

tion be available until that time. It is my opinion that the appropriation is available for the recruiting of students and nurses to alleviate the situation produced by the war and the war efforts until the legal termination of the war by formal action by competent national authority.

OFFICIAL OPINION NO. 109

October 2, 1945.

Hon Ralph F. Gates, Governor
 State of Indiana,
 State House,
 Indianapolis, Indiana.

My Dear Governor:

I have your letter of September 12, 1945, in which you make the following inquiry:

“In checking the official commission records on file in this office, I found that in accordance with the existing record here I was to make the appointment of four members to the State Teachers’ College Board of Indiana as of August 26, 1945. Since the records here reveal former Governor, Henry F. Schricker, appointed the present four members on August 26, 1941, for a term of four years and to expire on August 26, 1945. I have purposely delayed making these appointments.

“* * *

“1. In what manner should I make appointments at the present time to fill the vacancies created by the expiration of the terms of the present members of this board?

“2. Is Senate approval necessary and in what manner should this be handled if it is necessary, since, of course, they are not in session?”

The State Normal School was originally established in the special session of the Indiana Legislature of 1865. The provision for appointment of trustees is Section 2 of Chapter 36,

page 140 of the Acts of 1865 (S. S.) (28-5203 Burns' 1933 N. S.) and reads as follows:

"In order to the establishment and maintenance of such a school, the Governor shall appoint, subject to the approval of the Senate, four (4) competent persons, who shall, in themselves and in their successors, constitute a perpetual body corporate, with power to sue and be sued, and to hold in trust all funds and property which may be provided for said normal school, and who shall be known and designated as the 'Board of Trustees of the Indiana State Normal School.' The superintendent of public instruction shall be, ex officio, a member of this board."

Although the name of this Board was changed in 1929 to the "State Teachers College Board," the appointive provision of the 1865 Act remains intact. Sections 3 and 4 of the 1865 Act (28-5209, 28-5210, Burns' 1933 R. S.) read as follows:

"28-5209 (7095). Term of Office—Vacancies—Two (2) members of this board shall retire, as may be determined by lot or otherwise, in two (2) years after their appointment and the remaining two (2) in four (4) years; whereupon, the Governor, subject to the approval of the Senate, shall appoint, as aforesaid, their successors for a period of four (4) years. All vacancies occurring in said board from death or resignation shall be filled by appointments made by the Governor.

"28-5210 (7096). Organization — Officers. — Said board of trustees shall meet on the second Tuesday in January, 1866, at the office of the superintendent of public instruction, and shall organize, by electing one of its number president and one secretary, each for a term of two (2) years; and, at this or at a subsequent meeting, it shall elect some suitable person, outside of its number, as treasurer, who shall, before entering on duty, give bond in such sum as it may prescribe."

While approval by the Senate of executive appointments is not a familiar provision in Indiana, it is frequently found in

the statutes of other states. Of course, the exact function of the executive depends upon the language of the statute. There is a distinction normally made between a nomination and an appointment. It would seem, in view of the language of the Indiana statute, that the appointing power is actually vested in the Governor.

See *Barrett v. Duff*, 114 Kan. 220, 217 Pac. 918 (1923) ;

McChestny v. Sampson, 232 Ky. 395, 23 S. W. (2d) 584 (1930).

The proposition then resolves itself into the comparatively simple question whether the executive appointment of members of the State Teachers College Board may be subjected to legislative approval. In resolving that question, I do not deem it necessary to decide whether the members of the board are public officers because as to this particular situation, such a determination would in no event be controlling.

The relationship of the normal schools to the state is similar to that of Indiana University to the state. (Although Indiana University was originally established under constitutional mandate. See Article 9, Section 2, Constitution of 1816.) The trustees of Indiana Seminary (now Indiana University) were originally appointed in 1820 by the legislature.

See Acts of 1820, page 82. *Fisher v. Brower*, 159 Ind. 139, 1902.

In the revision of 1843 (Section 2, page 14, Statutes of Indiana) the board of trustees of the University of Indiana was continued as presently constituted. The most recent provision for election of trustees is found in Chapter 53 of the Acts of 1891 (28-5303 Burns' 1933 R. S.). Three members are elected by the alumni and five by the State board of education. Thus we see that prior to the 1851 Indiana Constitution, a method of appointment of trustees had been instituted other than by executive appointment. As pointed out in my opinion to you of January 24, 1945, the legislature might constitutionally retain control over appointment of state officers if that method of appointment had its inception prior to the present constitution. As also pointed out in that opinion, the legislative prerogative derived from the "now is" clause of Section 1 of Article 15 of the Indiana Constitution would also

apply to institutions "identical in kind" with those wherein the legislature had reserved some appointive power prior to the adoption of the 1851 Constitution. I am of the opinion State normal schools, an integral part of the Indiana system of schools, are identical in kind to Indiana University within the meaning of the "now is" clause of the Constitution, and therefore even though the members of the board be deemed state officers, the legislature would have a free hand in the method of appointment. (For the method of selection of trustees of Purdue University, see Chapter 155, page 390, Acts 1921 (28-5611, *et seq.*, Burns 1933 R. S.))

But I desire that my opinion in this respect be limited to the exact situation here presented. It is not intended to apply to appointments not covered by the "now is" clause of the Indiana Constitution.

