"Each of your questions must be answered in the affirmative for from the foregoing it is clear Vincennes University is a 'public school of Knox County, Indiana,' and would in my opinion come within the classification of a 'public school' made by the federal statute in question. Therefore, the Commission on General Education of the Indiana State Board of Education could follow the precedent of other states in interpreting such classes in Vincennes University as an extended secondary school for grades 13 and 14, and accordingly amend its plan, subject to the approval of the federal agency. In such event said classes in Vincennes University would, in my opinion, be eligible for participation under the federal statute and the amended state plan."

From the foregoing, I am of the opinion your questions should be answered as follows:

1. Vincennes University is a public, nonprofit educational institution.

2. It is an independently constituted educational body having autonomy in carrying out its educational program.

3. It is legally empowered under its charter and statutory law to construct and operate for educational purposes said proposed television station, subject to the requirements of the Acts of 1953, Ch. 22, if it is granted authority to do so by the Federal Communications Commission.

OFFICIAL OPINION NO. 7

March 16, 1961

Honorable James S. Hunter
State Representative
3910 Carey Street
East Chicago, Indiana

Dear Representative Hunter:

This is in answer to your letter of February 13, 1961, wherein you request an Official Opinion on the following questions:

"1. Can a duly elected State Senator also serve as an investigator in the prosecutor's office at the same time?

"2. Is it mandatory that an investigator in the prosecutor's office take an oath of office?"

Question No. 1: Your first question necessitates an application of the following tests in a determination of the propriety of such holding:

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

(2) Is such holding in violation of the provision of the distribution and separation of powers provided in the Indiana Constitution, Art. 3, Sec. 1?

(3) Are the offices incompatible with each other?

(4) Would such holding be against public policy?

First: Let us consider your first question on the basis of a possible "lucrative office" status. The Indiana Constitution, Art. 2, Sec. 9, provides, in part, 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:* * * *." (Our emphasis)

In my 1960 O. A. G., pages 42, 43, No. 9, wherein I considered dual holding by a member of the General Assembly, I stated:

> "There is a distinction in the application of the constitutional prohibition in that the Indiana Constitution, Art. 2, Sec. 9, *supra,* refers to a 'lucrative office' and does not therefore apply to one who is merely an employee. To be classed as the holder of a 'lucrative office * * * under this State,' one must be in a position to exercise a portion of the sovereignty of the State of Indiana. We must look to the scope of the duties and the authority vested in the position under examination to make a proper determination.

"A public office within the meaning of the Indiana Constitution, Art. 2, Sec. 9, *supra,* was defined in the case of Shelmadine v. City of Elkhart (1920), 75 Ind. App. 493, 495, 129 N. E. 878, as follows:

> " 'A public officer may be defined as a position to which a portion of the sovereignty of the state attaches for the time being, and which is exercised for the benefit of the public. The most important characteristic which may be said to distinguish an office from an employment is, that the duties of the incumbent of an office must involve an exercise of some portion of the sovereign power.'
>
> * * *

"The fact that a member of the Indiana General Assembly is the holder of a lucrative office under the Indiana Constitution, Art. 2, Sec. 9, *supra,* is well established. See my 1953 O. A. G., page 445, No. 96 and my 1954 O. A. G., page 258, No. 70, and authorities cited therein."

The authority for the appointment of an investigator by a prosecuting attorney is found in the Acts of 1935, Ch. 305, Sec. 1, as amended and found in Burns' (1959 Supp.), Section 49-2514, which reads, in part, as follows:

"The prosecuting attorney of any county of this state having a population of eighty-five thousand [85,000] or more according to the last preceding United States census, is hereby authorized to appoint one [1] or more *investigators* with the approval of the county council, *who shall work under the direction of the prosecuting attorney and whose duties shall be to conduct such investigations and assist in the collecting and assembling of such evidence as, in the judgment of the prosecuting attorney, may be necessary for the successful prosecution of any of the criminal offenders of the county; any such investigator so appointed shall give bond in the sum of five thousand dollars [$5,000] and shall have and possess the same police powers within the county authorized by law to all police officers* * * *." (Our emphasis)

The foregoing quoted section was amended by House Enrolled Act No. 197, approved by the Governor on March 8, 1961, which will become Chapter 185 of the Acts of 1961 and effective upon the publication thereof. That part of said section above quoted was not changed by said 1961 amendment. However, changes were made in other portions of said section, the effect of which in relation to your questions, will be discussed at a later point in this Opinion.

In my 1954 O. A. G., page 51, No. 16, I considered the question of whether a chief investigator for the Prosecuting Attorney of Lake County appointed under Burns' 49-2514, *supra,* held an "elective or appointive office" and my conclusion, as expressed therein, was that such an investigator did not hold an "elective or appointive office."

