> "National banks, such as plaintiffs, may be taxed by a state *only as expressly permitted by Congress.* Iowa-Des Moines Nat. Bank v. Bennett, 284 U.S. 239, 244, 52 S. Ct. 133, 76 L. Ed. 265; First Nat. Bank of Guthrie Center v. Anderson, 269 U.S. 341, 347, 46 S. Ct. 135, 70 L. Ed. 295. Section 5219 of the Revised Statutes of the United States (12 U.S.C. § 548) sets forth the four methods by which a state may tax those banks. *The fourth method, which has been adopted by California,* is to tax them 'according to or measured by their net income.' . . ." (Emphasis added.)

However, the Indiana Sales and Use Tax, as imposed by the Acts 1963 (Spec. Sess.) ch. 30, as found in Burns § 64-2651, *et seq.*, clearly is not one of the permissible taxes which the Congress has stated may be imposed by states upon national banks. Also, as in the case of the New York decision in the case of *Liberty National Bank and Trust Company v. Buscaglia, supra,* the incidence of the Indiana sales and use tax falls directly upon the purchaser so that, with respect to purchases made by national banks, the tax would be directly upon them. Therefore, it is my opinion that the Indiana Sales and Use Tax known as the "State Gross Retail Tax" and the "Use Tax" cannot be validly imposed upon national banks located in Indiana with respect to purchases made by such banks.

OFFICIAL OPINION NO. 5

March 17, 1967

CITY OFFICERS—CITY JUDGE—City of the Fifth Class Creating City Court.

Opinion Requested by Hon. Harry Spanagel, State Representative.

I am in receipt of your recent letter which reads as follows:

OPINION 5

"I respectively request your opinion on the following question.

"Sec. 48-1219, Burns Statute, Vol. 9 page 1, 1963 Replacement, provides that Cities of the Fifth class may, on or before the first day of May of the year in which elections of City Officers are held, create the Office of City Judge.

"Sec. 4-2615a Burns Statute, Vol. 2 page 2, 1966, Supplement, abolished City Courts in cities of the fourth and fifth class, unless any such city created the office of City Judge prior to May 1, 1959: Provided that City Courts abolished pursuant to this section, may recreate the same pursuant to the provisions of Burns Statute 48-1219, herein before cited.

"Question—can a City of the Fifth class, which had never created the Office of City Judge, either prior or subsequent to the first day of May, 1959, now create this Office?"

The statutes quoted in your letter are but two of a multitude of statutes pertaining to the office of city judge that have at various times been enacted by the Indiana General Assembly. In fact, the legislative history of this office is so rife with amendatory acts, supplementary acts, and original acts that amend or supplement previous acts by implication that confusion is almost inevitable. Therefore, even though your specific question might not be too difficult to answer in itself, and indeed the answer might be contained in an earlier opinion from this office, 1963 O.A.G., p. 1, it is my belief that an examination of that legislative history might produce a more complete answer to your question and in addition answer a number of additional related questions.

The proper starting point for such an historical review would be Acts 1905, ch. 129, entitled "AN ACT concerning municipal corporations". Section 215 of that act the same being Burns § 4-2401, provides in part:

"The judicial power of every city of the first, second, third and fourth classes shall be vested in a city

> court. The officers thereof shall be a judge, a clerk and a bailiff, except that, in cities of the third and fourth classes, the judge of such court shall act also as clerk and shall perform all duties, so far as applicable, hereinafter prescribed for the clerk of such court. . . . Provided, That, in cities of the fifth class, the mayor shall exercise all the powers and be required to perform all the duties herein provided for city judges, in so far as the same are applicable. . . ."

The following sections of the Act provide for the election of city judges, specify the power and jurisdiction of such judges, and establish a procedure for the operation of city courts.

