OFFICIAL OPINION NO. 53

June 19, 1945.

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

My dear Governor:

I have before me your letter of May 4, 1945, attaching a list of expenditures made out to the Governor's civil and military contingent fund and emergency contingent fund, during the years 1940 to 1945, for the benefit of the selective service system. You request an official opinion:

> "I would like to have you give me an official opinion as to whether we are liable for any expenditures under defense laws as they may have been enacted by our General Assembly. Undoubtedly, there was a law authorizing the creation of the selective service in the State of Indiana. I desire to know if this law authorizes any State expenditures. * * *"

The selective service law authorizes the President to accept the services of all officers and agents of the several states.

U.S.C.A. Title 50, Section 310 (4).

The regulations promulgated by Executive Order No. 8545 of the President provided in Paragraph 120 that the administration of the selective service law in each state should be in charge of the Governor and that the expense of operation of state headquarters should be paid for by the federal government, as provided in such regulations; and in Paragraph 504 of these regulations, the Governor was authorized to make certain expenditures for state headquarters in the manner set forth in the regulations. Without repeating these regulations at length and the rules as to federal government travel, which are incorporated in them by reference, it is sufficient for present purposes to state that the expenses listed in the schedule attached to your letter were not paid in accordance with those regulations, and it is, therefore, very doubtful that

they would be recovered from the federal government without specific Congressional action.

As to whether the state was liable for these payments, it must be kept in mind that the payments have been made. The question is not as to whether payment could have been compelled by the persons rendering the service or selling the property, but the question is rather as to whether the law authorized the payments to be made. The payments were made entirely out of the Governor's civil and military contingent fund and the Governor's emergency contingent fund, and the appropriations statutes of recent years do not indicate for what purposes these funds are to be used. In the first Session of the General Assembly, it was provided in an Act making certain specific appropriations:

> "That the Governor, be, and he is hereby authorized to draw on the contingent fund for all monies which may necessarily be expended by either the secretary of state, Auditor of public accounts or treasurer of state, for the purchase of books, stationery, etc., together with all monies which may be necessary in the executive department of government which are not particularly provided for by law."
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> Acts 1816, Ch. LXIX, Sec. 19, p. 241.

Thereafter appropriations were made from time to time "for contingent fund." See for example, Acts 1852, Chapter 4, Section 1, page 34.

This was modified in 1861 to read:

> "For the contingent fund, to be drawn by the Governor's warrant on the auditor."
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> Acts 1861, Ch. 5, Sec. 5, p. 7.

The military contingent fund was created during the civil war and in the Special Session of 1865, and thereafter, the appropriation was made to the "civil contingent fund."

> Acts 1865, (Spec. Sess.), Ch. 8, Sec. 6, p. 63.

In 1877 appropriations were made to both the Governor's civil contingent fund and the Governor's military contingent fund, and a proviso was added as follows:

> "Provided, That no part of any of these funds shall be drawn, except for actual expenditures, and all such expenditures shall be reported in detail to the Committee of Expenditures of the next General Assembly."
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> Acts 1877, (Spec. Sess.) Ch. 1, Sec. 1, p. 4.

This proviso was omitted in 1879 (Acts 1879, (Spec. Sess.) Ch. 3, p. 64), but in 1881 a new proviso was inserted as follows:

> "Provided, that no portion of these contingent funds shall be used for any purpose but to execute the civil and military laws of the State in an emergency not provided for, and that no more of either of said funds shall be drawn or expended for the respective purposes for which they are severally appropriated than may be necessary."
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> Acts 1881, (Spec. Sess.) Ch. 5, Sec. 1, p. 76.

This proviso was retained thereafter to and including 1903, although the appropriations were combined in 1899 into one fund, known as the civil and military contingent fund. In 1905 and thereafter until the present date the appropriations have been made to the civil and military contingent fund without any provisos or words of explanation or limitations.

The emergency contingent fund was created in 1903 in Chapter CCVIII, Section 1, p. 362, "to meet accidents or other requirements in any of the penal, benevolent or reformatory institutions of the state, to be expended only on the order of the Governor." Appropriations were thereafter made to the emergency contingent fund but they were made without further statement of purpose and without the addition of any limitations or qualifications.

Thus, so far as the legislative record is concerned, the proper use of these funds is ambiguous, and in such case the practical construction given by the public officers of the state is inferential and persuasive. There have been several prior Opinions by the Attorney General in regard to these funds. Thus, in the Opinions of the Attorney General (1923-1924), p. 36, the Attorney General held as to the emergency and contingent funds that: "The very nature of the fund is such that

it can be used for almost any public purpose when emergency or necessity demands, * * *" and held that the Governor could transfer $700.00 out of such funds to meet a deficit in the appropriation for the Clerk of the Supreme Court.

