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FRANK J. KELLEY,
Attorney General.

641103.1

PUBLIC OFFICES AND OFFICERS: Disapproval of appointment.
CONSTITUTIONAL LAW: Session day defined.

The day that the legislature convenes in regular and special session and the day the legislature adjourns the regular or special session without day, and all intervening days, including Sundays, are "session days" within Article V, Section 6 of the Michigan Constitution.

Where an appointment to fill a vacancy in public office requiring advice and consent of the senate is made while the senate is in session, and the legislature adjourns without date before the senate disapproves the appointment or 60 session days have elapsed, an interim appointment can be made and the appointee can assume office upon filing of his oath.

"60 session days" as set forth in Article V, Section 6 of the Michigan Constitution of 1963 includes all regular and special session days but of one legislature only.

No. 4329

November 3, 1964.

Hon. George Romney
Governor
State Capitol
Lansing, Michigan

You have requested my opinion on the following questions:

1. What is the meaning of the words "session day" as they appear in Article V, Section 6 of the Michigan Constitution of 1963?
2. Where the governor makes an appointment while the legislature is in session and the legislature adjourns sine die without taking action on it and 60 session days have not run, can the governor make an interim appointment and does the appointee take office immediately?
3. Does the period "60 session days" found in Article V, Section 6 include special sessions and does it carry over from one session to another and one legislature to another?

1. Under the Michigan Constitution of 1908 the people provided in Article VI, Section 10 as follows:

"Whenever a vacancy shall occur in any of the state offices, the governor shall fill the same by appointment, by and with the advice and consent of the senate, if in session."

The Attorney General has ruled that when the senate is in session, one nominated to fill a vacancy is not entitled to assume the office to which

he was appointed unless and until confirmation by the senate was had. OAG 1951-52, page 259.

Thus, under the Constitution of 1908 the law in Michigan was clear that a person appointed by the governor to fill a vacancy while the senate was in session was not entitled to assume office unless and until confirmation was had by the senate. Upon adjournment of the legislature without action of the senate, such person could receive an interim appointment.

Article V, Section 6 of the Michigan Constitution of 1963 provides:

"Appointment by and with the advice and consent of the senate when used in this constitution or laws in effect or hereafter enacted means appointment subject to disapproval by a majority vote of the members elected to and serving in the senate if such action is taken within 60 session days after the date of such appointment. Any appointment not disapproved within such period shall stand confirmed." (Emphasis supplied).

Article V, Section 7 states:

"Vacancies in any office, appointment to which requires advice and consent of the senate, shall be filled by the governor by and with the advice and consent of the senate. A person whose appointment has been disapproved by the senate shall not be eligible for an interim appointment to the same office."

The resolution of your questions is controlled by a construction of Article V, Sections 6 and 7 of the Michigan Constitution of 1963.

The meaning and intent of the people in adopting the Michigan Constitution of 1963 may be determined by resort to the debates of the Constitutional Convention and the Address to the People. *Burdick v. Secretary of State*, 373 Mich. 578, decided on July 29, 1964.

On first reading, the committee proposal which subsequently was approved by the convention and the people as Article V, Section 6, was considered as Committee Proposal 71, Sec. g, second paragraph, and as introduced read in pertinent part as follows:

"APPOINTMENT BY AND WITH THE ADVICE AND CONSENT OF THE SENATE WHEN USED IN THIS CONSTITUTION OR IN STATUTES IN EFFECT OR HEREAFTER ENACTED SHALL MEAN APPOINTMENT SUBJECT TO DISAPPROVAL BY A MAJORITY VOTE OF THE MEMBERS ELECT OF THE SENATE IF SUCH ACTION IS TAKEN WITHIN 60 LEGISLATIVE DAYS AFTER THE DATE OF SUCH APPOINTMENT."

Constitutional Convention 1961, Official Record, Vol. 1, p. 1767.

