutional provisions hereinabove set forth, I would refer you to the case of Tucker v. State (1941), 218 Ind. 614, and to Official Opinion No. 5 of 1945, addressed to the Governor concerning his appointments on certain boards therein specified.

During the same session of the General Assembly which enacted Chapter 183, the four statutes (Chapters 13, 108, 109 and 182) involved in the litigation in Tucker v. State were also enacted. An extended discussion of Tucker v. State would at this time be merely repetitious. It is enough for our purposes here to say that case established that inherently, under
the division of powers as established by the Indiana Constitution of 1851, the executive was vested with sole authority to appoint administrative officers in the executive branch of the government: that except as to those officers in the executive department, which had been appointed by the legislature prior to the adoption of the 1851 Constitution, the legislature had no authority to make appointments in the executive branch and therefore, could not delegate the appointing power to administrative officers other than the Governor.

At page 652, the court said:

"* * * But the Constitution has vested in the Governor not certain specific powers, executive or otherwise, which carry with them incidentally or secondarily the executive power to appoint to office, but he had been vested with the general executive power of the state which carries with it the general power to appoint to office, not as an incident to some other power, but as a principal power in itself. Logically, then, the appointive power vested in the Legislature, aside from those particular clearly executive powers which vest in it by certain exception, is limited to the incidental power of appointing those who assist in carrying out the legislative functions. And the appointive power of the courts is limited to those instances which are incidental to the judicial functions; and the appointive powers of administrative and ministerial officers in any department must be limited to that which is incidental to their principal administrative or ministerial functions. * * *"

At page 673, the court said:

"* * * The creation of the offices is a legislative function. The appointment of officers is an executive function. * * *"

In the 1945 Opinions at page 35, the Attorney General said:

"* * * As to the offices created since the adoption of said Constitution, the appointive power is in the Governor except officers of those institutions which are identical in kind with those in existence prior to
the adoption of the Constitution of 1851 and whose officers were appointed by the Legislature prior thereto.”

The same rule is applicable to appointments to fill vacancies in appointive offices.


Chapter 183 is an exercise by the legislature of the executive appointing power and is, therefore, unconstitutional insofar as it attempts to exercise that power in the executive branch of the government, except as to any officers who were appointed by the legislature prior to the adoption of the 1851 Constitution.

Furthermore, the purpose of Section 1 of Article 3 of the Constitution is to prevent exactly the type of legislation exhibited by Chapter 183. Chapter 183, insofar as limited above, is an exercise by officials of one department of the functions of another.

See: State ex rel. v. Noble (1889), 118 Ind. 350.

The General Assembly was created by the same power which created the office of Governor and the General Assembly can no more by statute usurp an executive function than can the Governor by decree create a law.

I am, therefore, of the opinion that insofar as the legislature by Chapter 183 attempted to exercise functions of the executive department, it is a violation of the Constitution.

But, finally, and conclusively it seems to me specific constitutional provision is made for filling vacancies in State offices. That provision is Section 18 of Article 5, supra. It provides that where a vacancy shall happen in a State office which historically has been filled by the General Assembly prior to 1851, the vacancy shall be filled by the Governor if it occurs during a recess of the General Assembly “or, when at any time, a vacancy shall have occurred in any other State office, * * * the Governor shall fill such vacancy, * * *.” (Our emphasis.)

Thus, the Governor’s executive constitutional authority to fill vacancies is even broader than his inherent authority to make appointments and when the vacancy shall occur in the recess of the General Assembly, as in this case, and a State
officer is involved, by constitutional provision, the Governor is the only one authorized to fill such vacancy. The language of Section 18 is clear. In my opinion it forbids an attempt by the legislature to fill a vacancy of any State office which occurs during a recess of the General Assembly and in any office of the executive department at any time.

For these reasons, I am of the opinion that Chapter 183 is unconstitutional. In doing so, I express no opinion as to the validity of any act by which the Lieutenant Governor is appointed as a member of any board.

III

An incidental question which arises concerns the period during which the Governor's appointee to the office of Lieutenant Governor shall serve. It will be noted that Section 18 of Article 5 of the Indiana Constitution recites that the appointment "**shall expire, when a successor shall have been elected and qualified." The specific question is as to whether an election is to be held for the office of Lieutenant Governor in the coming election for a term from election day until the inauguration of the Governor and Lieutenant Governor in January for the full term.

In the only preceding instance of a vacancy in the office of Lieutenant Governor, since the adoption of the 1851 Constitution, the resignation occurred during the first two years of the full term and the Attorney General gave his opinion that a Lieutenant Governor should be elected in the off year election to serve the balance of the term of his predecessor in office.

O.A.G. 1886, p. 222.

The litigation which ensued established only that the General Assembly had exclusive authority to determine the qualifications and validity of the election of the candidate for Lieutenant Governor who received the largest number of votes in such off year election.

Robertson v. State (1886), 109 Ind. 79.

The House of Representatives decided that question in favor of the successful candidate in the off year election. The Senate, on the contrary, refused to admit the validity of the
election and so far as I have been able to determine this deadlock was never resolved. Since the General Assembly, being the authority having the sole power to decide, was not able to arrive at a decision, the question is an open one in this State so far as direct authority is concerned.

As to other constitutional officers, it is established that in the event of a vacancy the Governor's appointment extends only until the next general election and the qualification of the successful candidate thereafter and that such successful candidate does not merely fill the vacancy but holds office for the entire constitutional term.

State, ex rel. v. Schortemeier (1925), 197 Ind. 507, 510.

