State are not elective officers of the township, city, county or state, within the meaning of Section 49-1103, Burns 1933, *supra*, and that said act does not prohibit an increase in the salary of such judges during their term of office.

It is unfortunate that the mistake of law was not discovered earlier since by now considerable in increased salaries has accrued. The salary of an officer is an incident to the office and I do not believe that the failure to draw it or make demand for it is a waiver or estoppel against the officer. It is not a matter of contract. Under those circumstances I am of the opinion that all judges are entitled to the increased salaries as of December 12, 1945. However, I am still of the opinion, which is supported by the 1947 Act, that the legislature never intended the receipt of both a salary and a per diem, so while the judges are entitled to the increased salary from the state for the period subsequent to December 12, 1945, every county where the judge has received a per diem since that time has a claim against the judge for the amount of per diem he has received since December 12, 1945.

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**OFFICIAL OPINION NO. 60**

September 27, 1948.

Colonel Ben Herr,

Adjutant General's Office,

212 State House,

Indianapolis, Indiana.

Dear Sir:

I have your letter of September 22 as follows:

"The National Defense Act under which the Indiana National Guard is organized, provides one of the requisites that the State assumes responsibility of federal property issued to the troops and shall be pecuniary liable for same in case of loss through neglect or, in certain cases, insecurity of stationed storage facilities.

"I now have before me a claim for $23.77, supported by a report of survey, for property lost under what
appears to be circumstances in which the State was negligent.

"Your opinion is respectfully requested as to the legality of paying claims such as mentioned above.

"If the payment of such claims is permissible, what fund should they be paid from?"

I understand that the Federal property referred to in the above letter was procured upon the requisition of the Governor under the Federal National Guard Act, which appears as Chapter 3 of Title 32 U.S.C.A. Section 47 of said title provides in part as follows:

"* * * If it shall appear that the loss, damage, or destruction of property was due to carelessness or neglect, or that its loss, damage, or destruction could have been avoided by the exercise of reasonable care, the money value of such property shall be charged to the accountable State, Territory, or District of Columbia to be paid from State, Territory, or District funds, or any funds other than Federal. * * * Provided, That if any State, Territory, or the District of Columbia shall neglect or refuse to pay, or to cause to be paid, the money equivalent of any loss, damage, or destruction of property charged against such State, Territory, or the District of Columbia by the Secretary of War after survey by a disinterested officer appointed as hereinbefore provided, the Secretary of War is hereby authorized to debar such State, Territory, or the District of Columbia from further participation in any and all appropriations for the National Guard until such payment shall have been made: * * *."
military forces of the state, the Governor has considerable inherent power and authority.

6 C.J.S., Army and Navy, Section 1, page 346;
Ives on Military, page 16.

As early as 1905 it was ruled by the Attorney General that the Governor had authority to disburse the military fund at his own discretion and could pay the commanding officer of the National Guard although there was no statute authorizing the same.


In an opinion dated February 25, 1915 the Attorney General referred to the above opinion of 1905 and said:

"In that case there was no provision for the payment of the officer commanding the National Guard in any statute, there was no explicit authority fixing the rate of pay, and it is doubtful if the legislature until 1911 ever contemplated a commanding officer of the National Guard on constant duty. For many years the commanding general of the National Guard maintained an office in the State House and was paid a regular salary by order of the Governor, but never until 1911 was an appropriation made by the legislature for such purpose.

"The authority of the Governor as Commander-in-chief in the exercise of his discretion is so absolute, that where the matter is solely one of discretion, and the exercise of a function belonging to the Commander-in-chief as such, neither the judiciary nor the Legislature may question the acts of such commander-in-chief.


"The necessity for non-interference, with a full authority to the Commander-in-chief, is discussed by
Mr. Justice Story conclusively in favor of the fullest exercise of his powers.”

