Honorable Harold W. Handley  
Governor of Indiana  
206 State House  
Indianapolis 4, Indiana  

My Dear Governor:

This is in answer to your question which reads as follows:

“A question has arisen as to the Governor’s authority to fill a vacancy resulting from a resignation in the office of City Judge in Goshen, Indiana. Michigan City, Hammond, Logansport, Richmond, Kokomo, Terre Haute, Anderson, Bloomington, and New Albany are cities which, during the past twelve years, have had vacancies in the office of City Judge. Such vacancies have been filled by appointments made by the various Governors holding office at the time. There seems to be some confusion as to whether or not a vacancy in a City Judge should be filled by the Mayor in the city involved or by the Governor.”

In the classification of Indiana cities as shown in the “Roster of State and Local Officials, State of Indiana, 1956,” compiled by the State Board of Accounts, I find the cities listed in your letter are given the following classifications:

<table>
<thead>
<tr>
<th>Second</th>
<th>Third</th>
<th>Fourth</th>
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<tbody>
<tr>
<td>Hammond</td>
<td>Michigan City</td>
<td>Goshen</td>
</tr>
<tr>
<td>Richmond</td>
<td>Logansport</td>
<td></td>
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<tr>
<td>Kokomo</td>
<td>Bloomington</td>
<td></td>
</tr>
<tr>
<td>Terre Haute</td>
<td>New Albany</td>
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<tr>
<td>Anderson</td>
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It is important to remember this difference of classifications in the consideration of the question which you have asked. All of the cities listed above, where the Governor has made appointments of a city judge in the past, have been cities of the second or third classes. Goshen is a city of the fourth class.

It should be further noted that in cities in the second class and cities of the third class, the city judge is an elective office. Provision is made for such election in second class cities by
Acts of 1943, Ch. 274, Sec. 7, as amended, as found in Burns’ (1957 Supp.), Section 48-1215c, and in third class cities by Acts of 1933, Ch. 233, Sec. 6, as amended, as found in Burns’ (1950 Repl.), Section 48-1216.

In connection with cities of the second and third class, listed above, it is well to note the provision of the Acts of 1905, Ch. 129, Sec. 45, as amended by the Acts of 1909, Ch. 188, Sec. 2, as found in Burns’ (1957 Supp.), Section 48-1246, which reads, in part, as follows:

“In the event of a vacancy occurring in an elective office of any city except the office of mayor or councilman and city judge, by reason of death, resignation or other causes, or in case of disability of any such officer to perform the duties of his office, it shall be the duty of the mayor or acting mayor to fill such vacancy by appointment for the unexpired term, subject to the approval of the common council. In case of a vacancy in the office of mayor the city comptroller in all cities having such office shall act as mayor: Provided, That such officer while acting as mayor shall not perform any duties as comptroller but shall appoint a suitable person to act as comptroller during such time. In the event of the death, resignation or removal of any city judge, such appointment shall be made by the governor of the state. * * *"

When Section 45 was originally enacted in 1905 the mayor was given the authority to fill all vacancies in elective offices of any city except the office of mayor or city councilman. The Legislature, in 1909, amended this section and removed the power of appointment in the case of city judge from the mayor and specifically placed the authority for the appointment “in the event of the death, resignation or removal of any city judge,” in the Governor of the state, where it remains for elective officers.

The Acts of 1905, Ch. 129, Sec. 80, as found in Burns’ (1957 Supp.), Section 48-1502, which outlines the powers and duties of a mayor, reads in part as follows:

“Sixth. To fill by appointment vacancies for unexpired terms in the offices of such city, except in case of
vacancy in the office of mayor or councilman, as in this act hereinbefore provided.”

In the Acts of 1905, Ch. 129, Sec. 218, as found in Burns’ (1946 Repl.), Section 4-2404, reads as follows:

“In the case of a vacancy in the office of city judge, the mayor shall appoint a successor, who shall hold such office during the unexpired term.”

The constitutionality of Section 218 as found in Burns’ 4-2404, supra, was upheld in the case of the State of Indiana ex rel. Gleason v. Gerdink (1909), 173 Ind. 245, 90 N. E. 70. This case involved the question of who had the authority to fill a vacancy in the office of city judge in the city of Terre Haute. The Supreme Court upheld the authority of the mayor to make this appointment.

The Gleason case makes no reference to Section 45, as found in Burns’ 48-1246, supra. Therefore, I have examined the transcript of the Gleason case in the office of the Clerk of Supreme and Appellate Courts. The record there shows that the appointment to the office of city judge in Terre Haute was made on November 28, 1908; that the Vigo Superior Court sustained the defendant’s demurrer on March 8, 1909, and the plaintiff refused to plead over. It is shown in Burns’ (1953 Repl.), Vol. 12 (Tables), Page 1, that the Acts of 1909 took effect on April 5, 1909. Therefore, at the time the appointment was made in the Gleason case and at the time the decision was made in the Superior Court of Vigo County, the amendment of 1909 was not in effect and the authority of the mayor to make an appointment in the event of a vacancy in the office of city judge was provided by the Acts of 1905, Ch. 129, Sec. 45, supra, as well as by the provisions of Burns’ 4-2404, supra.