At the same time, however, it was held, (p. 38), that these funds could not be used for the payment of claims accruing during preceding fiscal year.

In 1931 the Attorney General held that the emergency contingent fund "is very largely under the control of the Governor, if limited to a public use within the scope of the executive function. He, in the first instance, must necessarily be the judge of the emergency, where the statute itself provides no limitations."

O.A.G., 1931-1932, p. 58, 60-61.

The Attorney General there held that this fund could be used to clean the state house.

In the Opinions of the Attorney General (1929-1930), p. 215, 222, ff., the Attorney General traced the history of these funds at length and held:

> "* * * In my opinion, however, its character as 'public funds' is not changed by the above fact and as a matter of course it must be used by the governor in the furtherance of or to meet the necessity of some executive function within the scope of the duties devolving upon him in his official capacity. The constitution vests the executive powers of the state in the governor. He is the commander-in-chief of the military and naval forces of the state. He is required by the constitution to transact all necessary business with the officers of government and 'to take care that the laws be faithfully executed.' (Burns' Annotated Indiana Statutes of 1926, sections 134-145-148 and 149.) 'As a rule these duties involve the exercise of official discretion, and his action is therefore not ordinarily subject to judicial review or control.' (36 Cyc. 855.)"

and further quoted from People v. Lewis, 7 Johnson's Reports (N. Y.) 73, as follows:

> " 'The moneys for which the defendant was called upon to account, were received by him under several

acts of the legislature, appropriating certain sums to defray the incidental charges arising in and about administering the government of the state. The defendant having been called upon by the comptroller to account for the expenditure of the money, he complied with the request; but some of the *items* in the account, being, in the opinion of the comptroller, not allowable, the present suit was instituted; and we are called upon, in the first place, to decide whether it can be sustained. We are satisfied, that upon the facts stated in the case, it cannot. *The specific objects for which the moneys put into the defendant's hands were to be applied, are not designated. What are to be deemed incidental charges, arising in and about administering the government, are no where in our laws defined. The appropriation of the money must, therefore, necessarily be left to the discretion of the executive, under the control only of the legislature.* There is no rule of law, by which the comptroller could, or by which this court can, test the correctness of the application of the money. The defendant accounts for the money, as having been expended in and about administering the government. And the propriety of the charges, we think, is not a subject of judicial cognizance. It was an appropriation, resting entirely in legislative discretion.' (Our italics.)"

It is further my understanding that the officers of the state, including the Governor, the Auditor and the State Board of Accounts, have for many years interpreted these appropriations as authorizing the Governor to expend moneys for any public purpose and holding him accountable only for such balance as remains after deducting any expenditures made from the fund, and without questioning any such expenditures either as to the purpose for which made or the emergency justifying the expenditure. I also am informed that this construction has been known to the members of the General Assembly for many years, and that they have inferentially acquiesced in such construction by repeatedly making the appropriation in the same terms.

See:

Marvin v. Bike Webb Mfg. Co. (1944) 114 Ind. App. 320, 52 N. E. (2d) 360;
Groher v. Colgate-Palmolive Peet Co. (1932), 94 Ind. App. 234, 178 N. E. 242.

A further indication that expenditures made in co-operating with a federal program is a valid public purpose in the eyes of the legislature is contained in Chapter 153 of the Acts of 1943, which creates a fund and specifically authorizes its use in cooperation with the federal government in the field of civil defense.

In Coffman v. Keightley, (1865) 24 Ind. 509, it was held that the payment of bounties to secure enlistments in the United States Army is a proper expenditure for a public purpose. Whether the money be paid as a bounty or for administrative expenses would appear to be immaterial. In either event the money is spent for the purpose of assisting in the war effort and, under this decision, that is a public purpose for which the state can expend money even though the war power is lodged in the federal government. I fail to find any direct authority on the item for Christmas cards, but there would seem to be considerable doubt that such an expenditure would be for a public purpose.

It is my opinion, therefore, that the federal government would have been liable for all expenses of the selective service system in this state if compliance had been had with the selective service regulations governing the payment of such expenses, and that the state was under no legal obligation to provide the property and services which it did. Yet, the payment of such items by the Governor under the broad powers granted to him in the administration of his contingent funds fixed the liability of the state and such failure to comply with the applicable federal regulations concerning travel, procurement of supplies and furnishing of services prevents the reimbursement of such items by the federal government in the absence of congressional action authorizing such recovery.