There still remains the question of when the terms of members of the board begin. It is noted that the Act establishing the board was effective December 20, 1865. Section 4 of the Act provided that the board should meet on the second Tuesday in January, 1866, and organize. The first members of the board must then have been appointed at some time between December 20, 1865, and January 9, 1866. As pointed out in the opinion to you of April 2, 1945, (Opinion No. 24), it is within the power of the Governor to establish the term by his original appointment. Such term so established, continues until changed by legislative action. As stated in *State ex rel. v. Stonestreet*, 99 Missouri 361, 12 S. W. 895, at page 898:

"This reasoning leads to this result: That the *date* of the appointment, first made by the Governor for the office in question, initiated the official term of the first appointee, and that all subsequent appointments necessarily had reference to such initial period, and, so far as lawful, conformed thereto. * * *"

I have been unable to find the record of original appointments. I do find in the only available record of Governor appointments in the State Archives that on January 6, 1896, two appointments were made to expire on January 6, 1900. On January 15, 1898, two appointments were made to expire on January 20, 1902. It is apparent therefore that the statu-

tory provision for staggered terms had been complied with and that the original appointments were made on or about January 6, 1866. From 1896 to date various deviations from the set term are found. For instance, on February 5, 1930, an appointment was made to expire February 1, 1934. On June 4, 1930, another appointment was made to expire on June 1, 1934. One appointment was made January 6, 1932, to expire January 6, 1936, and another one June 25, 1932, to expire January 6, 1936. Beginning with June 30, 1933, all four members of the board were appointed for four-year terms, beginning as of that date. And finally on August 26, 1941, all four members were appointed for four-year terms beginning on that date. It is obvious that subsequent to January 6, 1866, the cycle of appointments has been varied by the appointing executives and the cycle of terms originally established, ignored. Upon examination of the various records, I am of the opinion that the terms of two members of the board expire on January 6, 1944, and the other terms would expire on January 6, 1946. I am consequently of the opinion since it is impossible to tell which persons are holding what terms, that all must be deemed to be holding over subject to immediate replacement.

The method of appointment of the members of the board, is additionally complicated by the fact that the regular session of legislature will not ordinarily occur until a year after the appointment of a member by the Governor. That, however, should not prevent the newly appointed member from assuming the duties of a member of the board immediately upon an appointment by the Governor. A similar situation arose in *State v. Williams*, 121 S. W. 64. Because that opinion squares exactly with the present problem, it is quoted somewhat at length (p. 68) :

“It is next earnestly insisted by relator that the respondent has never been legally qualified, for the reason that the state Senate has not ratified his appointment. This insistence is predicated upon the provision of the statute which reads: ‘The Governor of the state, with the advice and consent of the Senate, shall appoint,’ etc. It is fundamental that, in the construction of statutes, the courts should so interpret them as to conform with the intent of the lawmaking

power that enacted them. Applying this fundamental rule of construction to the contention of the relator upon this proposition, in our opinion, his insistence is not a fair construction of this law, and is directly in conflict with the manifest intention of the lawmaking power. The General Assembly provided for the first appointment to be made at the time when the Senate would not be in session. It must have known that the Senate would not be continuously in session, and would not likely be in session at the time when further appointments were made. The law contemplates that such appointments shall be made at the proper time, and that the Senate will act upon the appointment at the next session thereafter. The law does not contemplate that there can be no occupant of the office until both the Governor and Senate has acted. Were that true, in case of the death of an occupant at a time when the Senate was not in session, the business of the office would have to cease until the Senate met. Such was never in the minds of the members of the General Assembly. The very fact that the law itself provided for the first appointment to be made at a time when it was not contemplated that the General Assembly would be in session is strongly indicative of the legislative intent. We are unwilling to give the statute now under consideration an interpretation which would manifestly conflict with the clear intention of the lawmaking power and absolutely deprive the Governor of the power to discharge the administrative duties incumbent upon him by reason of such enactment. Laws must be given a reasonable construction, keeping in view the purpose of, as well as the circumstances surrounding, their enactment. Giving to this law such a construction, it must be held that the legislative intent was to authorize the Governor to make appointments to this office at such times as vacancies occurred therein, and that the consent of the Senate would be given or refused at the next succeeding meeting of that body. In the meantime, such appointee, after having otherwise qualified under the act, is entitled to the office until such time as the Senate may pass adversely upon his appointment. Should the Senate refuse to confirm, the

Governor would then have to appoint another. This at least has been the uniform course pursued by all prior administrations dealing with legislative enactments of this character."

See also cases annotated in 89 A. L. R. at page 138.

Specifically answering your questions:

(1) Although the authorities are not in accord, it seems to me the better view is that there is a vacancy in the case of all members of the board at present. See authorities cited in *State v. Williams, supra*. I am of the opinion that you are authorized by law to make immediate appointments to fill unexpired terms in the membership of said board; two terms to expire January 6, 1946, and two terms to expire January 6, 1948. I do not believe that the appointments to first expire are invalid because of the unlikelihood of approval by the Senate of such appointments, for otherwise upon the death or resignation of a member prior to the approval of his appointment by the Senate, such appointment might be invalid from inception.

(2) I am of the opinion that the Governor should report his appointment to the senate in the next special or regular session for approval. In the meantime as above stated, the appointments are valid.

OFFICIAL OPINION NO. 110

October 2, 1945.

Hon. Milton Matter, Director
Indiana Department of Conservation,
Indianapolis, Indiana.

Dear Sir:

I have your letter submitting nine instruments and inquiring as to the legality and effect thereof. These each purport to be an agreement relating to the operation of public service privileges and facilities at some state park. The contracts submitted may be divided into two general classes or types