OFFICIAL OPINION NO. 63

October 19, 1948.

Mr. Edwin Steers,
State Election Board
108 East Washington Building,
Indianapolis 4, Indiana.

Dr. Mr. Steers:

I have your letter of October 12, 1948, which is as follows:

"A judge of a Circuit Court died on the 11th day of October, 1948. He had been elected in the election held in 1946 and his term would not expire until 1953. Consequently, there was no candidate for this office on the ballot for the coming general election, and there was no vacancy in the office until his death.

"Under this state of facts, can candidates for this office be placed on the ballot to be voted for at the coming general election to be held November 2, 1948?

"We would like to have an official opinion on this matter."

Section 18 of Article 5 of the Indiana Constitution provides 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."

Section 9 of Article 7 of the Indiana Constitution provides as follows:

"The State shall, from time to time, be divided into judicial Circuits; and a Judge for each Circuit shall be elected by the voters thereof. He shall reside within the Circuit, and shall hold his office for the term of six years, if he so long behave well."
In the case of State, ex rel., v. Schortemeier, Secy. (1925), 197 Ind. 507, at pages 511 and 512, it is said:

"Also that the provision that the Governor shall fill a vacancy in the office of judge of any court by appointment, 'which shall expire when a successor shall have been elected and qualified,' is found in the same section and as a part of the same sentence which provides that '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 * * * the Governor shall fill such vacancy by appointment, which shall expire when a successor shall have been elected and qualified.' Obviously, since the Governor may only appoint to an office filled by the general assembly if the vacancy occurs when the general assembly is in recess and therefore cannot act, the provision that such an appointment will expire when a successor shall have been elected and qualified means that the appointee only holds until the general assembly shall meet and act to fill the vacancy. And joining the provision for appointment of a judge with that for appointment to a vacancy occurring in an office to which the general assembly is given authority to appoint, which expressly limits the power of the Governor in the latter case to making an appointment if the vacancy shall happen during a recess of the general assembly, indicates a purpose of the framers of the Constitution that the appointment shall be only until such time as the office can be filled in the regular way; in the one instance by choice of the general assembly, and in the other by election by the people. The provision that certain state and county officers shall continue in office two years indicates a purpose of the framers of the Constitution that a general election should be held at least every two years, and the legislature has enacted statutes which so provide. And in the absence of any provision creating a term of fixed and definite limit otherwise than by fixing the period of six years during which the judge, when elected, 'shall continue in office if he so long behave well,' we conclude that an appointment
by the Governor to fill a vacancy will expire 'when a successor shall have been elected' at the next general election provided for by law, and shall have qualified.'

(Our emphasis.)

Section 4-3220 of Burns' 1946 Replacement is as follows:

"The term of office of every person hereafter elected judge of the Appellate Court of Indiana, or of any circuit, superior, probate, criminal, or juvenile court of Indiana, shall begin on the first day of January next succeeding his election. The term of office of all persons who have been elected or appointed to any such judgeship shall expire on December thirty-first next succeeding the election of their respective successors."

This section relates to the beginning of the term of office of a judge, but does not attempt to fix the time of the election of a successor to a judge who had died during his six year term. Under the last sentence of the above quotation from the Schortemeier case the vacancy is to be filled by appointment by the Governor, which appointment will expire "'when a successor shall have been elected' at the next general election provided for by law, and shall have qualified."

The question then is when is "the next general election provided for by law?" Section 29-4801 of Burns' 1947 Supplement provides as follows:

"A general election shall be held on the first Tuesday after the first Monday in November in even-numbered years, at which election, all existing vacancies in office, and all offices the terms of which shall have expired or which will expire before the next general election thereafter, shall be filled, unless otherwise provided by law."

This section must be construed with the other sections of the election laws providing when and how a candidate is selected for an office and his name placed on the ballot.

Section 29-3805 of Burns' 1947 Supplement provides in part as follows:

"Certificates and petitions of nomination filed with the governor of the state shall not be filed later than
September 1st before the date fixed by law for the election of the persons in nomination. Certificates and petitions of nomination herein directed to be filed with the clerk of any county shall not be filed later than September 1st before the election: * * *.”

Under Section 29-3617 of Burns' 1947 Supplement the local election boards tabulate the vote for the candidates at the primary election. The clerk of the circuit court sends to the Secretary of State a complete list of all candidates nominated at such primary. Section 29-3618 of Burns' 1947 Supplement provides that such nominees shall be placed on the ballot.

Under Sections 29-4802 and 29-3608 of Burns' 1947 Supplement the clerk of the circuit court is required to publish notice of election showing what offices are to be filled, etc., which notice is to be published once each week for two consecutive weeks prior to the election.

Section 29-3809 of Burns' 1947 Supplement provides as follows:

“If any candidate whose nomination has been certified according to law shall wish to resign from such ticket, he shall file his resignation in writing with the officer with whom such certificate of nomination was filed not later than September 1st immediately preceding a general election: Provided, That should any vacancy on the ticket occur by reason of the death of any candidate whose name has been legally certified, such vacancy shall be filled at any time prior to any general, city or special election as provided for in this act.” (Our emphasis.)

