

OPINION 33

OFFICIAL OPINION NO. 33

October 28, 1969

Hon. Richard D. Wells  
Superintendent of Public Instruction  
229 State House  
Indianapolis, Indiana

Dear Superintendent Wells:

I am in receipt of your request for an opinion as to whether the Governor of Indiana may make appointments to the Board of Trustees of Indiana University without the State Board of Education participating therein. Your letter reads in part as follows:

“Since I have taken office, commencing March 15, 1967, the State Board of Education has not elected any members of the Board of Trustees of Indiana University. During this time, however, Governor Branigin, without consultation with the State Board of Education, made several appointments to the Board of Trustees. I am asking you for an official opinion regarding this situation.

“The specific question is: Are the Branigin appointments to the Indiana University Board of Trustees made after March 15, 1967, valid? If not, what is the status of the Trustees on the Board who are not elected by the State Board of Education and approved by the Governor?”

In order to answer your question, a review of the statute providing for the appointment of members of the Indiana University Board of Trustees is necessary. This statute, Acts of 1891, Ch. 53, Sec. 3, as amended, and as found in Burns' (1948 Repl.), Section 28-5305, is set out as follows:

“Five [5] members of the board of trustees shall be elected by the state board of education, with the approval of the governor, for terms of three [3] years. When a vacancy occurs in the membership of the board of trustees who are elected by the state board of education, because of death, resignation, removal

from the state, or for any other reason, such vacancy shall be filled by election by the state board of education, with the approval of the governor, for the unexpired term.”

As a general rule, the executive power carries with it the power of appointment. Tucker *et al.* v. State of Indiana (1941), 218 Ind. 614, 35 N. E. (2d) 270. However, an exception to the general rule is found in cases where appointments were made by the Legislature prior to the adoption in 1851 of the Constitution of Indiana. 1945 O. A. G. p. 28, No. 5. The Indiana University Board of Trustees was created by Acts of 1828, Ch. 82, which provided that the Legislature had the exclusive power to appoint members thereof.

In my opinion, the procedure for appointment of members of this Board of Trustees falls within this exception and is controlled by the provisions of Burns' Section 28-5305, *supra*.

Having determined that the statutory procedure for the appointment of members must be followed, we pass to the remaining problem of the trustees who were not appointed in accordance with statutory procedure.

In my opinion, such trustees are *de facto* members of the Board and hold office only until such time as appointment is properly made under the provisions of Burns' Section 28-5305, *supra*.