Delegate Martin, Chairman of the Committee on the Executive Branch, submitted the following reasons in support of Committee Proposal 71, Sec. g, second paragraph:

"The proposal retains a requirement for senate review of gubernatorial appointments, both for single executives who are department heads and for members of boards or commissions. The committee has accepted the procedure suggested in Delegate Proposal 1716 con-

cerning the nature of senatorial review. Such an appointment would be subject to disapproval by a majority vote of the members elect of the senate, provided the senate acts to disapprove within *60 legislative days* after the appointment is submitted to it. If fewer than *60 legislative days* remain for consideration after a submission of an appointment, the time available for possible disapproval would be extended into the next regular or special session for the balance of the specified period of 60 legislative or working days. The committee recommends this procedure as providing ample opportunity for the senate to render a negative judgment on gubernatorial appointees. At the same time, it permits the appointment to become effective unless the senate is willing to go on record as rejecting the appointee, and prevents withholding of confirmation simply by failure to act on an appointment.

“* * *

“The recommendation concerning interim appointments is intended to clarify the power of the governor to make such appointments, and to specify that such an appointment will continue in effect unless disapproved by the senate within *60 legislative days* after the beginning of its next session. In the event of disapproval, the same person is not eligible for another interim appointment to the same office.” (Emphasis supplied).

Constitutional Convention 1961, Official Record, Vol. I, p. 1768.

Subsequently Proposal 71, Sec. g, paragraph 2, was amended by the Committee of the Whole to add the following language:

“If not disapproved within such period of time the appointment shall stand confirmed.”

Constitutional Convention 1961, Official Record Vol. II, p. 1901.

Effort was then made to subject disapproval of such appointments to two-thirds vote of the members elect of the senate, but such effort was unsuccessful. Constitutional Convention 1961, Official Record, Vol. II, p. 1902.

The Committee of the Whole also considered an amendment proposed by Delegate Wanger, which reads as follows:

“No appointee whose appointment is subject to the approval of the governor under this constitution shall assume the duties of his office until his appointment has been so approved.”

Constitutional Convention 1961, Official Record Vol. II, p. 1903.

This proposal was likewise defeated.

Other amendments to Proposal 71, Sec. g, second paragraph, which are not pertinent to your inquiry, were likewise defeated.

On first reading an amendment to Proposal 71, Sec. g, second paragraph, to place the power to disapprove gubernatorial appointments in the House of Representatives was defeated, Constitutional Convention 1961 Official Record, Vol. II, p. 2205, and on April 6, 1962, the Constitutional Convention referred Committee Proposal 71, Sec. g, second paragraph, as amended, to the Committee on Style and Drafting. Constitutional Convention 1961, Official Record, Vol. II, p. 2211.

The Committee on Style and Drafting reported Committee Proposal 71, Sec. g, second paragraph, to the Convention on second reading to read as follows:

"Appointment by and with the advice and consent of the senate when used in this constitution or in statutes in effect or hereafter enacted [shall] mean appointment subject to disapproval by a majority vote of the members [elect of] ELECTED TO AND SERVING IN the senate if such action is taken within 60 legislative days after the date of such appointment. If THE APPOINTMENT IS not disapproved within such period of time the appointment shall stand confirmed."

Constitutional Convention 1961, Official Record, Vol. II, p. 2744.

The changes in the language were not debated. Thereafter Committee Proposal 71, Sec. g, second paragraph, was approved on second reading on April 24, 1962. Constitutional Convention 1961, Official Record, Vol. II, p. 2754.

On third reading Proposal 71, Sec. g, second paragraph, was reported by the Committee on Style and Drafting as Article V, Section 6 and was approved by the Convention on May 11, 1962 without debate. Constitutional Convention 1961, Official Record, Vol. II, pp. 3215-3274.

In the Address to the people the delegates to the Convention offered the following explanation of Article V, Section 6:

"This is a new section providing a constitutional definition of appointment by and with advice and consent of the senate as it applies to this constitution and laws now in effect or hereafter enacted. Such an appointment is subject to disapproval by a majority vote of the members elected to and serving in the senate, provided the senate acts to disapprove within 60 session days after the appointment is submitted to it. If fewer than 60 session days remain for consideration after submission of an appointment, the time available for possible disapproval will be extended into the next regular or special session for the balance of the specified period.

"This procedure provides ample opportunity for the senate to render a negative judgment on appointees. At the same time, it permits appointments to become effective unless the senate is willing to go on record as rejecting the appointees. It prevents withholding of confirmation simply by failure to act on appointments."