The court in the case of State ex rel. Gleason v. Gerdink, supra, recognizes the authority of the Legislature to provide for the filling of vacancies by the use of the following language:

“It thus appears that for fifty years the legislature, without a single exception, has been claiming and asserting its constitutional authority to provide by law
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for the filling of all vacancies that arise in the office of a judge of a city court as well as of all other elective officers of counties, townships, cities and towns. Since this construction was adopted and during its long continuance there have been divers amendments by the people to the Constitution in other respects, but there has been no dissatisfaction expressed, nor effort made to amend in this particular."

In the 1945 O. A. G., page 41, No. 6, the question of the appointment of a city judge for Michigan City was under consideration. Quo warranto proceedings were brought in connection with this same vacancy, as shown in State ex rel. Blieden v. Gleason (1946), 224 Ind. 142, 65 N. E. (2d) 245. The Governor's power of appointment was sustained in this case.

The court in this case of Blieden v. Gleason, supra, stated:

"* * * Section 218 specifically, in a case of a vacancy in the office of city judge, authorizes the mayor to appoint a successor. Section 2 of Ch. 188 of the Act of 1909 just as specifically empowers the mayor to fill all vacancies in city elective offices excepting that of mayor, city judge or city councilman and then authorizes and directs that any vacancy in the office of city judge shall be filled by an appointment from the governor." (Our emphasis)

The court says that in the above case:

"There being an irreconcilable conflict between the three sections, it is now held that §§ 80 and 218 of the Act of 1905, being ch. 129 thereof, are by implication repealed by the Acts of 1909, ch. 188 thereof, in so far as there is conflict in the appointing power to fill vacancies in the office of city judge. Pitzer v. Ind. State Board (1932), 94 Ind. App. 631, 177 N. E. 876."

In my opinion, the effect of the decision in State ex rel. Blieden v. Gleason, supra, is merely to restrict Section 218, as found in Burns' 4-2404, supra, to cases of vacancies where the office of city judge is not elective. Therefore, Section 218, of itself, retains the authority in mayors of fourth class cities
where the office of city judge is not elective, as is the case in the city of Goshen.

However, in addition to the authority given in Burns' 4-2404, supra, there is other specific statutory authority for such appointments by the mayors of cities of the fourth class, in which the office of city judge is not elective.

In this class of cities the powers and duties of city judge shall be held and exercised by the mayor unless he shall choose to be relieved from such duties in accordance with the provisions of the Acts of 1945, Ch. 277, Sec. 1, as found in Burns' (1946 Repl.), Section 4-2614, which provides as follows:

"In cities of the fourth and fifth class, the powers and duties of city judge shall be held and exercised by the mayor, unless he shall choose to be relieved of such duties and shall declare such action at a common council meeting and such declaration shall become a part of the minutes of that meeting as recorded by the clerk-treasurer, in which case the powers and duties of city judge shall be conferred upon a city judge, appointed by the mayor for a period of one [1] year, such city judge to possess the usual qualifications for judge. The salary of such city judge may be fixed by the city council.

"In any such cities, where the mayor acts as city judge, he may receive, for such services, additional compensation as follows: In cities of the fourth class, city council may fix an amount not to exceed nine hundred dollars [$900] per annum and in cities of the fifth class, the city council may fix an amount not to exceed six hundred dollars [$600] per annum."

The Legislature, in the provisions of Burns' 4-2614, supra, clearly outlined the procedure to be followed for the appointment of a city judge in a city of the fourth class which is the class to which the city of Goshen belongs.

In view of the fact that such an appointment is based upon the choice of the mayor to be relieved of his duties as city judge, coupled with the fact that such an appointment is for a definite period of one [1] year, it seems entirely possible that the mayor at the end of one [1] year period, or at the time of
vacancy in the office, could then decide that he would again resume the duties of city judge. At any time thereafter when he should choose to be relieved of such duties, it appears both possible and reasonable that the mayor could again avail himself of the provisions of Burns' 4-2614, supra, and make another appointment for a period of one [1] year and continue to follow such procedure during his term of office.

In conclusion, it is my opinion that the controlling difference between the authority to fill a vacancy in the office of city judge in Goshen, Indiana, as distinguished from such authority in respect to the other cities in your query, will be found in the fact that all of the cities which you mention, and in which the Governor has previously filled such vacancies by appointment, are cities in which the office of city judge is an elective office. Goshen is not such a city. Therefore, the mayor has the power of appointment both under the authority granted in Burns' 4-2404, supra, and even more specifically under the provisions of Burns' 4-2614, supra, which appear clear and unequivocal and, therefore, in my opinion any vacancy in the office of city judge in the city of Goshen should be filled by the mayor in accordance with the provisions of Burns' 4-2614, supra.