INDIANA UNIVERSITY: Whether Indiana University is a department of state government. October 25, 1938.

Mr. W. C. Biddle,  
Secretary to the Board of Trustees of Indiana University,  
Bloomington, Indiana.  

Dear Sir:  

I have before me your request for an official opinion in answer to the question as to whether the trustees of Indiana University, as respects the issue of first mortgage bonds under the authority of chapter 49 of the Acts of the General Assembly of Indiana of 1929, is a part of the state government as a department thereof.

The above Act gives broad powers to the several boards of trustees of the several state colleges, including Indiana University, to erect, construct, complete, furnish, operate, manage and control athletic field houses, gymnasiums, student unions and halls of music in connection with such colleges, including the authority to issue and sell bonds to provide funds for said purposes; providing that the bonds so issued, together with the interest thereon, shall be exempt from taxation, and providing how such bonds and the interest thereon shall be secured and paid. On the subject of how the bonds and interest thereon are to be secured and paid, the statute provides that the same "may be secured by pledge or mortgage of any property, real or personal, used or acquired or to be acquired and used for the purpose, or any of them, contemplated by this Act and the improvements made or to be made thereon, or by pledge or mortgage of the net income from said property, or by pledge or mortgage of said property and the net income therefrom, as said trustees may determine."


Section 5 of the Act expressly provides that no indebtedness, bond or obligation incurred or created under the authority of the Act shall be or become an indebtedness of or liability against the State of Indiana nor said respective corporations, nor a lien or charge against the property or funds of said respective corporations, except to the extent of the property or income pledged or mortgaged as authorized by the Act.

The above provision was doubtless inserted for the purpose of avoiding what might otherwise be a constitutional pitfall growing out of the fact that the constitution of the state provides, with respect to state indebtedness that "no law shall authorize any debt to be contracted, on behalf of the state, except in the following cases: To meet casual deficits in the revenue; to pay the interest on the state debt; to repel invasion, suppress insurrection, or, if hostilities be threatened, provide for the public defense."

Art. 10, sec. 5, Constitution of Indiana.

In so doing, however, there seems to be an implication that except for the constitutional provision, the trustees of the various state schools, because of their relationship to the state, might be authorized to incur indebtedness on behalf of the state.

With these preliminary observations with respect to the authority under which the bonds referred to in your letter are to be issued, I desire now to call attention, first, to the relation to the state of the common school system, including the elementary and high schools of the state, and thereafter to the relation of Indiana University to the state as revealed by the decisions of our Supreme Court. First then, as to the common school system, including the elementary and high schools of the state. It is well settled under the authorities that the common schools of the state represent the exercise of state functions and duties as distinguished from local functions. The constitution of the state expressly made it the duty of the General Assembly "to provide, by law, for a general and uniform system of common schools, wherein tuition shall be without charge and equally opened to all."

Art. 8, sec. 1, Constitution of Indiana.

After making provision for the common school fund, the constitution likewise provides that "the principal of the common school fund shall remain a perpetual fund, which may be increased, but shall never be diminished."

Art. 8, sec. 5, Constitution of Indiana.

The constitution also provides that the General Assembly
shall provide for the election by the voters of the state of a state superintendent of public instruction.

Art. 8, sec. 8, Constitution of Indiana.

Passing now to some of the decisions. In the early case of The State, ex rel., Clark v. Haworth, School Trustee, etc., 122 Ind. 402, the court said on page 405:

"Essentially and intrinsically the schools in which are educated and trained the children who are to become the rulers of the commonwealth are matters of state, and not of local jurisdiction."

Again, in discussing section 1 of article 8 of the Indiana Constitution already referred to, the court in the case of School Town of Windfall City v. Somerville, 101 Ind. 463, at page 472, said:

"By section 1, article 4" (evidently meaning article 8) "of our state constitution, the people have issued a mandate to the Legislature 'to provide, by law, for a general and uniform system of public schools.' This it has done and created administrative school corporations to which it has delegated authority to perform what is declared in the constitution to be a state function."

