

OPINION
45-292

March 10, 1945 (OPINION)

U.S. SENATOR

RE: Power of Governor to Appoint - Vacancies

You have requested an opinion as to your right as governor of the State of North Dakota to appoint a member of the North Dakota Legislative Assembly to succeed the Honorable John Moses, deceased, as United States senator.

Section 39 of the State Constitution reads as follows:

no member of the legislative assembly shall, during the term for which he was elected, be appointed or elected to any civil office in this state, which shall have been created, or the emoluments of which shall have been increased, during the term for which he was elected; nor shall any member receive any civil appointment from the governor, or governor and senate, during the term for which he shall have been elected."

The foregoing section was a part of the Constitution adopted by the constitutional convention in 1889.

In 1939 the Constitution was amended by the adoption of Article 51, which reads as follows:

The Governor or any officer of this State, or any manager or executive head, or other person employed either directly or indirectly in any department, bureau, commission, institution, or industry of this State, or any member of any State board shall not appoint a member of the Legislative Assembly to any civil office or employment of any nature whatsoever, during the term for which said member of the Legislative Assembly shall accept any such appointment to civil office or other employment during the term for which he was elected."

The qualifications of a person to hold the office of United States senator are prescribed by Section 3 of Article 1 of the United States Constitution, which reads as follows:

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen."

The qualifications of a member of Congress are prescribed by the Constitution of the United States. It is the supreme law of the land. No provision in a State Constitution and no act of a State Legislature can modify or amend the United States Constitution, and it is my opinion that the limitations imposed by Section 39 and Article 51 of the State Constitution upon the appointive power of the governor, and upon the right of a member of the Legislative Assembly to accept appointment by him, relate solely to appointment to a civil office within the jurisdiction of the State of North Dakota.

It may be contended that Section 39 of our State Constitution, and particularly Article 51 thereof, adopted as an amendment in 1939, do not limit the qualifications of a member of Congress; that those provisions of our State Constitution merely limit the appointive power of the governor and deny to member of the Legislative Assembly the right to accept appointment by him to any civil office. In other words, it may be contended that the appointment of a member of the Legislative Assembly is no appointment at all because the governor does not have the legal right to make it.

In my opinion such a construction of Section 39 and Article 51 of our State Constitution is fallacious because in effect it negatively, if not affirmatively, disqualifies a member of the Legislative Assembly from becoming a member of the United States Senate, and thereby limits the qualifications prescribed by Article 1 of the United States Constitution.

Historically, it is well known that Governor John Burke appointed W.E. Purcell, a member of the state Senate, to the United States Senate to fill a vacancy caused by the death of Senator Fountain L. Thompson, notwithstanding the provisions of Section 39 of our Constitution, and Mr. Purcell was seated when he presented himself to the Senate.

It will be noted that the provisions of Article 51 of our State Constitution, adopted in 1939, not only limit the appointive power of the governor but also the appointive power of "every officer of this state, manager or executive head, or other persons employed directly or indirectly in any department, bureau, commission, institution, or industry of this state, or any member of any state board, etc."

It is my opinion that Article 51 of the State Constitution was adopted solely for the purpose of preventing the employment of members of the Legislative Assembly during the terms for which they were elected by state officers, bureaus, and commissions and that no limitation upon the power of the governor to fill a vacancy which might arise in the United States Senate, or in any other federal office, was intended or contemplated.

There is submitted with this opinion a brief upon the law, which sets forth the pertinent legal questions involved of the rights of the governor to appoint a member of the Legislative Assembly of the State of North Dakota to the United States Senate, and of the right of such member to accept such appointment. That brief fully sustains the position of this office as indicated by this opinion.

If your position to appoint a member of the Legislative Assembly to fill the vacancy caused by the death of Honorable John Moses is challenged, ample authority is contained in the

brief submitted herewith to sustain your right to make such appointment, and it is my opinion that the restrictions embodied in Section 39 and Article 51 of the North Dakota Constitution do not apply to the appointment of a member of the Legislative Assembly to fill a vacancy in the United States Senate.

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Attorney General