STATE BOARD OF ELECTION COMMISSIONERS: Two Lucrative Offices—Whether the acceptance of a second lucrative office operates to vacate a previously held lucrative office; whether a Reserve Officer in the United States Army, having been called into active service and receiving compensation for such service, operates to vacate the previously held office of Judge of the Circuit Court.

Elections—Methods of filling vacancies in the Office of Judge of the Circuit Court.

March 26, 1942.

Honorable Henry F. Schricker,
Honorable Edwin H. Smith,
Honorable Fred C. Gause,
Members of the Indiana State Board
of Election Commissioners,
Indianapolis, Indiana.

Gentlemen:

I have before me your request for an official opinion on two subjects. First, you state that a person was elected Judge of a Circuit Court at the general election in 1940 for a six-year term, beginning January 1, 1941. At the time of his election he held a commission from the President of the United States as an officer in the Officers’ Reserve Corps of the United States Army. In the year 1941 and during the time he was serving as judge, he was called to active duty as such officer during the national emergency declared by Congress. He drew no pay as a reserve officer while not on active duty, but upon being called into active service of the United States Army, he received the same pay as other officers of like rank in the armed forces of the Federal Government. Upon this set of facts, you ask the following questions:

“(a) Does the fact that he was called to active duty and received regular pay from the government while on active duty result in the vacation of his office as judge, by virtue of Article 2, Section 9 of the Indiana Constitution?

“(b) Is there a vacancy in such office of judge that should be filled at the general election in 1942?”
Article 2, Section 9 of the Constitution of Indiana reads as follows:

"No person holding a lucrative office or appointment under the United States or under this State shall be eligible to a seat in the General Assembly; nor shall any person hold more than one lucrative office at the same time, except as in this Constitution expressly permitted: Provided, that offices in the militia to which there is attached no annual salary, and the office of Deputy Postmaster, where the compensation does not exceed ninety dollars per annum, shall not be deemed lucrative: And provided, also, that counties containing less than one thousand polls may confer the office of Clerk, Recorder, and Auditor, or any two of said offices, upon the same person."

The pertinent part of this constitutional provision, insofar as it applies to the question propounded, is as follows:

"Nor shall any person hold more than one lucrative office at the same time, except as in this Constitution expressly permitted."

Without reviewing the other provisions of the Constitution, it may be said that the questions involved here do not fall within any of the exceptions provided in the Constitution. I think, also, it may be stated that the fact that the judge referred to held a commission in the Reserve Corps of the United States Army at the time he was elected and assumed the office of judge, has no particular bearing upon the questions involved because the position of a reserve officer in the United States Army, at that time, carried with it no compensation and, therefore, was not a lucrative office within the provisions of the Constitution. The problem then is what is the effect of the person being called into active service as an officer in the armed forces of the United States and receiving a salary for such services.

In the final analysis, the question, therefore, is whether or not the position of an officer in the armed forces of the United States, which carries with it compensation from the Federal Government, is a lucrative office within the meaning of this
constitutional provision. We are not without precedent in Indiana on this subject.

The case of Kerr v. Jones, 19 Ind. 351, involved the status of Benjamin Harrison, who was elected Reporter of the Supreme Court of Indiana in 1860 for a four-year term. On August 7, 1862, he was commissioned as Colonel of Volunteers in the Army of the United States and soon afterward departed with his command to enter upon active service with the Union Army, having in the meantime appointed a deputy to carry on his work in his absence. In October following, Kerr was elected by the voters of the State of Indiana as Reporter of the Supreme Court to fill the office assumed to have been vacated by Mr. Harrison when he became an active officer in the Army of the United States. Mr. Harrison's deputy refused to turn over the books and records to Mr. Kerr, so an action was brought in the Supreme Court of Indiana to require the Clerk to furnish and produce the records and opinions to Mr. Kerr as Reporter. In discussing the question, the Supreme Court of Indiana said:

"On general principles, the office of colonel of volunteers, as now existing, is lucrative, and so is that of Reporter of the Supreme Court. Mr. Harrison can not hold them both, therefore, unless the office of colonel of volunteers is an office in the militia, within the meaning of the constitution; and if he can not hold them both, his acceptance of the colonelcy, being the later office, vacated that of reporter.* * *"

The effect of this decision was to declare that Mr. Harrison had vacated the office by assuming active service as an officer in the United States Army and that Mr. Kerr had been properly elected to fill the vacancy created by Mr. Harrison's action.

The case of Mehringer et al. v. State ex rel. Clements, 20 Ind. 103, is to the same effect. In this case Mr. Mehringer was elected Auditor of Dubois County at the general election of 1860. In September, 1861, he accepted the office of Major in the volunteer service of the United States. Thereafter the Prosecuting Attorney of the circuit of which Dubois County was a part filed an information asking that the office be declared vacant. In deciding the question the Supreme Court of Indiana said:
"The case of Kerr v. Jones, 19 Ind. 351, settles the proposition that the acceptance by Mehringer of the office of Major vacated his former office of auditor."