Returning now to the case of The State, ex rel., Clark v. Haworth, School Trustee, etc., 122 Ind. 462, already referred to, we desire to call attention to the further language quoted from page 465:

"In such matters" (referring to school matters) "the state is a unit, and the Legislature the source of power. The authority over schools and school affairs is not necessarily a distributive one to be exercised by local instrumentalities; but, on the contrary, it is a central power residing in the Legislature of the state."

Later on, in the same case, on page 400, the court in referring to article 8 of section 1 of the Constitution of the State of Indiana, said:

"The constitution enjoins a duty and confers a power. The duty and the power are co-extensive, but the object they are designed to accomplish is unified, because the
duty is 'to provide, by law, for a general and a uniform system of common schools,' and the power is granted to enable the General Assembly to effectively perform the duty both by the constitution and by the intrinsic nature of the duty and the power, the authority is exclusively legislative, and the matter over which it is to be exercised solely of state concern. That this conclusion is sound, is so clear, that authorities are not required to fortify or support it, but authorities are not wanting, for the current of judicial decisions is unbroken.'

Later on, on the same page, the court uses the following language:

"Judge Cooley has examined the question with care, and discussed it with ability, and he declares that the Legislature has plenary power over the subject of the public schools. He says in the course of his discussion, that: 'To what degree the Legislature shall provide for the education of the people at the cost of the state or of its municipalities, is a question which, except as regulated by the constitution, addresses itself to the legislative judgment exclusively.' Again, he says: 'The governing school boards derive all their authority from the statute, and can exercise no powers except those expressly granted and those which result by necessary implication from the grant.' Const. Lim. (8th ed.), note 1. No cause has been cited by counsel, and none has been discovered by us, although we have searched the reports with care, which denies the doctrine that the regulation of the public schools is a state matter exclusively within the domain of the Legislature."

Upon the authority of the above decisions, which have never been overruled, I think it must be considered as settled that the public school system of the State of Indiana is a state matter and that what is done in furtherance thereof must be considered as the exercise of a duty and function of government placed upon the state by the constitution itself. In the exercise of this power, the state has seen fit to declare that every township in the state is a school township, and as such, a body corporate and politic for the purpose of carrying out
the state's duty with respect to the common schools, and that for the same purpose, each incorporated town and city is a distinct municipal corporation for school purposes. But this distribution of power neither affects nor contradicts the original statement that the common school system is a state system and the establishment and maintenance of the same is a state function. This is emphasized by the fact that under the holding of our Supreme Court, a school corporation or subdivision, whatever it may be considered, is not liable in tort.

See
Freel v. The School City of Crawfordsville, 142 Ind. 27.

It is true that in the above case and in other cases like it, the local school subdivisions are spoken of as instrumentalities of government, but their lack of liability in tort apparently goes back to the constitutional provision which provides that:

"Provision may be made, by general law for bringing a suit against the state, as to all liabilities originating after the adoption of this constitution; but no special act authorizing such suit to be brought, or making a compensation to any person claiming damages against the state, shall ever be passed."

In other words, they are treated just as the state would be treated under like conditions and for the same reason.

Passing now to the specific case of Indiana University, the history of the founding of the University and its relation to the state is related briefly in the case of Fisher, et al., Trustees v. Drown, et al., 159 Ind. 139, where the court said after referring to the constitutional mandate of the constitution of 1916, with respect to providing for a system of education, differing somewhat in form, from the language of the Constitution of 1852:

