Hon. Marlin K. McDaniel  
State Senator  
34 South Seventh Street  
Richmond, Indiana  

Dear Senator McDaniel:

This is in response to your request for my Official Opinion on the following questions:

1. Whether a State Senator, who, in his political party capacity as a County Chairman, attends a meeting of the County Election Board to discuss its reorganization, did thereby become a member of that Board, and thereby vacate his Senate seat.

2. What further specific guidelines are available to State Legislators and other governmental officials to help them avoid getting involved in possible conflicts of dual office-holding.

ANALYSIS

Your questions get to the heart of the rationale of our representative form of government, dating from the very beginning when James Madison, the father of the Constitution of the United States upon which is based the Constitution of the State of Indiana, discussed the matter of checks and balances between the various departments of government as a means of preserving our freedoms under this form of government.

Madison stated specifically that these checks and balances were designed in order to lay a due foundation for that separate and distinct exercise of the different powers of government which to a certain extent is admitted on all hands to be essential to the preservation of liberty. He pointed out in Federalist Paper No. 51 that ambition must be made to counteract ambition. He said it may be a reflection on human nature that such devices should be necessary to control the abuses of government. "But what is government itself but the greatest of all reflections on human nature. If men were angels, no government would be necessary. If angels were to
governmen, neither external nor internal controls on govern-
ment would be necessary. In framing a government which is
to be administered by men over men, the great difficulty lies
in this: You must first enable the government to control the
governed; and in the next place oblige it to control itself. A
dependence on the people is no doubt the primary control on
the government; but experience has taught mankind the ne-
cessity of auxiliary precautions."

Madison continues, "This policy of supplying by opposite
and rival interests the defect of better motives might be
traced through the whole system of human affairs, private as
well as public. We see it particularly displayed in all the
subordinate distributions of power where the constant aim
is to divide and arrange the several offices in such a manner
as that each may be a check on the other that the private
interest of every individual may be a sentinel over the public
rights. These inventions of prudence cannot be less requisite
in the distribution of the supreme powers of the State."

Madison then speaks on how in our republican form of
government legislative authority is usually divided between
two houses. Then he goes on, "In the compound republic of
America, the power surrendered by the people is first divided
between two distinct governments [Federal and States] and
then the portion allotted to each subdivided among distinct
and separate departments. Hence a double security arises to
the rights of the people. The different governments will con-
trol each other, at the same time that each will be controlled
by itself." He adds, "It is of great importance in a republic
not only to guard the society against oppression of its rulers,
but to guard one part of the society against the injustice of
the other part."

Madison continues: "By comprehending in the society so
many separate descriptions of citizens as will render an un-
just combination of a majority of the whole very improbable,
if not impracticable" this is accomplished. And he elaborates:
"The society itself will be broken into so many parts, inter-
est, and classes of citizens that the rights of individuals, or
of the minority, will be in little danger from interested com-
binations of the majority. In a free government, the security
for civil rights must be the same as that for religious rights.
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It consists in the one case in a multiplicity of interests, and in the other in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects."

Coming now to your questions with respect to the Constitution of Indiana, the problem of dual office-holding involves at least six major questions and three particular sections of the Indiana Constitution. This matter was discussed in part in the biennial report of the Indiana Legislative Council to the Indiana General Assembly, Volume II, in 1969. The six questions are as follows:

1. Is each position a lucrative office within the meaning of the Indiana Constitution (Article 2, Sec. 9)?

2. Is such office-holding in violation of the doctrine of the separation of powers? (Article 3, Sec. 1 of the Indiana Constitution)

3. Does such office-holding involve a judicial office, and another office of trust and profit under the State? (Article 7, Sec. 16 of the Constitution of Indiana)

4. Are such offices incompatible with each other?

5. Is there a conflict of interests?

6. Would such office-holding be against public policy?

These questions have been discussed in many opinions of the Attorneys General. Many of the questions concern whether a given position is a lucrative one. A position which involves exercise of the sovereign powers of the State is an office. An office to which compensation, whether salary or per diem, is attached is a lucrative office. Time and time again these questions come up. And, particularly with the noticeable expansion of government and restructuring of government at all levels, these questions continue to plague office-holders who are trying to do the right thing. These questions arise not only with respect to legislative officers, but with respect to officers in the judicial and executive departments. The Indiana Legislative Council and its sub-committees made
the statement that they believe that the principle embodied in the Constitutional provisions above-cited are valid, that is, that the diffusion of influence and power is desirable. This is basic to our form of government. That Indiana Legislative Council Committee went on to assert this: "The committee does not believe that a public official, whether state or local, should be allowed to combine in himself responsibility for several offices."