A somewhat similar question was decided by the Supreme Court of Illinois in the case of Fekete v. City of St. Louis, 145 N. E. 692. Mr. Fekete was elected City Attorney of East St. Louis in April of 1917. July 23, 1917, he became a Captain in the Illinois National Guard. By proclamation of the President of the United States, made in July, 1917, all members of the National Guard, including their officers, were inducted into the armed forces of the United States Government "to serve for the period of the existing emergency unless sooner discharged." Mr. Fekete was discharged from the Army in August, 1919, after the expiration of his term as City Attorney, and brought an action for the balance of his salary for the two years amounting to $3,516.00, which the city refused to pay. The Illinois constitutional provision provided that:

"No person holding an office of honor or profit under the government of the United States shall hold any office of honor or profit under the authority of this state."

In deciding the question the Supreme Court of Illinois said:

"The question we have to determine is one of law, unaffected by sentiment. It seems not open to question that the office of captain in the United States Army is an office of honor or profit. If it is, plaintiff by his appointment to and acceptance of that office, was thereby rendered ineligible to hold the office of city attorney, an office of honor or profit under authority of this state. His acceptance of the former office was a constructive resignation or abandonment of the latter."

In deciding this case the Supreme Court of Illinois cited with approval the case of Kerr v. Jones, supra.

The case of Lowe v. State, decided by the Court of Criminal Appeals of Texas and reported in 201 S. W. 986, involved the status of a judge who became an officer in the United States Army. The Texas Constitution provided, in substance, that
“no person holding or exercising any office of profit or trust under the United States, shall be eligible to hold or exercise any office of profit or trust under this state.” In deciding the question the Court of Criminal Appeals of Texas said in part:

"* * * when an officer of the state accepts an office of profit in the military service of the United States his tenure as judge ceases by virtue of the constitutional provision * * *.""

There are many other decisions of similar effect but I believe the above quoted are sufficient to show the attitude not only of the Indiana Supreme Court but also of courts of last resort in other jurisdictions on this question. From the cases cited it seems quite clear that when the judge referred to in your letter became an officer on active duty in the United States Army and received the compensation attaching to such office, he thereby vacated the judgeship which he previously held.

Your first question, therefore, is answered in the affirmative.

In answer to the question as to whether or not a vacancy exists in such office that should be filled at the general election in 1942, I call your attention to the case of State ex rel. v. Schortemeier, 197 Ind. 507, in which it was held that where a vacancy exists in the office of judge of the circuit court, the Governor should appoint to fill such vacancy until a successor is elected at the next general election and qualifies. It seems to me that this case clearly answers your question and that the proper procedure in this case would be for the Governor to appoint to fill the vacancy until such time as the successor to the Governor’s appointee is elected at the general election to be held in November, 1942. The person elected at the general election in 1942 can qualify immediately after his election and assume the office.

The second problem contained in your letter is stated as follows:

“The same question arises in the case of a person who was elected a member of the Senate in the General Assembly for a four-year term in 1940, and he was at such time commissioned by the President as an officer
in the Officers’ Reserve Corps and was afterwards called to active duty as such officer and since that time receives the regular pay of an active officer.”

There can be no question but that the office of Senator in the General Assembly of the State of Indiana is a lucrative office under the provisions of Section 9 of Article 2 of the Indiana Constitution. Therefore, it seems clear that upon assuming active duty as a commissioned officer in the armed forces of the United States and receiving compensation therefore, the Senator vacated his office and the vacancy should be filled at the general election to be held in November, 1942.

I can find no case decided by the courts of Indiana involving the office of State Senator. However, a similar case, McMillan v. Sadler, decided by the Supreme Court of Nevada and reported in 58 Pac. 284, at 289, is a case in point. In this case a State Senator was elected in 1896 to the Nevada State Senate for a term of four years. In 1898 he was commissioned as a Major in the Paymaster’s Division of the Army of the United States. That same year a Mr. J. A. Conboie was nominated and elected to fill the vacancy thus created. The Supreme Court of Nevada, in deciding whether or not Mr. Conboie was duly elected to the office of State Senator, held that the former Senator, “by reason of the acceptance of said appointment, became incapable of legally holding the office of State Senator. That the acceptance of the federal office was a resignation of the state office and created a vacancy in the latter office.”

One of my predecessors has held by official opinion that a member of the House of Representatives of the General Assembly by accepting appointment to the State Board of Tax Commissioners, thereby vacated the office of State Representative. (Opinions of the Attorney General 1934, p. 334.)

In this connection I also call your attention to Paine on Elections, p. 139. In discussing the effect of a provision of the Constitution of the United States which reads as follows: “* * * no person holding any office under the United States shall be a member of either House during his continuance in office,” this text says:

“The acceptance, by a member of the House of Representatives, of the office of major of militia, in the District of Columbia, was unanimously held, by the
It is my opinion, therefore, that a vacancy exists in the office of State Senator in the case referred to in your letter and that this vacancy should be filled by election at the general election to be held in November, 1942.

INDIANA MILK CONTROL BOARD: Right of Milk Control Board to fix prices to producers on its own motion; whether the Section granting an appeal applies to cases where no complaint has been filed.

April 8, 1942.

Indiana Milk Control Board,
State House Annex,
Indianapolis, Indiana.

Gentlemen:

I have before me your letter requesting an official opinion with reference to the authority of the board to fix minimum prices to producers of fluid milk, outlining the procedure as respects the necessity of hearings and investigations, and as to whether such provisions violate either the Fourteenth