"In compliance with this mandate of the constitution the Legislature in 1820 established the State Seminary at Bloomington. Acts 1820, p. 22. In 1828 this institution was advanced to the dignity of Indiana College, an endowment fund established, its trustees required to report receipts, expenditures, etc., to the Governor, for submission to the General Assembly, and the constitution of the college declared to be unalterable
by any law or ordinance of the trustees, 'nor in any other manner, than by the Legislature of this state.' Acts 1828, p. 115. By an Act of 1838 (Local Laws 1838, p. 294), the General Assembly conferred upon the institution the name of Indiana University, and the same body in 1842 adopted a joint resolution,—reciting in terms section 2 of article 9 of the Constitution of 1816 above quoted,—requiring the trustees of the Indiana University to report to the next legislative session, whether, in their opinion the resources of said university are sufficient to enable the Legislature to pass a law making tuition gratis, in compliance with the constitutional mandate. Acts 1842, p. 174. In order that the special relation of the university to the state might be continued unquestioned, under the new constitution of 1851, the General Assembly of 1852 enacted that 'The institution established by an Act entitled 'An Act to establish a college in the State of Indiana,' approved January 28, 1828, is hereby recognized as the university of the state.' 1 R. S. 1852, p. 504, 1 G. & H., p. 660. And again in 1867 the Legislature asserted that it should be the pride of every citizen of the state to place the state university in the highest condition of usefulness and make it the crowning glory of our present great common school system. Acts 1867, p. 20.

"The maintenance fund is in no smaller sense a state fund. It has its origin from the sale of certain lands of the state acquired by gift from the government for educational purposes. Acts 1828, p. 117. It has been augmented from time to time, as the needs of the university increased, by specific appropriations from the state treasury—first in 1867 (section 8159, Burns’ 1901) ; again in 1873 (section 6100, Burns’ 1901) ; and by general taxation for twelve years beginning in 1883 (section 6161, Burns’ 1901), and again in 1895 (Acts 1895, p. 171).

"The university as well as its endowment has always been under the supervision of the state. Five out of its eight trustees are chosen by the state board of education. Section 6060, Burns’ 1901. Its trustees are
required to report to the state. Section 6081, Burns’ 1901. The Governor shall annually cause 5,000 copies of the report to be printed, at the expense of the state, for distribution. Section 6084, Burns’ 1901. The trustees are required to provide for special instruction in certain branches. Sections 6088, 6089, Burns’ 1901. The state librarian shall supply books to its library. Section 6099, Burns’ 1901. The state geologist shall collect specimens of mineralogy and geology for its cabinet. Section 6095, Burns’ 1901. The home of the fund is the state treasury, and prior to April, 1897, it was loaned and collected by the state officers (Acts 1852, secs. 6095-6107, Burns’ 1901), and the annual interest thereon applied to the expenses of the university, upon warrants drawn on the treasurer of state by the auditor of state upon requisitions of the trustees. Section 6094, Burns’ 1901.”

Upon the basis of the history therein set out, the court concluded that Indiana University is an integral part of our free school system. Apparently, it would seem to be sound to proceed, therefore, upon the theory that, notwithstanding the particular organization of the university, it should be considered as sustaining a relation to the state similar to the several school townships, school towns and school cities.

We come, therefore, now to a consideration of what that relationship is, and in this consideration I feel obliged to say that, in my opinion, the dividing line between an instrumentality and a department of government is not always clear. In the decisions of the courts of Indiana, the various school townships, school towns and school cities are bodies corporate and politic just as the trustees of Indiana University is a body corporate and declared by the incorporating Act to be politic as well. In the decisions, school township, school towns and school cities, and ordinarily I think, Indiana University have in the past been designated as instrumentalities of government. But when we consider the fact that the system of which they are a part is a state system and that the function exercised is a state function, the question arises as to whether the use of the term “instrumentality” goes far enough and as to whether they may with equal propriety be considered departments. Especially would that be true as
regards Indiana University, which can, in no sense, be considered as local.

