You have informed me that the Indiana State Police Department has requested special funds for riot control personnel, equipment and training so that it will be better able to meet potential threats to the public safety. You then asked the following questions:

"Does the Governor have the authority to draw from the unappropriated surplus of the State General Fund sufficient moneys to meet emergency needs affecting the public security?"

"If so, would the needs of the State Police Department qualify if in the opinion of the Governor they do constitute emergency requirements for the proper functioning of the police powers of the State of Indiana?"

The answer to your first question must be somewhat general. Article 10, § 3, of the INDIANA CONSTITUTION reads as follows:

"No money shall be drawn from the Treasury, but in pursuance of appropriations made by law."

This section of the Constitution has been strictly upheld by the judiciary, to the extent that the General Assembly may
not make a valid appropriation by joint resolution, but must make appropriations by passage of an act, *May v. Rice*, 91 Ind. 546 (1883).

As I recently advised you informally concerning an abortive "open-ended" appropriation for the Legislative Council, the Supreme Court has interpreted Art. 10, § 3 of the Constitution as follows:

"It is clear that under the present constitution, and, perhaps as fully under that which preceded it, the power to raise revenue and to control the disposition thereof after it is raised, is vested in the legislative branch of the government." *State ex rel. Board of Commr's v. Ristine*, 20 Ind. 345, 352 (1863).

"And the abuse to be corrected by the establishment of the principle, was the exercise of official discretion in paying out the public money. The purpose to be accomplished, was the giving to the legislative power alone the right, of designating, periodically, the particular demands against the State, or other objects, to which the moneys in the treasury shall be, from time to time, applied, and the amount to each." *Ristine v. State ex rel. Board of Comm'r's*, 20 Ind. 328, 336 (1863).

The Preamble to the Indiana Constitution reads as follows:

"To the end, that justice be established, public order maintained, and liberty perpetuated: WE, the People of the State of Indiana, grateful to ALMIGHTY GOD for the free exercise of the right to choose our own form of government, do ordain this Constitution." (Emphasis added.)

There it is affirmatively stated that a basic reason for the promulgation of our Constitution was the maintenance of public order. Every state has the inherent duty to maintain public order.

"In the performance of its essential function, in promoting the security and well-being of its people, the
State must, of necessity, enjoy a broad discretion. The range of that discretion accords with the subject of its exercise. . . . As the State has no more important interest than the maintenance of law and order, the power it confers upon its Governor as Chief Executive and Commander in Chief of its military forces to suppress insurrection and to preserve the peace is of the highest consequence.” Sterling v. Constantin, 287 U. S. 378, 398-399 (1932). (Emphasis added.)

The Governor of Indiana is the sole executive officer of the State of Indiana, and is charged with the responsibility of executing its laws, Art. 5, § 1 of the INDIANA CONSTITUTION; Tucker v. State, 218 Ind. 614, 690, 35 N.E. 2d 270, 301 (1941).

Article 5, § 12 of the INDIANA CONSTITUTION reads as follows:

“The Governor shall be commander-in-chief of the military and naval forces, and may call out such forces, to execute the laws, or to suppress insurrection, or to repel invasion.”

In the recent case of State ex rel. Branigin v. Morgan Super. Ct., — Ind. —, 231 N.E. 2d 516 (1967) (with which you are, of course, familiar), the Indiana Supreme Court quoted the constitutional sections and statutes which pertain to the Indiana Governor’s power and duty to call out the national guard in cases of emergency:

“The constitution of the State of Indiana specifically cites the division of the powers of the government, the executive power of the state and the judicial power of the state. The pertinent sections are the following:

“ ‘The Powers of the Government are divided into three separate departments; the Legislative, the Executive including the Administrative, and the Judicial; and no person, charged with official duties under one of these depart-
ments, shall exercise any of the functions of another, except as in this Constitution expressly provided.' Art. 3, § 1, Ind. Const.

" 'The executive power of the State shall be vested in a Governor. . . .' Art 5, § 1, Ind. Const.

" 'The Governor shall be commander-in-chief of the military and naval forces and may call out such forces, to execute the laws, or to suppress insurrection, or to repel invasion.' Art. 5, § 12, Ind. Const.

" 'The militia shall consist of all able-bodied male persons, between the ages of eighteen and forty-five years, except such as may be exempted by the laws of the United States, or of this state; and shall be organized, officered, armed, equipped, and trained, in such manner as may be provided by law.' Art. 12, § 1, Ind. Const.

" 'The Governor shall appoint the Adjutant, Quartermaster and Commissary Generals.' Art. 12, § 2, Ind. Const.

" 'All militia officers shall be commissioned by the Governor, and shall hold their offices not longer than six years.' Art. 12, § 3, Ind. Const.

