OFFICIAL OPINION NO. 19

July 31, 1970

Hon. Edgar D. Whitcomb
Governor of Indiana
Room 206 State House
Indianapolis, Indiana

Dear Governor Whitcomb:

You have asked my opinion regarding the application of the so-called voting rights act amendment of 1970, Public Law 91-285, passed by the Congress and signed by the President on June 22, 1970, with particular reference to the letter from Attorney General John N. Mitchell to you with a copy to me concerning its effect on the residence requirements and the age requirements for voters generally in the State of Indiana.

ANALYSIS

The major changes projected by the 1970 Act, to take effect January 1, 1971, would be to eliminate residence requirements as a condition for voting for President and Vice-President, and to prescribe federal rules regarding absentee registration and absentee voting in Presidential elections, and to lower to the age of 18 the minimum age for voting in all elections.

Intensive research indicates that this cannot be done simply by an Act of Congress under the Constitution of the United States and the Constitution of the State of Indiana. The men who wrote the Constitution set out in Article 1, Section 2(1) of the United States Constitution, a provision that the electors (the voters) in each State voting for candidates for the United States House of Representatives shall have the qualifications that are set by the States for the electors or the voters for the most numerous branch, that is the lower house of the state legislatures in their respective states. In the same fashion, the Seventeenth Amendment to the United States Constitution provides that the electors in each State who are voting for candidates for the United States Senate, directly, shall have the same qualifications that are

requisite for the electors or voters for the most numerous branch of the respective state legislatures.

The United States Constitution, therefore, expressly leaves to the States the right to determine the qualifications of the electors voting for candidates for Congress. This view is supported by the case of Breedlove v. Suttles (1937), 302 U. S. 277, wherein the United States Supreme Court specifically states at page 283:

> "Privilege of voting is not derived from the United States, but is conferred by the State and, save as restrained by the Fifteenth and Nineteenth Amendments and other provisions of the Federal Constitution, the State may condition suffrage as it deems appropriate."

Since the States have the right under the United States Constitution to determine the qualifications of electors for congressional candidates, the States have the right to set age and residence requirements so long as they are reasonable, and do not conflict with other United States Constitutional provisions. In the case of Riley v. Holmer (1930), 100 Fla. 938, 131 So. 330, the Florida Supreme Court held:

> "Article 19 of the Amendments to the federal Constitution in effect extends the right of suffrage to females without reference to age as to either, [male or female] that being a matter for the state to determine."

Article 2, Section 2 of the Indiana Constitution, as amended on September 13, 1921, provides as follows:

> "In all elections not otherwise provided for by this Constitution, every citizen of the United States, of the age of twenty-one years and upwards, who shall have resided in the State during the six months, and in the township sixty days, and in the ward or precinct thirty days immediately preceding such election, shall be entitled to vote in the township or precinct where he or she may reside."

The twenty-one year age requirement has been in conformity with the common law rule of majority in the Indiana Constitution.

With regard to the lowering to eighteen of the minimum age for voting in all elections, proponents of PL-91-285 may concede that the States have the right to establish qualifications for electors in all elections, but may contend that a twenty-one year age requirement is violative of other Federal Constitutional provisions. For example, in Section 301 of the captioned statute, the current Congress declares that the imposition and application of the requirement that a citizen be twenty-one years of age as a condition to voting in any primary or in any election—

> "1. Denies and abridges the inherent constitutional rights of citizens 18 years of age but not yet 21 years of age to vote, a particularly unfair treatment of such citizens in view of the national defense responsibilities imposed upon such citizens;
>
> "2. Has the effect of denying to citizens 18 years of age, but not yet 21 years of age, the due process and equal protection of the laws that are guaranteed under the Fourteenth Amendment of the Constitution;
>
> "3. Does not bear a reasonable relationship to any compelling state interest."

With regard to subsection one (above) the Supreme Court of the United States has labeled suffrage *not* an inherent Constitutional right, but a privilege conferred by the State which the State may condition as it deems appropriate, subject, of course, to Federal Constitutional requirements in point. Breedlove v. Suttles, *supra*. And, in extending it to eighteen year olds, what about the right to vote for seventeen year olds who volunteer to serve in the Navy?