Before going further with the discussion, it perhaps is in order to see just what a department of government is. A department of government is defined by Webster's New International Dictionary, second edition, as being "a division or branch of governmental administration." If the operation of a state university, such as Indiana University, is a state obligation, as the authorities seem to hold, it would appear that the university would be within that definition. Of course, the state could have discharged that government obligation by entrusting the operation of the university to a board of education, in which case no question would probably arise as to whether such board was a department of the state government. It is only because the organization takes corporate form that the question arises. Even so, I think it may be that the holding that the university is an instrumentality of government is not in contradiction to a holding that in a very real sense it is also a department. Considered as an organization it is an instrumentality, means, by which the state discharges one of its duties and obligations. Considered, on the other hand, upon the basis of what it does in toto it is a department of state government within the meaning of the above definition.

Before closing this discussion, I desire to call attention to the case of Emergency Fleet Corporation, United States Shipping Board v. Western Union Telegraph Company, 275 U. S. 415. In that case the relation of the Fleet Corporation to the United States government was under consideration and the question involved was the right of the Fleet Corporation to the special privileges granted to the government and its departments by an Act of Congress providing, in part:

"That telegraphic communications between the several departments of the government of the United States and their officers and agents shall, in their transmission over the lines of any of said companies, have priority over all other business, and shall be sent at rates to be annually fixed by the Postmaster-General."

Objection was made to according these privileges to the Fleet Corporation, first, upon the basis that it is a private corporation. The court held that the Fleet Corporation was,
in form, a private corporation, but went on to point out that all of its capital stock was subscribed and paid for by the shipping board on behalf of the United States and that the United States alone had a financial interest in its capital stock. The court pointed out that an important, if not the chief, reason for employing a corporate agency was to enable the government to employ commercial methods and to conduct the operations of the corporation with a freedom supposed to be inconsistent with accountability to the treasury under its established procedure and with its control over the financial operations of the United States. Other arguments were made against according to the Fleet Corporation the privileges accorded by the above Congressional Act, supra, but the court denied all of the contentions of the telegraph company and held that the Fleet Corporation was entitled to the government rate and priority.

It is interesting to note the language of the court beginning on page 425, where the court said:

"It is urged that if the Fleet Corporation is granted the government rate, it may likewise be claimed by every instrumentality of the government. Instrumentalities like the national banks or the federal reserve banks, in which there are private interests, are not departments of the government. They are private corporations in which the government has an interest. Compare Bank of the United States v. Planters' Bank, 9 Wheat. 904, 907. The Fleet Corporation is entitled to the government rate, not because it is an instrumentality of the government, but because it is a department of the United States within the meaning of the Post Roads Act."

The case of Indiana University as a department of the state government, I think, is equally as strong as the case of the Fleet Corporation as a department of the United States government. The difficulty with your question is the difficulty attendant upon the use of terms, and the conclusion is necessarily affected by the way in which the question is approached. If the University is considered from the standpoint of its organization, "instrumentality," is perhaps the more appropriate term to use to describe its relation to the state; but, when it is considered from the standpoint of what it is
organized for and what it actually does, it is evidently proper to consider it as "a division or branch of governmental administration," a department.

In my opinion, therefore, there is no question as to the position of Indiana University as a state institution organized for and operating in the discharge of a state function, and while, in the conventional sense it has been termed an instrumentality of government, probably because of the character of its organization, when the question is approached from the standpoint of the purpose of its organization and what it actually does, it should be treated as a department within the definition given earlier in this opinion, especially in view of the decision in Emergency Fleet Corporation, etc. v. Western Union Telegraph Company, supra.

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October 28, 1938.

Mr. Fred Ferguson,
Director, Bureau of Mines and Mining,
Dept. of Commerce and Industries,
Division of Labor,
State House,
Indianapolis, Indiana.

Dear Sir:

Your letter of October 27, asks an opinion as to the meaning of a portion of clause F, section 11 of chapter 177 of the Acts of the Indiana General Assembly for 1923. The portion of the statute with which you are concerned reads as follows:

"Hereafter where electricity is installed no higher than two hundred seventy-five (275) volts shall be used under-ground, except for transmission, or for application to transformers or other apparatus, where the high voltage circuit is stationary. High voltage motors, and transformers, shall be installed in suitable chambers, built of fire proof construction, and well