" 'The General Assembly shall determine the method of dividing the militia into divisions, brigades, regiments, battalions and companies, and fix the rank of all staff officers.' Art. 12, § 4, Ind. Const.

" 'The militia may be divided into classes of sedentary and active militia, in such manner as shall be prescribed by law.' Art. 12, § 5, Ind. Const.

" 'The judicial power of the State shall be vested in a Supreme Court, in Circuit Courts
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and such other courts as the General Assembly may establish.’ Art. 7, § 1, Ind. Const.

“Moreover Burns’ Ind. Stat. Ann. § 45-2104 reads as follows:

‘It shall be the duty of the governor and he is authorized and required, in case of war, invasion, insurrection, public disaster, or breach of the peace or imminent danger thereof or any forcible obstructing of the execution of the laws or reasonable apprehension thereof, and at all other times he may deem necessary, to order on state duty the National Guard or any part thereof. No member thereof who shall be ordered out for such duty shall be liable for civil prosecution for any act done by him in the discharge of his military duty on such occasion.’ (Emphasis added.) Ind. Acts 1953, ch. 187, § 404, Burns § 45-2104.” 231 N.E. 2d at 518.

In that case, it was argued that a statute which forbade the muster of the national guard on election days, Acts 1953, ch. 187, § 416, Burns § 45-2116, applied to the Governor’s call of the guard. The court first decided that that section was not intended by the Legislature to apply to the Governor. The Court then stated:

“Any interpretation of Burns § 45-2116 which made it apply to the Governor would make the statute an attempt by the Legislature to limit the power given to the Governor by Article 5, § 12 of the Indiana Constitution, quoted supra, which confers on the Governor the power and discretion to ‘call out such forces [military and naval forces], to execute the laws, or to suppress insurrection, or to repel invasion.’

“Such an attempted infringement by the legislative branch of the government on the constitutional power of the executive would be repugnant to the doctrine of separation of powers as stated in Article 3, § 1, of the

"The same may also be said of any attempt by the courts to infringe on the Governor's executive power. The power, duty, and the discretion to manage the military forces of the state are given to the Governor by the Constitution and not to the courts." 231 N.E. 2d at 519.

Thus, it is apparent that neither the Legislature nor the courts can interfere with your performance of the constitutional duties imposed upon you to execute the laws, to suppress insurrection, and repel invasion. It is also apparent that the General Assembly has recognized the powers conferred upon you and has passed legislation to implement those powers.

The Court in the State ex rel. Branigin case definitely decided that no court of equity may issue an injunction against the Governor's exercise of his discretion in determining whether or not an exigency exists which requires the use of the military forces. However, the Governor's power is not entirely absolute. The case of Cox v. McNutt, 12 F. Supp. 355 (S. D. Ind. 1935) (quoted in the State ex rel. Branigin case), and the case of Griffin v. Wilcox, 21 Ind. 370 (1863), both indicate that the Governor's decision to call out the guard and to suspend civil laws can be reviewed by the courts after the fact. See also Sterling v. Constantin, 287 U. S. 378 (1832). The Griffin case involved the war powers of the President of the United States rather than powers of the Governor of Indiana. However, the court, after conceding a government's right to exercise martial law, limited by a Constitution, defined that law as follows:

"It is the law of force, applied to govern persons and places where the civil law is expelled; its officers rendered unable to execute it, by forcible resistance. The right, thus temporarily and locally to exercise martial law, in case of necessity, is the war power of the Governor of a State and of the President of the United States, and it is all the war power that either possesses by virtue of which he can assume to govern
independently of the civil law; and this war power, each executive usually exerts through his subordinate military officers.” 21 Ind. at 380.

The court held, in that case, that there had been no forcible resistance to the government or civil power in the City of Indianapolis, and therefore, the attempt of the President of the United States, through his military officers, to declare and enforce martial law in that city, was invalid.

In the case of Cox v. McNutt, the federal court more definitely spelled out the range of the Governor’s discretion:

“‘The nature of the power also necessarily implies that there is a permitted range of honest judgment as to the measures to be taken in meeting force with force, in suppressing violence and restoring order, for, without such liberty to make immediate decisions, the power itself would be useless. Such measures, conceived in good faith, in the face of the emergency, and directly related to the quelling of the disorder or the prevention of its continuance, fall within the discretion of the executive in the exercise of his authority to maintain peace.’” 12 F. Supp. at 359, quoting Sterling v. Constantin, 287 U. S. 378 (1932), and, in turn, quoted with approval in State ex rel. Branigin V. Morgan Super. Ct., 231 N.E. 2d at 521.

I have detailed, at some length, your constitutional powers and the limitations upon them, because I am aware that you, with the Governors of all of the other states of the United States, are presently faced with a situation in which you must be prepared to meet at any moment the type of emergency delineated in the Indiana Constitution. The fact that you have been forced to use those powers on one occasion, and that your use of such emergency powers did maintain public order, points up the fact that you may be called upon to use them again. And, of course, if you are, the question immediately arises — where does the money come from to pay the troops, to pay for their equipment, etc.

