inally adopted,[4] as requiring the holding of a primary for the purpose of nominating the 36 candidates, and thus prohibiting the certification of the names of those 30 candidates who filed nominating petitions without a primary, stating:

> "The Constitution plainly requires that nominations for certain judicial offices other than justices of the Supreme Court shall be made at nonpartisan judicial primary elections, and nowhere authorizes the legislature to do away with the holding of a nonpartisan judicial primary for the purpose of such nominations. The plain purport of article 7, § 23, is to require the holding of a nonpartisan primary election not only so that the 30 persons mentioned may be voted upon at the primary by electors in designating their choice of nominees, but also that electors may have the opportunity, by proper procedure, to vote for the direct nomination of others as nominees for the office of circuit judge; and thus have printed on the ballots for use at the April election the names of 36 candidates if nominated, which may or may not include the names of all of the 30 persons whose petitions have been filed with the secretary of State."

The decision in the *Ranney* case makes it clear that the holding of the primary election is not tantamount to election to the office and that the subsequent general election must be held in order to elect a nominee to the office. It must follow that the election of December 9, 1963 was required to be held in order to elect a justice of the peace in the city of Hancock.

FRANK J. KELLEY,
Attorney General.

640401.2

ATHLETIC BOARD OF CONTROL – Members of.
PUBLIC OFFICERS: Removal.
GOVERNOR: Power to remove appointed officer without cause.

Under section 3, Act 205, Public Acts of 1939, as amended, the Governor may lawfully remove one or more members of the Michigan State Athletic Board of Control without assigning cause therefor.

No. 4282 April 1, 1964.

Hon. George Romney
Governor
Lansing, Michigan

You have requested my opinion concerning the right of the Executive to remove members of the Michigan State Athletic Board of Control.

[4] Article VII, Section 23 was amended following the *Ranney* decision, which amendment was proposed by joint resolution of the 1947 legislature, and ratified at the election held on April 7, 1947, so as to contain provisions similar to those of section 540 of the Michigan election law. Article VII, Section 23 was later amended by an amendment ratified at the election held April 4, 1955.

Act 205, P.A. 1939, as amended (M.S.A. and M.S.A. 1963 Cum. Supp. § 18.422(1), et seq.; C.L. 1948 and C.L.S. 1961 § 431.101, et seq.), creates the Michigan State Athletic Board of Control. Section 2 of the original act provided for the appointment by the Governor of a State Athletic Commissioner and four other persons as "advisory members thereof," the commissioner to be appointed for a term of four years, and the other members for terms of four, three and two years and one year, respectively, with all appointments thereafter by the Governor to be for a term of four years, except where vacancies are to be filled for the unexpired terms.

Section 3 as originally enacted states that: "Members of the board may be removed by the governor at will without any cause assigned therefor."

Act 100, P.A. 1957,[1] amended section 1 by increasing the number of "advisory members" to five and further added that they were to be appointed by the Governor, "by and with the advice and consent of the senate." The same 1957 act also amended section 2 of the original act, repeating some of the amendatory language in section 1 and added that one of the appointive members shall reside in the upper peninsula. Section 3 was not amended.[2]

The question for consideration is the right of the Executive to remove an appointee without cause in the face of the statutory language providing for appointment of advisory members for "a term of four years."

The rule has been stated as follows:[3]

> "The authorities generally support the rule that, in the absence of a constitutional provision prescribing the manner of removing the officer in question, or requiring that there be cause as a condition of such removal, a statute specifying the number of years for which an officer shall hold office, and expressly providing that he may be removed without cause, authorizes his summary removal at any time within the designated term."

While it appears to be the policy of the state that officers should hold for fixed terms, in the absence of constitutional provision to the contrary the legislature may confer power to remove appointed officers without cause. *Trainor v. Board of Auditors of Wayne County* (1891), 89 Mich. 162.

The Michigan Supreme Court in 1939[4] had before it the question of whether an appointing authority may remove an appointee without assigning cause. The statute involved therein provided that a probate judge may appoint a probate register "who shall hold such office during the term for which the judge of probate making the appointment shall have been elected, unless sooner removed by the judge of probate." (p. 244). After discuss-

[1] C.L.S. 1961 § 431.101; M.S.A. 1963 Cum. Supp. § 18.422(1).