During the next twenty-eight years a number of acts relating to city courts, and therefore affecting the provisions of the 1905 Act, were adopted by the General Assembly. Among such acts are: Acts 1909, ch. 5, § 5, same being Burns § 4-2613, which provided that if a city of the third class did not have a city judge the mayor should perform the duties of the city judge; Acts 1925, ch. 194, § 27, same being Burns § 4-2527, which abolished city courts in cities of the first class located in counties containing a municipal court; Acts 1917, ch. 77, as found in Burns §§ 4-2601 through 4-2612, which by its terms was intended to supplement the 1905 Act in relation to city courts in cities of the second, third and fourth classes; Acts 1921, ch. 215, as found in Burns §§ 4-2701 through 4-2707, which also declared itself to be supplemental to earlier acts and which was primarily concerned with city courts in cities of the second class; Acts 1923, ch. 52, as found in Burns §§ 4-2801 through 4-2810, which also declares itself to be supplemental and which is solely concerned with city courts in cities of the fourth class located in townships having certain characteristics so well defined that the Act in fact applied only to the City of Whiting, Indiana.

The Acts cited in the preceding paragraph are not directly relevant to your question, but they do illustrate the plenitude of statutes on this subject.

In 1933 the General Assembly enacted legislation eliminating much of the confusion. Acts 1933, ch. 233, § 8, provides in part:

> "The elective officers of cities of the fifth class shall consist of a mayor, a clerk-treasurer and members of the common council as hereinafter provided. Such officers shall be elected in accordance with provisions of laws now in effect except as herein provided.
>
> "In such cities the mayor shall act as city judge and the duties now provided by law for city judge shall devolve wholly upon the mayor. The salary herein provided for mayor shall be in full for all services performed by him as mayor and for acting as city judge."

Section 7 of the Act made identical provisions for cities of the fourth class. Sections 5 and 6 provided for the elective office of city judge in cities of the second and third class respectively. The Act made no provisions for a city judge in cities of the first class, thereby effectively eliminating such an office.

The 1933 Act removed all confusion as to whether a city would have a city judge as to who would exercise the functions of that office. However, later Legislatures changed that situation.

Acts 1945, ch. 277, as found in Burns §§ 4-2614, 4-2615, provided that in cities of the fourth and fifth class the mayor could decline to act as city judge and appoint a city judge to perform the functions of that office. Strangely enough, that Act specifically exempted city courts existing under Acts 1923, ch. 52, referred to above. As a result, the mayor of the City of Whiting was not able to appoint a city judge. See 1951 O.A.G., p. 29. The General Assembly then in session either was already aware of the anomaly or responded with unusual haste to the Attorney General's Opinion. The Opinion was issued on February 12, 1951, and on February 19, 1951, the Governor approved House Bill 108. That Bill became Acts 1951, ch. 26, the same being Burns § 4-2811. That Act created the office of city judge, to be filled by election, in cities of the

fourth and fifth class that satisfied criteria so strict as to eliminate all but the City of Whiting.

The situation was again getting out of hand. The law was that in all cities of the fourth and fifth class the mayor was to be city judge unless he declined to serve as such, in which event he appointed a city judge. His successor in office as mayor had the opportunity to make the same decision, except, of course, for the City of Whiting where the mayor had no option and a city judge was elected.

In the meantime, Acts 1933, ch. 233, § 8, had been amended by Acts 1949, ch. 26, § 1, and was later amended by Acts 1955, ch. 346, § 1. These amendatory Acts were concerned with the composition of the common council in cities of the first class and did not alter the provisions relating to city judge. Therefore, the independent intervening acts relating to city judges were still controlling. See 1949 O.A.G., p. 341.

The general Assembly moved to eliminate that confusion by adopting Acts 1959, ch. 107. Section 4 of that Act further amended Section 8 of the 1933 Act so as to cause that section to read in part:

> "In all cities of the fifth class the elective officers shall be:
>
> "(1) The mayor;
>
> "(2) The clerk-treasurer;
>
> "(3) The members of the common council; and
>
> "(4) The city judge.
>
> Such officers shall be elected in accordance with the provisions of the state election laws.
>
> "The provisions of this section shall not be construed as creating the office of city judge in cities of the fifth class: Provided, That any city of the fifth class may, by proper ordinance of the common council passed and adopted on or before the first day of May of the year in which elections of city officers are held, create the office of city judge: Provided further, That the mayor of any city of the fifth class shall be ineligi-

> ble to hold the office of city judge during the tenure of his office as mayor."

