

# MAINE STATE LEGISLATURE

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## STATE OF MAINE

DEPARTMENT OF THE ATTORNEY GENERAL

AUGUSTA, MAINE 04333  
January 23, 1978

Honorable John L. Martin  
Speaker of the House  
State House  
Augusta, Maine

Dear Speaker Martin:

We are responding to your letter of January 9, 1978, in which you requested our opinion concerning the possible reappointment of Mr. Allan Harding to the Commission on Governmental Ethics and Election Practices. Your question arises from the fact that Mr. Harding will be working as a legal aide to Justice James P. Archibald of the Supreme Judicial Court for the next several months. The question is whether simultaneous service on the Commission and for Justice Archibald would create any conflict of interest or conflict with the constitutional doctrine of "separation of powers" between the branches of government. Because of the unique factual circumstances and the lack of precedent in questions of this type, we cannot give a categorical answer. However, we must advise that simultaneous service in the two positions could raise at least the appearance of a conflict with the doctrine of separation of powers.

We assume that as a legal aide to Justice Archibald, Mr. Harding would be performing those duties customarily associated with a law clerk, i.e., research concerning pending cases and, possibly, preliminary drafting of opinions, all under the direction of the Justice. As such, Mr. Harding would have to be considered at least an employee of the judicial branch of State Government. On the other hand, Mr. Harding's selection to and duties with the Commission on Governmental Ethics and Elections Practices (hereinafter "Commission") are statutorily determined. 1 M.R.S.A. C. 25, §§ 1001 et seq. Members of the Commission are selected by the Legislature, though they may not be members of the Legislature or holders of elective office. 1 M.R.S.A. § 1002,

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sub-§§ 1 and 2. The general duties of the Commission are twofold: (1) investigatory and advisory with regard to legislative ethics; and (2) administrative, investigatory, factfinding, and advisory with regard to election practices. 1 M.R.S.A. § 1008.

The respective duties of the two positions are not such that we believe they necessarily would result in a conflict of interest. However, the "separation of powers" question is more difficult. This question results from Article III of the Maine Constitution which reads as follows:

"Section 1. The powers of this government shall be divided into three distinct departments, the legislative, executive and judicial.

"Section 2. No person or persons, belonging to one of these departments, shall exercise any of the powers properly belonging to either of the others, except in the cases herein expressly directed or permitted."

Although the provisions of Section 2 might have been considered unique at the time that they were adopted,<sup>1/</sup> they were accepted by the Constitutional Convention without debate. Perley's Constitutional Debates, p. 130. Nor have these provisions been interpreted in any cases which have had even remotely similar factual bases. Therefore, our analysis must be made entirely from the wording of the constitutional provisions, particularly Section 2, and the facts of the question as we understand them.

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<sup>1/</sup>

There is no comparable provision in the United States Constitution. Furthermore, the Massachusetts Constitution, from which Maine derived many of its provisions, spoke in terms of "departments" rather than "persons" belonging to the respective departments. Bamford v. Melvin, 7 Me. 14 (marginal pagination at 5) (1830). There is at least some indication that the wording may have come from the provision drafted by Thomas Jefferson for the Constitution of the State of Kentucky. Sibert v. Garrett, 246 S. W. 455, 457 (Ky., 1922).

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Mr. Harding's service as a legal aide to a Justice of the Supreme Judicial Court would not involve the exercise of constitutional powers of the judicial branch of government. However, as an employee of that branch, he would be arguably a person "belonging" to this branch. Therefore, the question is whether, as a member of the Commission, he would exercise any of the powers properly belonging to the legislative branch.

The Constitution provides that each House is the judge of its own elections and the qualifications of its members. Art. IV, Part Third, Section 3, Const. of Me. In addition, each House determines its own rules of procedure and punishes its own members. Art. IV, Part Third, Section 4, Const. of Me. Although the legislation which establishes the Commission recognizes the ultimate authority of the Houses of the Legislature in these matters, it nevertheless establishes for the Commission a considerable role in the fields of legislative ethics and election practices. To the extent that the Commission is operating in an area which the Legislature could constitutionally preempt for itself, the scope of authority for the Commission may be arguably an exercise of legislative powers. Examples of this exercise would include the Commission's factfinding procedures and its administration of disclosure statements.

In light of the foregoing discussion, we cannot conclude with certainty that Mr. Harding's simultaneous service in the two positions would violate the separation of powers doctrine. However, we also note that the appearance of such conflict would be present and might expose Mr. Harding's reappointment to the Commission to challenge.

Sincerely,

JOSEPH E. BRENNAN  
Attorney General

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