February 22, 1937.

Hon. John R. Page
The Senate
Helena, Montana

Dear Senator Page:

You have submitted to this office an inquiry as to whether or not House Bill 38, now in the Senate, would be a constitutional enactment. The bill provides for a graduated license tax upon chain businesses, with certain exemptions to other chain businesses as to a portion of the taxes. The question to be determined is whether or not the legislature assembly has the power to impose a chain store graduated license tax upon chain businesses, and, if so, whether or not the exemptions from a part of the tax, as provided in Section 5 of the bill, would impair the vadidity of the Act.

Article XII, Section 11 of the State Constitution, provides:

> "Taxes shall be levied and collected by general laws and for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax."

See also Article XII, Section 16 and Article V, Section 26, all having relation to the uniformity of the tax rate and prohibiting special legislation.

The legislature has the right to classify business, and impose a tax upon each class of business but each class of business must be taxed impartially and each classification of business must be based upon some reasonable dictinction and reasonable dissimilarity. Article 1, Section 23 of the Indiana Constitution, provides:

> "The General Assembly shall not grant to any citizen or class of citizens privileges and immunities which upon the same terms shall not equally belong to all citizens. The General Assembly shall provide by law for a uniform and equal rate of assessment and taxation."

It appears that the Constitution of the State of Indiana, is practically the same as our Constitution. In the case of Tax Commissioners v. Jackson, 283 U. S. Rep. 527, at page 537, the court said:

Opinion No. 45.

Taxation—Power of Legislature—Chain Store Tax—Constitution—Classification for tax purpose.

HELD: Legislature may impose a graduated tax upon chain stores, and make such classification of businesses as are not arbitrary for purpose of such tax.

"A very wide discretion must be conceded to the legislative power of the State in the classification of trades, callings, businesses or occupations which may be subjected to special forms of regulations or taxation through an excise or license tax. If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law.

"Our duty is to sustain the classification adopted by the legislature if there are substantial differences between the occupations separately classified. Such differences need not be great."

See also 12 Fed. Supp. p. 761.

From the authority above quoted, it appears to be well settled that the legislature has the power to impose the form of tax as you propose upon chain stores.

In Section 5 of the proposed Act, you restrict the definition of "store" so that it shall not include gasoline stations, lumber yards and grain elevators doing a certain gross business from the operations of certain taxes that will be placed upon the non-exempted chain stores. It is a well settled rule of law, as before stated, that the legislature may impose these graduated license taxes upon chain stores; however, it is also a fundamental law that no part of that class or classification can be discriminated against by exemptions, etc. The entire class must be treated impartially and alike. The question, therefore, to be determined, is whether or not the proposed bill, by the terms of its exemption clause, exempts a part of the same class of business or whether or not gasoline stations, lumber yards, etc., are a business in a different classification and dissimilar to the classification of the non-exempt chain stores.

It has been held in the case of Fox v. Standard Oil Company, 294 U. S. Rep. 87, that chain gasoline stations are subject to a graduated license tax. Whether there is a distinction between the exempted three classes of business as to a portion of the taxes and the non-exempted chain stores, would be a question of fact for the court to determine. It would always be necessary to submit facts to adjudicate and ascertain whether the exempted chains were in the same classification. The legislature may be able to ascertain whether there is a difference, or a different clasification, in the exempted and non-exempted chain businesses as proposed in this bill, and if the legislature enacts this bill as now proposed, there would be a presumption that the exempted businesses were in a different classification than non-exempted businesses. However, it may be a difficult matter to ascertain whether there are two classifications or only one. The language of Judge Sutherland in his dissenting opinion in the case of Tax Commissioners v. Jackson, 283 U. S. Rep. 550, well illustrates this situation. The court said:

"A large number of decisions are cited in support of the act. They, as well as those cited above, demonstrate the impossibility of stating precisely or categorically the distinction between such statutes as fall within, and such as fall without, the ban of the Constitution. The decisions have depended not only upon the varying facts which constituted the background for the particular legislation under consideration, but also, to some extent, upon the point of view of the courts or judges who have been called upon to deal with the question. Some of the cases press to the limit fixed by the Constitution; and that fact, while affording no ground for objection to the cases themselves, admonishes us to use caution in applying them to other sets of substanially dissimilar circumstances, lest, by doing so, we pass into the forbidden territory which lies wholly beyond the verge."

This office believes that the facts would show that the legislature may properly exempt the businesses that it has proposed to exempt and that those businesses proposed to be exempted, from a portion of the tax, occupy a different classification from the non-exempted businesses. For instance, both gas and lumber businesses have a more monopolistic nature, have access to different markets and sell different merchandise than would a chain store engaged in the sale of general merchandise, such as clothing and groceries.

The court held in the case of Tax Commissioners v. Jackson, supra, that the constitutional provisions in the State of Indiana, which are practically the same as in the State of Montana, set no different standard than the Fourteenth Amendment, and that the Indiana Constitution permits classification for purpose of taxation, and that the same principles are applicable as under the Fourteenth Amendment, and that the Indiana constitutional provisions and the statutes thereunder, which you now propose, were not repugnant to the clauses of the Indiana Constitution or the Federal Constitution.

It is, therefore, my opinon that the proposed bill is valid and constitutional.