A study of the debates of the Constitutional Convention on Article V, Section 6 reveals that on first reading the delegates sought to provide 60 legislative days for the Senate to disapprove an appointment to fill a vacancy in an office where advice and consent of the Senate was required. The words "legislative days" appeared to be equated with working days of the Senate. However, when the delegates to the convention approved Article V, Section 6 of the Michigan Constitution of 1963 they substituted the word "session" for "legislative." The debates are silent concerning the purpose of the change.

While the delegates to the Constitutional Convention in their debates

used the words "60 legislative days" in the sense of working days, and subsequently substituted the word "session" for "legislative" without explanation, such connotation was not conveyed to the electorate in the Address to the People. Instead the people were duly advised that the senate would have 60 session days to disapprove an appointment, any unexpended period to be carried over to the next regular or special session. The people were entitled to follow the Address to the People in placing their construction on the Constitution. See opinion of Mr. Justice Black in *U. S. Gypsum Co. v. Department of Revenue*, 363 Mich. 548 (1961).

The people have required the legislature to meet in regular session on the second Wednesday in January of each year at twelve o'clock noon. Each regular session shall adjourn without day upon a day as determined by concurrent resolution at twelve o'clock noon as specified in Article IV, Section 13 of the Constitution.

The governor has been empowered to convene the legislature in extraordinary session under Article V, Section 15, and the legislature is prohibited by the people from passing any bill on a subject other than those expressly stated in the proclamation or message of the governor at such a special session in accordance with Article IV, Section 28 of the Michigan Constitution of 1963. Such special session is adjourned without day upon a day determined by concurrent resolution.

From these provisions of the Constitution it is clear that the legislature is in regular session from twelve o'clock noon on the second Wednesday of every year until noon on such day that it adjourns without day pursuant to concurrent resolution adjourning such regular session. Similarly the legislature is in special session on the day that it convenes pursuant to proclamation or message of the governor until it adjourns without day upon a day determined by concurrent resolution.

It must follow that the day that a regular or special session is convened and the day of adjournment without day of such regular or special session, and each and every day between the convening of the legislature and the final day of adjournment without day is a session day under Article V, Section 6 of the Michigan Constitution.

Such construction is supported by the decision of the Michigan Supreme Court in *Smith v. Auditor General*, 165 Mich. 140 (1911), where the Court held that employees of the legislature were entitled to draw compensation during the entire time of the legislative session including Sundays and ordinary adjournments, relying upon the holding in *Davock v. Moore*, 105 Mich. 120 (1895), where the Court recognized that the "first 50 days of a session" as found in Article IV, Section 28 of the Michigan Constitution of 1850 was the first 50 successive days of the session, including Sundays.

"Under our Constitution and laws the session of the legislature is to be considered as an entirety, its beginning fixed by the Constitution itself. As said by Mr. Cushing:

"The sitting of a legislative assembly, from day to day, begun on the day fixed by law, whether a quorum assembles, or the assembly is organized on that day, or not, and brought to a close by lapse of time, or by mutual agreement, constitutes a session for all legal or

parliamentary purposes.' Law and Practice of Legislative Assemblies, par. 507."

Therefore it is the opinion of the Attorney General that the day that the legislature convenes in regular or special session, and the day the legislature adjourns the regular or special session without day, and each intervening day including Sundays is a "session day" as set forth in Article V, Section 6 of the Michigan Constitution of 1963.

Such construction of "session day" affords a reasonable opportunity to the Michigan senate to disapprove an appointment to fill a vacancy in office requiring the advice and consent of the senate.

2. Your second question is premised upon the fact that the appointee has not taken office since the appointment was made while the senate was in session. The senate has not approved such appointment and 60 session days have not elapsed so that confirmation would be by operation of law.

Article V, Section 7 of the Michigan Constitution of 1963 provides that a person whose appointment has been disapproved by the senate shall not be eligible for an interim appointment to the same office.