The most important characteristic distinguishing an office from an employment is that the duties of an office must involve an exercise of some portion of the sovereign power. An examination of Burns' 49-2514, *supra,* shows such investigators work under the direction of the prosecuting attorney and their duties are to conduct investigations and to assist in the collecting and assembling of evidence. In these duties I see no opportunity for the exercise of any sovereign power by such an investigator.

It is interesting to note the difference in the case of a deputy prosecuting attorney, where 1 R. S. 1852, Ch. 28, Sec. 2, as found in Burns' (1951 Repl.), Section 49-502, provides:

> "Such deputies shall take the oath required of their principals, and *may perform all the official duties of such principals* being subject to the same regulations and penalties." (Our emphasis)

The duties enumerated above and the lack of any opportunity for such an investigator to exercise sovereign power classify the holder of such a position as an employee as distinguished from the holder of a "lucrative office."

Therefore, since the position of investigator is merely that of an employee, such holding would not be in violation of the "lucrative office" prohibition of the Indiana Constitution, Art. 2, Sec. 9, *supra.*

Second: Let us next consider whether or not such dual holding would be in violation of the constitutional provision for the distribution and separation of powers. The Indiana Constitution, Art. 3, Sec. 1, provides as follows:

> "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."

A leading case in Indiana on the distribution and separation of powers for governmental departments is State *ex rel.* Black v. Burch (1948), 226 Ind. 445, 80 N. E. (2d) 291. The four appellants therein had each been elected to the Indiana General Assembly and each had received an appointment to one of the following positions: (a) Secretary of the Flood Control and Water Resources Commission, (b) Director of the Motor Vehicle Department of Public Service Commission of Indiana, (c) Superintendent of Maintenance of State Highway Commission and (d) Barber Inspector of the State Board of Barber Examiners. The Supreme Court held that each of the four last enumerated positions were not "public offices" but that the holders thereof were merely "employees."

In State *ex rel.* Black v. Burch, *supra,* the Court said on pages 462, 463 and 464, as follows:

> "The case of *Saint v. Allen, supra* [(1930), 169 La., 1046, 126 So. 548], is very similar to the case which we are now considering. This was a suit brought on behalf of the State of Louisiana by two taxpayers to prevent persons holding office in one of the departments of the state government from being employed to exercise powers or functions belonging to another of the three departments. The facts disclosed that among others, there were three state senators employed by the State Highway Commission on a monthly salary; one as an attorney, one as chief enforcement officer, and the other as assistant to the general maintenance superintendent.

"Section 1 of the Constitution of Louisiana provided that the powers of government should be divided into three distinct departments: legislative, executive and judicial. Section 2 provided that 'No one of these departments, nor any person or collection of persons holding office in one of them, *shall exercise power properly belonging to either of the other,* except in the instances hereinafter expressly directed or permitted.' (Our italics).

"As was done in the cases before us, counsel for the defense in that case argued that the three members of the Legislature so employed by the highway commission, were not 'exercising power' belonging to the executive department; they were not officers, but only employees of the highway department. In answering this contention and in deciding for the plaintiffs, the Court stated:

> "'* * * The language of article 2 of the Constitution, however, leaves no doubt that it is not a law against dual office holding. It is not necessary, to constitute a violation of the article, that a person should hold office in two departments of government. It is sufficient if he is an officer in one department and at the same time is employed to perform duties, or exercise power, belonging to another department. The words "exercise power," speaking officially, mean perform duties or functions.'

"It will be noted that § 2 of the Louisiana Constitution provides that an office holder in one department shall not exercise power properly belonging to either of the other departments, while § 1, Art. 3 of our Constitution instead of the word 'power' uses the word 'functions.'

"It is interesting to note that when this particular article of our Constitution was reported in its original form by the committee on miscellaneous provisions on January 21, 1851, the word 'power' was contained therein instead of the word 'functions.' 1 Kettleborough, *Constitution Making in Indiana* 309; *Convention*

> *Journal* 1850 p. 732. It would seem to us that these two words are interchangeable but, if there is any distinction, the term 'functions' would denote a broader field of activities than the word 'power.'
>
> "In view of the fact that it is obvious that the purpose of all these separation of powers provisions of Federal and State Constitutions is to rid each of the separate departments of government from any control or influence by either of the other departments, and that this object can be obtained only if § 1 of Art. 3 of the Indiana Constitution is read exactly as it is written, we are constrained to follow the New York and Louisiana cases above cited. *If persons charged with official duties in one department may be employed to perform duties, official or otherwise, in another department the door is opened to influence and control by the employing department. We also think that these two cases are logical in holding that an employee of an officer, even though he be performing a duty not involving the exercise of sovereignty, may be and is, executing one of the functions of that public office, and this applies to the cases before us.*" (Our emphasis)

In the case of State *ex rel.* Spencer v. Criminal Court of Marion County (1938), 214 Ind. 551, 556, 15 N. E. (2d) 1020, it is said:

> "* * * *The prosecuting attorney is a constitutional judicial officer, * * * In him is vested discretionary judicial power to investigate and determine who shall be prosecuted and who shall not be prosecuted * * *.*" (Our emphasis)

In my 1960 O. A. G., pages 42, 46, No. 9, after a consideration of the duties and official status of a prosecuting attorney, I expressed the following opinion:

> "It is clear to me that the office of prosecuting attorney meets the necessary requisites of a lucrative office *under the state* * * *." (Our emphasis)

The emphasized portion of State *ex rel.* Black v. Burch, *supra*, in the last paragraph quoted above from that opinion is

directly in point in the instant case. Such an investigator, "an employee of an officer," in the performance of a duty outlined in Burns' 49-2514, *supra,* would be "executing one of the functions of that public office," namely, the office of the prosecuting attorney.