No cases could be found relating to subsection two (above). If eighteen year olds are denied those privileges, what about sixteen year olds, fourteen year olds, *et al.*? Wherever one would like to draw the line, it can only be done by a Constitutional amendment.

In the past when the privilege of voting was extended to groups of citizens previously excluded by law, Constitutional Amendments were specifically ratified by three-fourths of the States as the only way of effecting this change in every instance.

Examples in our Constitutional history are as follows:

(1) Even though the Thirteenth Amendment freed the slaves, and the Fourteenth Amendment guaranteed their citizenship, it was necessary to ratify the Fifteenth Amendment to the Constitution of the United States on February 26, 1869, in order to guarantee the right to vote regardless of race, color or previous condition of servitude.

(2) In order to provide for the direct election of United States Senators, it was necessary to ratify the Seventeenth Amendment to the United States Constitution on April 8, 1913, which provided for direct election of the United States Senators by the voting citizens of the United States based on their qualifications set by the States.

(3) The third example in American Constitutional history is this: The States ratified the Nineteenth Amendment on August 20, 1920. This amendment grants women the right to vote.

(4) The fourth example is the Twenty-Third Amendment to the Constitution of the United States. This amendment was ratified on March 29, 1961, in order to give to the residents of the District of Columbia the right to vote for President and Vice-President. An Act of Congress was not enough—it took a Constitutional Amendment.

(5) The fifth example in Constitutional history of this requirement would be the Twenty-Fourth Amendment to the Constitution of the United States, which was ratified on January 23, 1964. This Amendment eliminated the payment of a poll tax as a prerequisite to voting in a federal election.

The twenty-one year age requirement in Indiana does indeed bear a reasonable relationship to compelling state interests in that countless legal duties and responsibilities delineated by the Constitution and laws of the State of Indiana in every area of life conform with the legal age of twenty-

one years as the line of demarcation between minority and majority estates.

Attorney General Mitchell asserts in his letter that as a result of Public Law 91-285 passed by the current Congress and the supremacy clause of the Sixth Amendment to the United States Constitution that any contradictory provision of State law or of a State Constitution is superceded. This argument omits the fact that the supremacy clause of the Sixth Amendment to the United States Constitution does not supercede other basic parts of the same United States Constitution.

Specifically, since Article 1, Section 2(1) and the Seventeenth Amendment to the United States Constitution expressly granted to the individual States the right to determine the qualifications of electors for Congressional candidates, the general terms of the supremacy clause have no application in this argument.

The men who wrote the Constitution of the United States clearly had this in mind. James Madison kept the records of the Constitutional Convention, and he wrote these pertinent comments in Federalist Paper No. 52, discussing the qualifications of electors:

> They are to be "the same with those of the electors of the more numerous branch of the State Legislature. The definition of the right of suffrage is very justly regarded as a fundamental article of republican government. It was incumbent on the convention, therefore, to define and establish this right in the Constitution. To have left it open for the occasional regulation of the Congress, would have been improper for the reason just mentioned. . . . To have reduced the different qualifications of the different States to one uniform rule would probably have been as dissatisfactory to some of the States as it would have been difficult to the convention. The provision made by the convention appears, therefore, to be the best that lay within their option. It must be satisfactory to every State, because it is conformable to the standard already established, or which may be established, by the State itself. It will be safe to the United States, because,

being fixed by the State Constitutions, it is not alterable by the State governments, and it cannot be feared that the people of the States will alter this part of their Constitutions in such a manner as to abridge the rights secured to them by the federal Constitution."

CONCLUSION

Thus, regardless of feelings in the matter pro and con, the Founding Fathers of the Constitution, the Constitution itself, Supreme Court decisions, and the history of the Constitution, all coincide in the view that the only legally effective way to change the age and residence and other basic requirements for voters within the States is by amending the individual State Constitutions, or by amending the Constitution of the United States.