On August 24, 1915, the then Attorney General said, concerning the expenditure of the military fund for a moving picture film advertising and giving publicity to the Guard:

“It is my opinion that where the matter to be determined is discretionary with the governor, and his judgment is that certain action proposed is for the proper organization of the militia, or the promotion of its discipline, instruction or military efficiency, then that, no matter what the subject matter of such determination, the judgment of the governor is sufficient to preclude interference or objection by other persons. The responsibility and the authority are his. If his judgment says that any measure will effect proper organization, discipline, instruction or efficiency, then the expenditure of money from the military fund made necessary by the expense entailed in effecting such proper organization, discipline or military efficiency, is properly charged against the military fund. However, before the expenditure can be made, the Governor must first determine that the purchase and use of a moving picture film for the purpose of advertising and giving publicity to the Indiana National Guard, will either aid in the proper organization of the militia or promote its discipline, instruction or military efficiency. When he determines these matters one way or the other, my judgment is that his judgment cannot be questioned.”

Opinions of Attorney General, 1915, page 466.

In an opinion dated January 4, 1916, the then Attorney General gave an opinion that the Governor could expend funds for additional assistance in the Adjutant General’s office, although there was a specific appropriation for clerical and stenographic help, which had already been used and none for such additional help, saying:

“The functions given to the Adjutant General’s office by law are varied. The Adjutant General’s office has supervision of the militia as a whole as well as of
the Indiana National Guard. It also has care and custody of the records of Indiana troops in the various wars of the United States and has functions to perform in relation to those who are now, and have been at times in the past, soldiers, of the State and of the United States. It is appreciated that the personnel for which appropriations are specifically made may be sufficient under some circumstances in the office of the Adjutant General but wholly inadequate to accomplish the purposes for which the militia of this State is intended, and to properly administer the affairs of the Indiana National Guard, in my opinion, the Governor's authority is complete and his will and discretion supreme."


On March 10, 1916, the Attorney General gave it as his opinion that the Governor might, by general order, provide:

"* * * through what officer or officers of the militia the fund should be expended, what sort of vouchers or receipts should be taken, and in a general way the purposes for which the fund is to be expended, when such expenditure is not expressly authorized by statute."


These opinions are referred to and collected in Official Opinion No. 85, dated September 25, 1944, O.A.G. 1944, page 362.

It was not only the right but the duty of the Governor to requisition from the Secretary of War such supplies and equipment as was reasonably necessary to equip the National Guard and permit its efficient functioning. When this was done the State assumed the burdens and responsibilities under which such property and equipment was furnished the State by the Federal Government, including the responsibility set forth in the above quoted part of the Federal Act. Under the provisions of the Federal Act quoted, the failure to meet this obligation would have the effect of disbaring the State of Indiana from further participation in any and all appropriations for the National Guard.
It is my opinion that, assuming that the property in ques-
tion was lost due to carelessness or negligence, it is proper
and legal to pay said claim. It is further my opinion that,
as shown by the former opinions of prior Attorneys General,
said claim may be paid from any military fund, including
the Governor's Military Contingent Fund.

OFFICIAL OPINION NO. 61

October 1, 1948.

Colonel Ben Herr,
Fiscal Officer,
Office of Adjutant General,
Indianapolis, Indiana.

Dear Sir:

I have your letter of September 27, 1948, requesting an
official opinion as follows:

"The city of Monticello, through its city attorney,
Mr. Charles D. Boomershine, has indicated a desire
to donate some land in its park to the State to be
used as an armory site.

"Mr. Boomershine says while he believes that the Acts of the Indiana General Assembly of 1945, Chapter 135, page 291, Sec. 7, gives the city this authority,
he prefers that before any definite steps are taken.
we obtain for him an official opinion from your Office,
as to whether such a donation can be made.

"If you will favor us with an opinion on this sub-
ject, we will appreciate it very much."

Section 7, Chapter 135 of the Acts of 1945, referred to
in your letter, appears as Section 45-307 Burns' 1946 Supple-
ment, and is as follows:

"Such armory board shall have power to receive from counties, cities, municipalities, the federal gov-
ernment or other sources, donations of land or con-
tributions of money, to aid in providing or erecting armories throughout the state for the use of the mili-