There are two current appropriations of specified amounts to the Adjutant General, Acts 1967, ch. 298, § 2, at pp.
1009-1010 of the 1967 Acts. The following additional fund is appropriated at p. 1011:

"FOR THE GOVERNOR'S CIVIL AND MILITARY CONTINGENT FUND

"Total Operating Expense

75,000  75,000

"PROVIDED, That if any part of the foregoing contingent appropriation for the fiscal year 1967-1968 is unexpended on June 30, 1968, then such unexpended balance shall not revert to the General Fund but shall be carried forward as an appropriation for the fiscal year 1968-1969 in addition to the appropriation made for the fiscal year 1968-1969."

By operation of section 8 of the 1967 Appropriations Act, at pp. 1078-1079 of the 1967 Acts, your Civil and Military Contingent Fund is appropriated in lieu of the appropriation in The Indiana Military Code, Acts 1953, ch. 187, § 701, Burns § 45-2401, of $75,000.00 as a fund for military purposes, to be set aside from the general fund of the State otherwise unappropriated on the first day of January annually. The Military Code does, however, specify the uses for which that Fund was intended:

"The military fund shall remain in the state treasury, and shall be drawn on the warrant of the governor for such expenses as may accrue under this law, and to pay the expenses of all encampments ordered or approved by the governor, inspections, courts-martial, boards of inquiry, inspection, examination and survey, pay of officers and soldiers, on state active duty." (Emphasis added.) Military Code, section 702, Burns § 45-2402.

A portion of the Department and Institutional Contingency Fund and the Department Contingency Fund for Equipment appropriated to the State Budget Agency by section 2 of the 1967 Appropriations Act, at p. 1069 of the 1967 Acts, could also be allocated, with your approval, for emergency purposes. See 1968 O.A.G. p. 99, supra.
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It is conceivable that an emergency could arise after all of the above funds are exhausted. The question then would be presented: Is it your duty to let a riot rage unchecked because the specific dollar appropriations to pay expenses are exhausted, or do you have authority to draw money from the unappropriated surplus to pay expenses necessary to quell the riot? Phrasing the question thus removes any doubt about your power and responsibility in the matter. Under such circumstances, you may withdraw the required funds.

Furthermore, I believe that the Legislature, without using the word "appropriation," or specifying a dollar amount, has made an appropriation of any money necessary for your exercise of the power to call out the National Guard of Indiana.

In Orbison v. Welsh, 242 Ind. 385, 179 N.E. 2d 727 (1962), the Supreme Court defined an appropriation:

"This Court has heretofore stated that no particular form need be followed in the making of an appropriation nor is it necessary that any particular language or words be used. The Legislature must merely indicate the purpose for which the money is to be used, the source from which it is to come, and indicate in some manner either the sum to be used or a method of ascertaining a maximum that may be used." (Emphasis added.) 242 Ind. at 403, 179 N.E. 2d at 736.

The Court earlier made the following statement:

"It may be said generally, that a direction to the proper officer, or officers, and pay money out of the treasury on a given claim, or class of claims, or for a given object, may, by implication, be held to be an appropriation of a sufficient amount of money to make the required payments." Campbell v. Board of Commr's, 115 Ind. 591, 594, 18 N.E. 33 (1888).

That case and Board of State House Comm'r's v. Whitaker, 81 Ind. 297 (1882), decided that a direction to officers
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to build a structure costing no more than a specified amount carried with it by implication an appropriation of the additional amount necessary to pay for expenses incurred.

The Legislature has given you the duty, as well as the right, to call out the National Guard in case of insurrection, public disaster or breach of the peace, or imminent danger thereof, or any forcible obstructing of the execution of the laws, or reasonable apprehension thereof, Indiana Military Code, section 404, Burns § 45-2104. It has further provided that the pay and allowances for officers and enlisted men while in active service of the state shall be the same as those of equivalent officers and enlisted men in the United States armed forces in 1953, subject to adjustment by the Adjutant-General (with the approval of the Budget Agency) to meet any increases or decreases in pay for the United States armed forces. Indiana Military Code, section 417, Burns § 45-2117. The Adjutant-General is authorized to purchase property under the Governor’s direction, Indiana Military Code, section 206(7), as last amended by Acts of 1967, ch. 192, § 1, Burns § 45-1906(7). Since you have thus been directed by both the Constitution and the General Assembly to perform a specific duty—preserve order during emergencies—and the General Assembly has ordered that specific classes of claims be paid—pay and allowances of National Guard members on active duty, and claims for property for the use of those members—it is my opinion that an appropriation of the amount required has been made by the General Assembly. Since the Governor’s discretion in determining the existence of an emergency is not absolute, the appropriation is of an ascertainable amount, i.e., that amount necessary to prevent or quell the disturbance.