The report then listed some offices deemed to be public or lucrative offices, and therefore not compatible with holding a legislative office at the same time. The list which the Indiana Legislative Council gave to the General Assembly in 1969 is as follows:

City Attorney (1964 O. A. G. 14, p. 48)
City Judge (1960 O. A. G. 45, p. 255)
City School Board Member (1949 O. A. G. 79, p. 301)
Contractor with State Agency (1953 O. A. G. 53, p. 245)
Member of the County Alcoholic Beverage Board (1951 O. A. G. 78, p. 236)
County Auditor (1962 O. A. G. 15, p. 67)
Member of the County Board of Review (1935 O. A. G. p. 209)
County Commissioner (McCabe v. Board of Commissioners of Fountain County)
County Councilman (1951 O. A. G. 78, p. 236)
County Welfare Director (1936 O. A. G. p. 155)
Member of the County Election Board (1961 O. A. G. 30, p. 173)
County Hospital Trustee (1953 O. A. G. 34, p. 156)
Member of the County Planning Commission (1954 O. A. G. 70, p. 258)
County Sheriff (1962 O. A. G. 15, p. 67)
County Surveyor (1935 O. A. G. p. 103)
Member of the County Welfare Board (1958 O. A. G. 21, p. 92)
Deputy Prosecuting Attorney (1960 O. A. G. 9, p. 42)
Deputy Registration Officer (1962 O. A. G. 15, p. 67)
Deputy State Veterinarian (1933 O. A. G. p. 370)
Indiana Game Warden (1929-30 O. A. G. p. 745)
Deputy United States Game Warden (1929-30 O. A. G. p. 745)
Member of the General Assembly (1961 O. A. G. 18, p. 87)
County Hospital Trustee (1953 O. A. G. 34, p. 156)
Jury Commissioner (1953 O. A. G. 102, p. 475)
Justice of the Peace (1951 O. A. G. 26, p. 68)
License Bureau Manager (1953 O. A. G. 9, p. 37)
Superintendent of State School (1938 O. A. G. p. 270)
Trustee of a State Hospital (1949 O. A. G. 98, p. 373)
Notary Public (1874 O. A. G. p. 36)
Member of the Parole Board (1956 O. A. G. 16, p. 67)
Member of the Retirement Board (1947 O. A. G. 40, p. 202)
Postmaster (1881-82 O. A. G. p. 40)
Prosecuting Attorney (1953 O. A. G. 35, p. 159)
Investigator for the Prosecuting Attorney (1961 O. A. G. 7, p. 30)
Counselor of the Public Service Commission (1947 O. A. G. 30, p. 142)
Real Estate Commissioner (1953 O. A. G. 102, p. 475)
Member of the State Board of Registration (1935 O. A. G. p. 103)
Military Officer on Active Duty (1942 O. A. G. p. 76)
Member of School Board (1953 O. A. G. 34, p. 156)
School Trustee (1954 O. A. G. 16, p. 51)
Member of the State Board of Health (1884 O. A. G. Part II, p. 143)
Secretary of the State Board of Health (1933 O. A. G. p. 170)
Member of the State Fair Board (1953 O. A. G. 96, p. 445)
Member of the State Board of Tax Commissioners (1934 O. A. G. p. 334)
Deputy Secretary of State (1929-30 O. A. G. p. 78)
Trustee of the Teachers’ Retirement Fund (1961 O. A. G. 18, p. 87)
Member of the State Toll Bridge Commission (1953 O. A. G. 58, p. 284)
Township Trustee (1961 O. A. G. 30, p. 173)
Member of Town Advisory Board or Town Trustee (1951 O. A. G. 77, p. 234)
To that list could of course be added many other specific judicial, executive, or legislative positions, on the county, state, and national level.