This provision of the Michigan Constitution of 1963 first came to the attention of the Constitutional Convention as Committee Proposal 71, Section e, which reads as follows:

"WHEN THE SENATE IS NOT IN SESSION AND A VACANCY OCCURS IN ANY OFFICE, APPOINTMENT TO WHICH REQUIRES ADVICE AND CONSENT OF THE SENATE, THE GOVERNOR SHALL FILL THE SAME BY APPOINTMENT, SUCH AN INTERIM APPOINTMENT MAY BE DISAPPROVED BY THE SENATE AS WITH OTHER APPOINTMENTS REQUIRING SUCH ADVICE AND CONSENT. A PERSON SO APPOINTED SHALL NOT BE ELIGIBLE FOR ANOTHER INTERIM APPOINTMENT TO SUCH OFFICE IF THE APPOINTMENT SHALL HAVE BEEN DISAPPROVED BY THE SENATE."

Constitutional Convention 1961, Official Record, Vol. I, p. 1767.

Mr. Martin, Chairman of the Committee on Executive Branch, offered the following reason in support of the committee proposal:

"The recommendation concerning interim appointments is intended to clarify the power of the governor to make such appointments, and to specify that such an appointment will continue in effect unless disapproved by the senate within 60 legislative days after the beginning of its next session. In the event of disapproval, the same person is not eligible for another interim appointment to the same office."

Constitutional Convention 1961, Official Record, Vol. I, p. 1768.

Proposal 71, Section e was debated by the Committee of the Whole on first reading on March 27, 1962. The following debate is pertinent to your inquiry:

"MR. MARTIN: Mr. Chairman and members of the committee, this provides for appointments when the senate is not in session.

"The present provisions of the constitution provide that when a vacancy shall occur in any of the state offices the governor shall fill

the same by appointment, by and with the advice and consent of the senate if in session. We feel that this provision, the present provision, can't be really understood; that is, there is no reason why the governor shouldn't have authority to fill a vacancy when—whether the senate is in session or whether it is not in session.

"We provide that such interim appointments are subject to disapproval or subject to the advice and consent of the senate in the same way that other appointments are subject to it, and the later provision in this proposal, later paragraph, makes it clear that they may be disapproved within 60 legislative days, just as with other appointments. We further provide, however, that a person who is so appointed shall not be eligible for another interim appointment to the same office if that appointment is disapproved by the senate. Now, I think that the majority report provides for these. The minority report does not. It is not before us yet, but it simply leaves out any provision with respect to appointments when the senate is not in session, because it has eliminated the whole question of senate advice and consent. It proposes to eliminate that, and of course that matter has been settled at an earlier time. So we do need this provision, and the minority report which would appear to strike it, therefore, we feel, should be defeated. It is not before us yet, but I believe it will be.

* * *

"MR. MARSHALL: I have to agree with Delegate Martin in his explanation. Our language is very brief. We say merely that whenever a vacancy shall occur in any state office the governor shall fill the same by appointment, period. In accord with what you have already done, though, if you are going to retain advice and consent, I would think you would have to have the majority language. This is primarily designed to give the governor the authority to appoint without advice and consent of the senate."

Constitutional Convention 1961, Official Record Vol. II, p. 1897.

While there was considerable disagreement over any advice and consent of the senate on appointments to fill vacancies, efforts to amend Proposal 71, Section e to allow appointments to fill vacancies without the advice and consent of the senate were unsuccessful. Constitutional Convention 1961, Official Record, Vol. II, p. 1897.

The Constitutional Convention referred Committee Proposal 71, Section e to the Committee on Style and Drafting. Constitutional Convention 1961, Official Record, Vol. II, p. 2211.

The Committee on Style and Drafting reported Committee Proposal 71, Section e to the Convention on second reading to read as follows:

"When the senate is not in session, [and] THE GOVERNOR SHALL FILL a vacancy [occurs] in any office, appointment to which requires advice and consent of the senate [, the governor shall fill the same] by appointment[.] WHICH [such an interim appointment] may be disapproved by the senate [as with] IN THE MANNER PROVIDED FOR other appointments requiring such advice and consent. A person WHO HAS BEEN DISAPPROVED BY THE SENATE [so appointed]

shall not be eligible for another interim appointment to [such] THE SAME office [if the appointment shall have been disapproved by the senate].”

Constitutional Convention 1961, Official Record, Vol. II, p. 2744.