Therefore, in my opinion, since the positions herein considered belong to two different departments, namely, membership in the Indiana General Assembly to the Legislative department and investigator for the prosecuting attorney to the Judicial department, such dual holding would be in violation of the Indiana Constitution, Art. 3, Sec. 1, *supra,* as construed in State *ex rel.* Black v. Burch, *supra.*

Third and Fourth: Your Question No. 1 has been fully answered above. Therefore, a discussion of the tests of incompatibility and of public policy against dual office holding is unnecessary herein. Nevertheless, I wish to emphasize again their importance in any question pertaining to the legal right of an individual to hold simultaneously more than one position under state government.

See: 1954 O. A. G., page 258, No. 70;

1960 O. A. G., page 42, No. 9, *supra,* and

1960 O. A. G., page 255, No. 45.

Moreover, as heretofore noted, the act authorizing the employment of such investigator was amended by House Enrolled Act No. 197, Ch. 185, *supra,* approved March 8, 1961. The 1961 amendment changed the provisions of Burns' 49-2514, *supra,* in that such investigators, in counties having a population of not less than three hundred thousand nor more than six hundred thousand according to the last preceding United States census and in which counties are located three or more cities of the second class and which county comprises in itself a judicial circuit, may receive a maximum salary of sixty-five hundred dollars per year, being an increase in the maximum salary previously provided of fifteen hundred dollars. Although this might raise a question of incompatibility and public policy for a member of the General Assembly to so benefit from action of a session of the Legislature of which he was a member if he were otherwise eligible for such employment, a dis-

cussion of this phase is unnecessary because of State *ex rel.* Black v. Burch, *supra,* holding without question that the employment as contemplated by your query would clearly be in violation of the separation of powers doctrine.

Question No. 2: This question reads as follows:

> "Is it mandatory that an investigator in the prosecutor's office take an oath of office?"

The Indiana Constitution, Art. 15, Sec. 4, provides as follows:

> "Every person elected or appointed to any office under this constitution, shall, before entering on the duties thereof, take an oath or affirmation, to support the Constitution of this State, and of the United States, and also an oath of office."

See also 1 R. S. 1852, Ch. 13, Sec. 1, as found in Burns' (1951 Repl.), Section 49-101, which provides as follows:

> "Every officer and every deputy, before entering on his official duties, shall take an oath to support the Constitution of the United States and of this state, and that he will faithfully discharge the duties of such office."

It will be noted in each instance shown above that the requirement for an oath is directed toward an *officer* as distinguished from an *employee.*

The statute which authorizes the appointment of such investigators, namely Burns' 49-2514, *supra,* makes no reference to any requirement for the taking of an oath by an investigator as a condition precedent to entering upon his duties. The General Index to Burns' Indiana Statutes, Vol. L-Z, pp. 1249 to 1253 inclusive, contains many examples wherein the taking of an oath is a mandatory requirement. I find no such statute pertaining to investigators for prosecuting attorneys.

In Indiana Law Encyclopedia, Vol. 22, Officers, § 32, Qualification, p. 223, the following statement is found:

> "*Oath.* It is provided by the Constitution, that every person elected or appointed to any office under the Con-

stitution shall, before entering on the duties thereof, take an oath or affirmation, to support the Constitution of this State, and of the United States, and also an oath of office. *Such provision is inapplicable to persons who are not officers under the Constitution.* The taking and subscribing of an oath of office is provided for by statutes, and compliance therewith is essential in order to permit an officer to qualify for office * * *." (Our emphasis)

See: Hunter v. The Burnsville Turnpike Co. (1877), 56 Ind. 213, 227;

67 C. J. S. Officers § 38, Oath, p. 191.

An investigator in the prosecutor's office is not an officer under the Constitution. There is no constitutional or statutory provision requiring him to take an oath; therefore, in my opinion, the taking of an oath by such an investigator is not mandatory.

In summary, it is my opinion that:

(1) The office and position in question are under separate departments of state government and the simultaneous holding thereof by one individual would be in violation of the Indiana Constitution, Art. 3, Sec. 1, *supra.*

(2) It is not mandatory by law for an investigator in the prosecutor's office to take an oath of office as a condition precedent to entering upon his duties.