Mr. Edwin Steers, Sr.,  
State Election Board,  
Indianapolis 4, Indiana.

Dear Sir:

We acknowledge receipt of your recent letter in which you request my official opinion on the following question stated in your letter:

"Will you please give us an official opinion on the situation presented in the letter of Mr. Earl M. Baxter as to whether or not a person who was elected Justice of the Peace in 1946 can be a candidate and serve in the legislature during the period for which he was elected even though he resigns, and whether or not the Secretary of State has the right to refuse to accept a filing of a candidate for the legislature, assuming that the party is ineligible."

The letter of Mr. Baxter contains the following information: A certain candidate for the General Assembly was elected Justice of the Peace in 1946, he was commissioned and served for a time, then resigned. He filed his declaration for State Senator recently in the office of the Secretary of State. Prior to his filing such declaration, a legal voter of his district filed a protest with the Secretary of State's office against him filing as a candidate. The record of this man's disability is in the office of the Secretary of State and nowhere else.

Article 7, Section 16 of the Constitution of Indiana provides "No person elected to any judicial office, shall, during the term for which he shall have been elected, be eligible to any office of trust or profit, under the State, other than a judicial office."

In Smith v. Moore (1883), 90 Ind. 294, this section was construed to mean that a person elected to a judicial office is ineligible to any office other than judicial, the term of which begins before the expiration of the term of the judicial office.

A Justice of the Peace is a township office and the term of such office continues for a period of four years. (Article 7,
Section 14, Indiana Constitution; Acts 1945, Section 175, Article 18.)

Under the Constitution and statutes, it is well established that the office of the Justice of the Peace is a judicial office.

Vogel v. State, ex rel. Land, Prosecuting Atty. (1886), 107 Ind. 374.

In Waldo v. Wallace (1859), 12 Ind. 569, the facts were that Wallace was elected mayor in 1857 for a term of two years and thereafter qualified and acted in such capacity. Within the two-year period for which he was elected mayor he resigned, became a candidate for sheriff, and at the election received the highest number of votes. Upon these facts the court held that the mayor of Indianapolis was a judicial office under the State and that Wallace was ineligible to the office of sheriff during the term for which he was elected mayor by reason of Article 7, Section 16 of the Indiana Constitution. There is no question but that the office of State Senator is an office of trust and profit under the State and is not a judicial office.

The term of office of State Senator to be elected at the general election to be held on Nov. 2, 1948, will begin on Nov. 3, 1948 (Art. 4, Sec. 3, Indiana Constitution). According to the above referred to letter, the person in question was elected to the office of Justice of the Peace in 1946, was commissioned and served for a time in such office. The term of such office began on January 1st, 1947, and will continue for a period of four years thereafter. The said term will therefore expire December 31st, 1950. (Art. 7, Sec. 14, Indiana Constitution; Acts 1945, Sec. 175, Art. 18, p. 795.) Under Sec. 16, Article 7 of our Constitution and the cases above cited, he would be ineligible to any office other than judicial, the term of which begins before the expiration of the term of his office as Justice of the Peace, even though he resigned from such office in the meantime.

The term of office of State Senator to be elected in 1948 will begin before the expiration of his term of office as Justice of the Peace. In my opinion he is, therefore, ineligible to the office of State Senator.

As to the second part of your question concerning whether or not the Secretary of State has the right to refuse to accept
a filing of a candidate for the legislature, assuming that the party is ineligible, I call your attention to Sec. 10, Art. 4, of the Indiana Constitution which provides that each House of the General Assembly shall "judge the elections, qualifications and returns of its own members."

In Lucas v. McAfee, et al. (1940), 217 Ind. 534, this section of the Constitution received careful consideration. The facts in the case were that Lucas received the next highest number of votes for State Senator from Lake County in the primary election of 1940. Lake County comprised a senatorial district and was entitled to elect two State Senators. Lucas was declared to be one of the nominees. His nomination was contested by one McAfee, who received the third highest number of votes in the primary election for said office, on the grounds that Lucas was ineligible to said office by reason of having been previously convicted of a crime against the laws of the United States where the sentence imposed therefor exceeded six months. (Sec. 49-303 Burns' 1933 provides that it shall be deemed an indispensable qualification for persons to hold any office within the State of Indiana that such person shall never have been convicted of crime against the laws of the United States where the sentence imposed therefor exceeds six months.) The facts as to the conviction of crime were admitted by Lucas, but he contended among other things that the trial court had no jurisdiction to pass upon his qualifications as a candidate for nomination for State Senator.

The court held that the right of legislative bodies to judge the elections, qualifications and returns of their own members is a high prerogative of ancient origin. That such authority was essential to the enactment of legislation without interruption and confusion and to maintain a proper balance of authority where the functions of government are divided between coordinate branches. It further held that under said section of our Constitution, courts have no jurisdiction to determine the qualifications of members of the General Assembly and the fact that the controversy arose out of a primary election contest is immaterial so far as the substantial issue is concerned. The answer would necessarily be the same however the controversy arose, that the court's jurisdiction could not be invoked to determine the qualifications of a person seeking a seat in the State Senate.
On petition for rehearing the appellee contended that the conclusion of the court might permit a ten-year-old boy, or a nonresident of the district to become the nominee of a party for a seat in the General Assembly. The court answered by saying that the question as to who is to determine the matter of age and period of residence is answered by Sec. 10, Art. 4 of the Indiana Constitution wherein it is provided that "Each House, when assembled shall * * * judge the elections, qualifications and returns of its own members * * *".

We can say, I think, that in view of Sec. 16, Art. 7 of our Constitution and the meaning ascribed to the language of said section by our Supreme Court, the person in question, under the facts as stated in your letter, clearly would be ineligible to take and hold the office of State Senator should he be nominated and elected. But we find that under Sec. 10, Art. 4 of the Indiana Constitution this fact cannot be determined by our courts, that the jurisdiction of a court cannot be invoked to determine the qualifications of a person seeking a seat in the State Senate; and that the jurisdiction to determine the qualifications of its own members rests exclusively in the Senate when assembled. When the Constitution speaks of qualifications as applied to membership in the General Assembly it must be construed to mean that constitutional as well as legislative provisions affecting qualifications were contemplated. (Lucas v. McAfee, supra). If our courts have no jurisdiction to determine the qualifications of one seeking a seat in the General Assembly, certainly the Secretary of State would have no such authority.

It is, therefore, my opinion that the Secretary of State has no right to refuse to accept a filing of a candidate for the legislature even though facts within the knowledge of the Secretary of State indicate that such person is and will be ineligible to serve as a member of the General Assembly under our Constitution.