The changes in the language were not debated. Thereafter Committee Proposal 71, Section e was approved on second reading on April 24, 1962. Constitutional Convention 1961, Official Record, Vol. II, p. 2754.

On third reading Committee Proposal 71, Section e was reported by the Committee on Style and Drafting as Article V, Section 7 and the proposal was approved by the Convention on May 11, 1962 without change. Constitutional Convention 1961, Official Record, Vol. II, pp. 3215-3274.

In the Address to the People the delegates to the Convention offered the following explanation of Article V, Section 7:

“This is a revision of Sec. 10, Article VI, of the present constitution clarifying the power of the governor to make appointments when the senate is not in session. It specifies that such appointments will continue in effect unless disapproved by the senate as provided in Sec. 6 of this Article.

“In the event of senate disapproval, the same person is not eligible for another interim appointment to the same office.” (page 45).

At the outset it is clear that the people have barred interim appointments to persons to fill a vacancy in office requiring advice and consent of the senate only when the senate has previously disapproved the appointment.

It must follow that where an appointment to fill a vacancy in office requiring the advice and consent of the senate has been made while the senate is in session and the senate has taken no action, nor have 60 session days elapsed, an interim appointment can be made and such person may occupy the office upon filing of his oath of office in accordance with Article XI, Section 1 of the Michigan Constitution of 1963.

The appointment that was made before the sine die adjournment continues to be before the senate for appropriate action to disapprove the appointment within 60 session days after the date of the original appointment.

Therefore, it is the opinion of the attorney general that when an appointment is made while the senate is in session to fill a vacancy in such office requiring the advice and consent of the senate and the senate takes no action upon the appointment, nor have 60 session days elapsed since the appointment was made, an interim appointment may be made and an appointee may assume the office upon filing of his oath of office.

3. In your third question you make inquiry whether the period “60 session days” found in Article V, Section 6, includes special sessions, and does it carry over from one session to another and one legislature to another.

In the Address to the People the framers of the Michigan Constitution of 1963 advised the people as follows:

“If fewer than 60 session days remain for consideration after submission of an appointment, the time available for possible disapproval will be extended into the next regular or special session for the balance of the specified period.”

There can be no question but that the framers intended that the period for disapproval should extend to the next regular or special session.

Officers appointed by the governor may be confirmed at a special session of the legislature. OAG 1912, p. 302. See, also, OAG 1947-48, p. 513, which held that the legislature could consider a joint resolution proposing a constitutional amendment at special session even though such matter was not included in the message of the governor.

Article IV, Section 13 of the Michigan Constitution expressly provides that business pending at the final adjournment of a regular session held in an odd numbered year shall carry over with the same status to the next regular session. An appointment sent to the senate in an odd numbered year and unacted upon by the senate, 60 session days not having elapsed, would carry over to the next regular session without resubmission of the appointment. The Constitution does not provide that unfinished business pending before one legislature shall carry over to the succeeding legislature.

Historically the Michigan legislature has served for periods of two years and have been identified by number. For example, the present Michigan legislature has served as the 72nd Michigan Legislature, sitting in the 1963 regular session and the 1964 regular session, with such additional special sessions as were called by the governor pursuant to his constitutional power.

An examination of the debates of the Constitutional Convention and the Address to the People fails to reveal any indication of intent on the part of the framers or the people to extend the words "60 session days" from one legislature to another. On the contrary, the intent seems clear that the period of "60 session days" is restricted to one legislature.

Therefore, it is the opinion of the attorney general that the period "60 session days" as set forth in Article V, Section 6 of the Michigan Constitution of 1963, includes all regular and special sessions of one legislature, such as the 72nd Legislature and not carried over to the 73rd Legislature.

FRANK J. KELLEY,
Attorney General.

641103.2

RETIREMENT SYSTEMS: School Employees—Retirement Board.

An appointee to the office of member of the Public School Employees' Board, created under Sec. 3 of Chapter I, Act 136, P.A. 1945, as amended, must be a member of the Retirement System.

No. 4359

November 3, 1964.

The Honorable George Romney
Executive Office
The Capitol
Lansing, Michigan

In your recent letter you state that you have appointed Mr. Clifford Seys of Grand Rapids to the Michigan Public School Employees' Retirement Board. This appointment has been challenged by the executive secre-