However, that case indicates that a different result would be reached in the case of the Governor or Lieutenant Governor. It is said there:

"There is no provision of the Constitution of Indiana which assumes to require that judges of the circuit court shall be elected in any particular year, or that their terms of office shall begin or end at any specified time, which is in contrast with the provision that, 'The official term of the governor and lieutenant-governor shall commence on the second Monday of January in the year one thousand eight hundred and fifty-three; and on the same day every four years thereafter.' Art. 5, Sec. 9, Constitution, Sec. 142 Burns' 1926. * * *

The constitutional provisions to which the court refers are contained in Article 5 and are as follows:

"Sec. 2. There shall be a Lieutenant Governor, who shall hold his office during four years.

"Sec. 3. The Governor and Lieutenant Governor shall be elected at the times and places of choosing members of the General Assembly.

"Sec. 4. In voting for Governor and Lieutenant Governor, the electors shall designate, for whom they vote as Governor, and for whom as Lieutenant Governor. The returns of every election for Governor
and Lieutenant Governor shall be sealed up and transmitted to the seat of government, directed to the Speaker of the House of Representatives, who shall open and publish them in the presence of both Houses of the General Assembly.

"Sec. 6. Contested elections for Governor or Lieutenant Governor, shall be determined by the General Assembly in such manner as may be prescribed by law.

"Sec. 9. The official term of the Governor and Lieutenant Governor shall commence on the second Monday of January in the year one thousand eight hundred and fifty-three; and on the same day every fourth year thereafter."

Referring first to Sections 4 and 6, supra, it will be noted that a Lieutenant Governor cannot be declared elected until the returns of the elections have been opened and published in the presence of both Houses of the General Assembly and that the General Assembly is the judge of such election. The first regular session of the General Assembly following the election convenes on the Thursday next after the first Monday of January following the election (Art. IV, Sec. 9, Ind. Constitution) and the term of the elected Lieutenant Governor for the full term commences on the following Monday (Art. V, Sec. 9, supra). In the absence of a special session called by the Governor, a Lieutenant Governor elected to fill the vacancy could serve then only for the three days from Thursday until Monday in the event the vacancy occurred during the second two years of the term of office of the retiring Lieutenant Governor. It can hardly be thought that the term of a Lieutenant Governor elected to fill a vacancy should be subject to the discretion of the Governor in calling a special session of the General Assembly nor can it be considered that it was intended to elect a person to act as Lieutenant Governor for a term of three days.

It will be noted that Article 18 does not in terms require an election of a successor at any particular time but leaves the time of election to other provisions of the Constitution concerning the officers involved. As to the Governor and Lieutenant Governor, the framers of the Constitution have very carefully provided that they shall be elected only in
presidential years and proceeds to specifically fix the time when they shall take office.

In Official Opinion No. 16, dated February 28, 1948, it was held that where the General Assembly fixed the term of office of a county treasurer, having constitutional authority to do so, the person elected in the November election did not take office until the day fixed by the legislature for the commencement of the term, even though the office was filled at the time of the election by one appointed to fill the vacancy.

In Official Opinion No. 17 of the same date where a mayor was holding over "until his successor shall have been elected and qualified," it was held that there was no authority to elect a mayor at a general election and that a successor could only be elected at a city election, that being the election proper to elect such officers.

Reference may well be made to cases from other states upon this subject. In People, ex rel. Lynch v. Budd (1896), 114 Cal. 168, 45 Pac. 1060; 34 L.R.A. 46, the Constitution provided that an appointment to fill a vacancy "*** shall expire at the end of the next legislature or at the next election by the people." The court held that this phrase meant the next election provided for the filling of that particular office and since the Lieutenant Governor could not be regularly elected in an off year election, the appointee held until the end of his predecessor's term. A like result was reached in State, ex rel. v. Nash (1902), 66 Ohio State 616, 64 N. E. 558 and in State, ex rel. v. Olcott (1920), 94 Oregon 633, 187 Pac. 286, 289. A contrary result was reached, however, in State, ex rel. v. Day (1871), 14 Fla. 9.

In the present instance, the Constitution has specifically stated the beginning of the time when the term shall begin and the length of the term. There is no constitutional authority for the election of a Lieutenant Governor for any other or different term or for the holding of an election at any time other than is necessary to fill such office for such term.

For the reasons stated and having in mind the weight of authority upon the question, as above set forth, I do not believe that an election may be had in the coming election for the office of Lieutenant Governor to fill the vacancy in that office.
CONCLUSION

It is, therefore, my opinion that:

1. It is your duty, as Governor, under Section 18 of Article 5 of the Constitution to appoint a Lieutenant Governor to fill the vacancy in that office caused by the resignation of the incumbent.

2. That Chapter 183 of the Acts of 1941 is unconstitutional and that the Auditor of State has no power or authority to perform any of the duties of the Lieutenant Governor or to succeed him as a member of any board or commission.

3. That the person appointed by you will hold office until the election and qualification of a Lieutenant Governor for the four-year term beginning on the second Monday of January of 1949.

OFFICIAL OPINION NO. 31

April 5, 1948.

Mr. LeRoy E. Yoder, Chairman,
Public Service Commission,
401 State House,
Indianapolis, Indiana.

Dear Sir:

Receipt is acknowledged of your letter of March 12, 1948 in which you request an opinion as to the jurisdiction of the Public Service Commission over municipal water utilities in the State of Indiana and especially pertaining to the water company in Michigan City, Indiana. Receipt is likewise acknowledged of the enclosed letter from the legal representative of the Department of Water Works of the city of Michigan City, Indiana.

The writer of the enclosed letter states the Department of Water Works of Michigan City, Indiana is constituted and operating under and by virtue of Chapter 235 of the Acts of 1933, being Sections 48-5301 to 48-5327 of Burns. He states that this chapter is an amendment to Chapter 18 of the Acts of 1931 and that it was under the 1931 Act that Michigan City first established its water department; also that the 1933