Under the above sections of the statutes all the steps for placing names of candidates on ballots are required to be taken by September 1st before the election and no resignations are permitted after this date. This is apparently for the purpose of definitely determining the content of the ballots by that date so that they may be printed, absent voters' ballots sent out, and the mechanical steps and machinery necessary to conduct the election be had by the date of the general election. The only provisions made for filling a vacancy after
that time, as illustrated by the last section quoted, are limited to a situation where a vacancy on the ticket occurs by reason of the death of any candidate whose name has been legally certified.

See also: Section 29-3801, 29-3810 and 29-5002, all in Burns’ 1947 Supplement.

Section 29-5002 of Burns’ 1947 Supplement is as follows:

“In case of the death, removal or resignation of any candidate after the printing of such ballots and before such election, it shall be lawful for the chairman of the state, district or county political organization of which such candidate was a member to make a nomination to fill such vacancy, after having obtained the written consent of the person so nominated and having filed the same with the proper officials with whom nominations are filed, and to provide the election board of each precinct and the county election board of each county in which such candidate is to be voted for with a number of pasters containing only the name of such candidate at least equal to the number of ballots provided each precinct for voting in the precinct and to the county election board pasters at least equal to the number of ballots provided for absentee voting, but no pasters shall be given to or received by any one except such election boards and such chairman, and it shall be the duty of the precinct election clerks to put one of such pasters, in a careful and proper manner and in the proper place, on each ticket to be voted in the precinct before they shall sign their initials thereon, and it shall be the duty of the clerk of the circuit court to put one of such pasters, in the same manner and place on each ticket to be voted by an absent voter before he signs his signature thereon.”

The above section providing for pasters applies only where there was the name of a candidate on a ballot as printed and that candidate dies, is removed, or legally resigns. It does not apply to a situation where a vacancy in an office
occurs after September 1st and where there are no candidates for that office on the ballot as printed.

In the case of Beal v. Ray et al. (1861), 17 Ind. 554, the office of Judge of the Circuit Court became vacant on September 28, 1861; the Governor filled the vacancy by appointment of Ray. Votes were cast at the general election for the respective parties to the action at the general election held October 8, 1861. Beal received more votes than Ray, but Ray, who was also the incumbent by appointment, brought the action contending the election was void.

There was a statute then in existence relative to the time of holding general elections similar to Section 2-4801, above quoted, fixing the date as the first Tuesday in October. Another section provided that the sheriff should post the election notices (now the clerk publishes them). The court said at page 557:

"The first section authorized, generally, vacancies to be filled; but the second, and a later section, required that before 'such elections,' as authorized in first section, shall take place, the clerk should certify, etc., twenty days, and the sheriff should notify fifteen days, etc. Now, this section is just as obligatory, just as much law, as the first section; and so limits the first as to preclude elections under it to fill vacancies where the vacancies do not occur long enough before the day of election to enable the steps required by the statute to be taken. This must have been the intention of the Legislature, and is the legal interpretation and construction, the meaning, in short, of the law, as a whole. (Our emphasis.)

"Public policy may require that officers shall not have it in their power, by neglect of duty, to defeat elections.

"We do not therefore intimate that where the vacancy had occurred such length of time before the election, the failure of the officers to certify and notify would vitiate an election held. Such then, as above interpreted, we deem to be the statute itself on this subject. And that this construction is in accordance with public policy, and the rights and interests of the people, there can be no doubt."
"It secures to them time to examine the qualifications of volunteer candidates, to bring out others of their own volition, if desirable, and to ascertain precisely what the voters have to do, and to secure some concert of movement, some concentration of public opinion and action, so as to prevent a few persons near the public offices from imposing officers, for long periods, upon the people.

"This, in popular governments, is a matter of the utmost importance. See Biddle v. Willard, 10 Ind. 62; Carson v. McPhetridge, 15 id. 327."

In Lake County Election Board v. State ex rel. Eyears (1946), 224 Ind. 465, at page 468, the court said:

"The general election proper to elect an officer to fill a vacancy in the office of auditor of a county is the general election provided for by law—Section 29-701, Burns' 1933—and occurring next after such vacancy, if the vacancy occurred before the time required to give notice of such election. Beal v. Ray (1861), 17 Ind. 554; Beal v. Morton (1862), 18 Ind. 346. * * *

In the present situation the vacancy occurred October 11th, almost six weeks after the time for filing certificates and petitions for nomination. The ballots have been printed. Absent voters' ballots have been mailed, some have been voted. Notices of election have been or could have been published. There are no candidates on the ballot for that office. It is not a situation where there were the names of candidates legally filed by September 1 and a vacancy by one of such candidates where a paster can be used.

Based upon the foregoing statutes and decisions, it is my opinion that the election laws do not make provision for filling a vacancy in an office which occurs as late as October 11th before the general election on November 2nd; that the vacancy did not occur "long enough before the day of election to enable the steps required by the statute to be taken."