Further, the state guard which you are authorized by the Military Code to organize and maintain when the National Guard is called to active federal duty is to be paid from “any appropriation hereafter provided.” Indiana Military Code, section 815, Burns § 45-2515. However, “This section shall relate only to drill and instruction pay and does not apply to payroll for active duty.” You are also authorized to permit such forces to use “available” state property and pre-
mises, section 804, Burns § 45-2504. The Adjutant-General is to determine and pay for the expenses necessarily incurred in carrying out the provisions concerning the state guard, Code section 803, Burns § 45-2503. Thus, it appears that the General Assembly believed that funds were appropriated and available for active duty pay of the state guard in emergencies.

In summary, it is my opinion that, in the case of emergencies for which the Indiana Constitution authorizes you to call out the National Guard, pursuant to your absolute constitutional duty to execute the laws of the State of Indiana, Art. 5, § 1, coupled with the legislative direction to pay a certain class of claims (i.e., for pay of National Guardsmen on active duty and for the purchase of military property), there is, when necessary, an appropriation from the otherwise unappropriated surplus of the General Fund of the amount of money necessarily expended.

Now, with this prologue, let us look to the posture of the Indiana State Police in these emergencies. The State Police Department was created by Acts 1945, ch. 344, which may be found in Burns §§ 47-846 to 47-869. Section 10, Burns § 47-855, which prescribes the powers of the department and its officers and police employees, reads in part as follows:

“They shall be subject to the call of the Governor, and the Governor may, from time to time, assign to the department such other police duties as the executive department may deem advisable or necessary, including the duties now performed by deputy fire marshals. They shall have full power to arrest, without warrant, any person committing or attempting to commit in their presence or view a breach of the peace or any other violation of any of the laws of the State of Indiana. And, under order of the superintendent, they are empowered to cooperate with any other department of the State of Indiana or with local authorities. They shall not exercise their powers within the limits of any city in labor disputes, nor to suppress rioting and disorder except by direction of the Governor, or upon the request of the mayor of any such city with the approval of the Governor or if the Gov-
Governor is not available, with the approval of the Lieutenant Governor. And without the limits of any city of the state they shall not exercise their power and authority in labor disputes except by direction of the Governor, or the request of the judge of the circuit court of the county with the approval of the Governor or if the Governor is not available, with the approval of the Lieutenant Governor. The control or direction of the officers or members of the department hereby created shall not be transferred or delegated to any other department, commission, agency or officer of the state or any subdivision thereof.” (Emphasis added.)

This section makes it clear that the General Assembly intended that you be authorized to utilize the Indiana State Police as a supplement to, or replacement of, the National Guard in appropriate cases when a true constitutional emergency exists.

The Superintendent of State Police may not exceed the appropriation made by law for the department in his approval of expenditures for expenses of employees and for operation of the department, sections 8 and 9, Burns §§ 47-853 and 47-854. The State Police Board is so restricted in providing for employee uniforms and equipment, section 7, Burns § 47-852. However, in constitutional emergencies in which exigencies require the use of state policemen to maintain public order, it is my opinion that you may use money from the unappropriated surplus of the State, if necessary, to supply the Indiana State Police with the ammunition and equipment necessary for their use in that emergency.

I do not believe that your powers extend to drawing money for the Indiana State Police from the otherwise unappropriated surplus to purchase equipment or to give training which is required neither by an emergency in existence nor one of which there is imminent danger at the time the money is withdrawn. You may, of course, convene a special session of the General Assembly and request an appropriation for such purposes whenever you believe in your sound discretion
such action is warranted, even though the portents of civil disorder are not clearly visible. As stated by William Shakespeare, "I will arm me, being thus forewarn'd." As chief executive and Commander-in-Chief, the Governor of a state can make necessary preparations to quell civil disorder. If time is not of the essence, it should be done through the normal processes of our tripartite form of government, which would include appropriations of necessary monies by the Legislature. If, however, time is of the essence, and the peril of imminent civil disorder is upon the State, then you as Governor can accomplish the maintenance of public order through any agency of this State by purely executive mandate. This is probably the greatest of the constitutional powers conferred by the people upon the chief executive of this State, and one the steward of this power must exercise with all the wisdom in his possession.

The thrust of your questions does not suggest to me the constitutional exigency which would clearly authorize such expenditure of public funds without action by the Legislature.

Therefore, in my opinion, the funds you indicated have been requested by the Indiana State Police Department for additional personnel, riot training and equipment should not be withdrawn by you from unappropriated surplus of the State general fund unless and until you have determined that an emergency exists or that there is imminent danger thereof, within the purview of Art. 5, § 12 of the Indiana Constitution, and that such emergency or imminent danger necessitates the requested expenditures.