Section 3 of the 1959 Act amended Section 7 of the 1933 Act so as to make identical provisions for cities of the fourth class.

The statute above is Burns § 48-1219, one of the two statutes set out in your letter.

This portion of the 1959 Act plainly does two things:

1. It prohibits the mayor of any city of the fifth class from acting as city judge;

2. It places the decision as to whether any given city of the fifth class should have a city judge, and therefore a city court, in the hands of the common council of that city, and provides the manner in which they are to effectuate their decision.

Section 3 of the 1959 Act accomplishes the same purposes in relation to cities of the fourth class.

Although making the above specific provisions in relation to city judges in cities of the fourth and fifth classes would tend to organize and settle the law in this area, there were still in existence in each and every city of the fourth and fifth class city courts established by prior legislative actions. Some measure then had to be taken that would permit the common councils of the various cities to determine whether they wished to continue having a city court in their city, and that would furnish the courts that were to be eliminated sufficient time to terminate their affairs. This problem was solved by § 7 of Acts 1959, ch. 107, which added a new section to the 1933 Act. This new section, as found in Burns § 4-2615a, is the other statute referred to in your letter and it provides:

> "On January 1, 1960, the city courts in all cities of the fourth and fifth class shall be abolished unless the common council of any such city has by ordinance, duly enacted on or before the first day of May, 1959, created the office of city judge: Provided, That the city court

in any city of the fourth and fifth class, abolished pursuant to the provisions of this section, may be recreated by the enactment of an ordinance creating the office of city judge pursuant to the provisions of section 8 of this act."

To evaluate fully this section of the Act, two other factors must be considered:

1. Acts 1959, ch. 107, § 11, declared an emergency and made the Act in effect from and after its passage; the Act was approved March 10, 1959;

2. The year 1959 was a year in which city elections were to be held. See Acts 1945, ch. 229, § 1, the same being Burns § 29-4312. This meant that the term of office of those persons presently exercising the judicial power in cities of the fourth and fifth classes would terminate on December 31, 1959, and it further meant that if the common council provided for the continuance of the city court by an ordinance enacted on or before the first day of May, 1959, as required by § 5 of the 1959 Act, they would simultaneously be creating the office of city judge by an ordinance adopted on or before the first day of May of the year in which elections of city officers are held, as required by §§ 3 and 4 of the 1959 Act.

The 1959 Act, then, was the source of both the statutes cited in your letter, and both statutes were necessary to accomplish the intent of the Legislature. Section 4 was intended to and did place the decision as to whether the city should have a city judge in the hands of the common council of the city and also provided the means to effectuate the decision; section 5 was intended to and did provide for the orderly termination of those courts previously established by the Legislature or, alternatively, for a proper method of changing an established court from one created by the Legislature to one created by the common council.

An earlier Opinion from this office, 1963 O.A.G., p. 1, held that the right granted common councils of cities of the fourth and fifth class to create the office of city judge, or to abolish that office, is a continuing right that may be exercised as oft-

en as, in the opinion of the common council, the public interest may demand.

Therefore, in answer to your specific question as to whether a city of the fifth class which had never created the office of city judge may now create that office, it is my opinion that the common council of any city of the fourth or fifth class may either create or abolish the office of city judge by an ordinance duly enacted on or before the first day of May of any year in which city elections are to be held regardless of the prior existence or non-existence of that office in that city.

OFFICIAL OPINION NO. 6

March 21, 1967

ELECTIONS—Redistricting of Wards by County Commissioners and Town Boards in Preparation for Town Election.

Opinion Requested by State Election Board of Indiana.

This is in answer to your questions concerning House Enrolled Act No. 1851, passed by the 95th General Assembly. As you noted, that original Act applies to any town in Lake County having a population of more than ten thousand according to the last preceding United States census. (The question of whether this Act may be special legislation in violation of Art. 4, § 22 of the Constitution of the State of Indiana is not considered herein.) It provides that the number of trustees shall be seven and no more, that the town shall be divided into five wards of equal population, with one trustee elected from and by the electors of each ward and two elected at large. Section 3 repeals all acts and parts of acts in