[2] Section 8.3u, C.L.S. 1961 [M.S.A. 1961 Rev. Vol. § 2.212(21)], to the extent pertinent reads: "The provisions of any law or statute which is reenacted, amended or revised, so far as they are the same as those of prior laws, shall be construed as a continuation of such laws and not as new enactments." See, also, *Perry v. Hogarth*, 261 Mich. 526 at 530.

[3] 119 A.L.R. 1438.

[4] *Chamski v. Wayne County Board of Auditors*, 288 Mich. 238.

ing earlier cases which were concerned with statutes giving no express power of removal, the court said (p. 250):

> "It is generally held that unrestricted power of removal expressed in a statute gives authority to dismiss without assigning any cause." (citing several cases).

The court finally stated as follows (p. 252):

> "Offices created by the Constitution and having a definite term cannot be vacated before the expiration thereof without a trial of some sort; but the legislative office or offices created by the legislature may be filled, vacated, or abolished as the legislature may prescribe. Cooley, Constitutional Limitations (3d ed.), p. 312; 1 Dillion, Municipal Corporations (3d ed.), §§ 245, 250."

The Supreme Court of Delaware[5] had before it a similar matter as is dealt with here. A Delaware statute creating an Industrial Accident Board provided for the appointment of the members on a staggered basis and thereafter for six-year terms each. The statute gave the authority to the Governor to appoint and also stated that: "The Governor may remove any member of said board with or without cause. * * *." The Governor did remove more than one member of the board at one time without a hearing and without assigned reason. In the course of its opinion the Delaware Supreme Court said:

> "The provisions that the terms shall be for six years and that the Governor may in substance summarily remove a member of the Board at any time before the expiration of the six year period, are reasonably capable of reconciliation. * * *.
>
> "Taking the two provisions together may it not be reasonably said that, notwithstanding the literal language and the form in which the six year clause is expressed, the *intention* of the legislature as shown by the removal clause was that members of the Board should hold office for six years unless sooner removed by the Governor, or, putting the thought in another and clearer way, that they should hold their offices during the pleasure of the Governor but in no event longer than six years? The difference between saying 'for six years, but the Governor may remove' and 'during the pleasure of the Governor but for not longer than six years,' is a difference only in manner of expressing the same fundamental thought which is that the term shall be an indeterminate and indefinite one not exceeding in any event the period of six years."

It is true that section 2 of the act, as amended by Act 100, P.A. 1957, requires the advice and consent of the Senate to complete the appointment of the advisory members of the Michigan State Athletic Board of Control. However, the power of removal set forth in section 3 is in no way affected. Once the Senate confirms an appointee to the said board and the commission of appointment has issued, it no longer has any function until such time as another appointment or reappointment is made.

[5] *Collison v. State, ex rel. Green*, 39 Del. 460, 473, 474 (1938), 2 Atl. (2d) 97, 103; 119 A.L.R. 1422, 1430, 1431.

The removal of an appointed state officer whose appointment was subject to the consent of the Senate was upheld in *Beasley v. Parnell* (1928), 177 Ark. 912, 9 S.W. 2d 10, where the statute was construed by the court to allow the Governor to remove the incumbent by appointing a successor before the expiration of the term. See, also, *Stadler v. Detroit* (1865), 13 Mich. 346.

The people have expressly empowered the Governor, in accordance with section 10 of Article V of the Michigan Constitution of 1963, to remove or suspend from office for reasons enumerated therein any elective or appointive state officer except legislative or judicial. Consideration should also be given to section 3 of Article V. After the allocation of offices, agencies and instrumentalities within not more than 20 principal departments, as specified in section 2 of Article V, Michigan Constitution of 1963, the procedure for removal of the members of a board or commission who serve upon the board or commission as the head of a principal department is to be in accordance with the Constitution or as prescribed by law as specified in section 3, Article V.

It is clear that section 2 and section 3 of Article V are not applicable here.

In my opinion Act 205, P.A. 1939, as amended, authorizing the Governor to remove members of the board at his will and without any assigned cause, is not repugnant to section 10 of Article V of the Michigan Constitution of 1963 and therefore continues in effect pursuant to section 7 of Article III of the same Constitution.

Therefore, the Governor may remove one or more members of the board without assigning cause therefor in accordance with section 3 of the statute.

FRANK J. KELLEY,
Attorney General.