You, as a legislator might ask if it is wrong for a legislator or a legislative appointee to serve in another public office simultaneously, isn’t it also wrong for an appointee of the executive or the judiciary branch or a member of those branches to serve in two different public offices at the same time. The answer would obviously be, yes.

It might be well to look at the wording of the three Constitutional sections quoted earlier in this Opinion. First, Article 2, Section 9 of the Constitution of the State of Indiana. It 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 $90.00 per annum, shall not be named lucrative: and provided also, that counties containing less than 1,000 polls may confer the office of Clerk, Recorder and Auditor or any two of said offices upon the same person.”

The next clause discussed is Article 3, Section 1, of the Constitution of the State of Indiana, and this goes to the heart of the matter in keeping with what James Madison discussed earlier: “The powers of the Government are divided into three separate departments: the Legislative, the Executive including the Administrative, and the Judicial; and no person, charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided.”

The Courts of Indiana, too, have many times referred to this area in upholding the separation of powers. In the case of Black v. Burch, 226 Ind. 445, 80 N. E. (2d) 294, the Indiana Supreme Court held that members of the General Assembly may not hold administrative appointments to such positions as Secretary of the Indiana Flood Control and Water Resources Commission or as Director of the Motor Vehicle
Department of the Public Service Commission, or as Superintendent of Maintenance of the Highway Commission, or as Barber Inspector of the Board of Barber Inspectors, without violating this section.

Furthermore, when it is noted that holding a public position and holding a Notary Public Commission are incompatible, many people tend to dismiss this as not being of consequence. But it is most vital. Most lawyers in this state are also holders of Commissions of Notary Public. Yet every lawyer knows that if he is elected to a public office such as judge, prosecutor, member of the General Assembly, Attorney General, etc., that upon taking his oath of office to which he is elected, he automatically vacates his Notary Public Commission. The position of Notary Public is an important one, even though it is not one that is very lucrative. And, this further illustrates that it is incompatible to hold two commissioned offices at one and the same time under our form of government, where those commissioned offices share the power of different branches of government or even within the same branch of government (Constitutional exceptions noted).

In 1851 when governmental leaders wrote the current Constitution of the State of Indiana based upon the theories expounded by the Founding Fathers of the United States, they felt that as small as the population was, there was still no scarcity of talent, that it was not necessary to concentrate political offices with any one individual. The theories they accepted and upon which they based the Constitution separate the powers of government in order to protect freedom, and not concentrate control in any one individual. The Indiana Constitution has not been changed in that respect.

There are some exceptions to the matter of dual office-holding but only to the specific extent authorized by the Constitution of the State of Indiana and certain statutes. Examples of these exceptions are as follows: A county clerk serves ex-officio as the secretary of the County Election Board. Another example: The Governor of Indiana, the Auditor of Indiana, and the Treasurer of Indiana, together serve ex-officio as members of the State Board of Finance and the State Revenue Board.

The questions you submitted were accompanied by an affi-
davit of Marian D. Wadman, who is the duly elected Clerk of the Wayne Circuit Court, in Richmond, Indiana. And she states under oath that she did meet on February 23, 1970, with you, as Wayne County Republican Chairman, and with Mr. Jerrell Brooks, as Wayne County Democratic Chairman, to discuss matters pertaining to the reorganization of the Wayne County Election Board. She further verifies that at this meeting no oath of office was administered and no one officially became a member of that Board. She further states that at the following meeting, which was on April 1, 1970, that she administered an oath of office to Mr. Jerrell Brooks, as the Democratic member of the County Election Board, and to Miss Ruth Kercheval, as the Republican member of the County Election Board. The latter person was appointed by you in your capacity as Republican County Chairman prior to that date.

CONCLUSION

Therefore, in answer to your first question, since you did not take the oath of office as a member of the County Election Board and received no commission and did not go on the payroll, you, therefore, are not, and have not been, a member of that County Election Board. Therefore, you did not vacate your seat as a member of the Senate of the Indiana General Assembly.

The answer to your second question is contained in the foregoing analysis.