the police and fire departments and naming the combined unit a public service department could be considered a more elaborate avoidance of the Act. Inordinate attention, however, to the strict letter of the law should be avoided in order to permit the spirit and purpose of the Act to prevail. *Ballinger v. Smith,* 328 Mich. 23. Clearly, the salutary effects of Act 125, *supra,* are intended by the legislature to benefit those employees of an organized paid or part paid fire department who are engaged in fire fighting or subject to the hazards thereof.

The provisions of Section 2(b) of Act 125, *supra,* also deserve a comment in order to avoid any conflict with the foregoing. That subsection reads as follows:

> "The provisions of section 1 shall not apply
> (a) * * *
> (b) To employees of a fire department who are employed subject to call;"

In 1945 the Attorney General ruled that this subsection applies to persons who do not work regularly as firemen and who receive no regular compensation therefor, but who are employed subject to some agreement with the municipality that they will hold themselves in readiness to answer fire calls when needed, to be compensated only for the service rendered; the subsection does not apply to firemen regularly employed by a municipality even though they are subject to call when off duty.[2]

In summation, it is the opinion of this office that the terms of Act 125, P.A. 1925, apply, where otherwise applicable, to those municipal employees who are engaged in fire fighting or who are subject to the hazards thereof, although the fire fighting services are incorporated into a department known by a name other than "fire department" or integrated with the police department and called a department of public safety or police-fire department.

FRANK J. KELLEY,
Attorney General.

650331.1

CONSTITUTIONAL LAW: Powers of Legislature.
Procedure to invoke provisions of the Constitution.
TAXATION: Power to classify taxpayers for income tax purposes.

Under provisions of §§ 3 and 7, Art. IX, Const. 1963, the legislature can, in enacting an income tax statute, classify taxpayers as natural persons,

[2] O.A.G. 1945-46, August 21, 1945, No. 0-3853, page 438.

corporations and financial institutions, and can apply different rates, exemptions and/or deductions to each class.

The procedure for invoking the provisions of § 8, Art. III, Const. 1963 for judicial review relating to obtaining an advisory opinion from the Supreme Court is by resolution of either house of the legislature stating the questions to be answered or by a comparable request of the governor.

No. 4428 March 31, 1965.

Hon. Emil Lockwood
State Senate
The Capitol
Lansing, Michigan

You request an opinion of this office on the following question:

> Under the provisions of §§ 3 and 7, Article IX, Constitution of 1963, can the legislature, in enacting an income tax statute, classify taxpayers as natural persons, corporations and financial institutions, and apply different rates, exemptions and/or deductions to each class?

The constitutional history of § 7, Article IX, Constitution of 1963, was carefully considered in *O.A.G.* 4295, dated May 14, 1964, which held that a city income tax, imposed upon the income of residents and nonresidents, that recognizes in the tax base a differential between the amount of income earned or received from sources within the city by residents and by nonresidents was not in violation of § 7 of Article IX.

Furthermore, in *O.A.G.* 4415, dated February 25, 1965, this office concluded that § 7 does not bar the legislature from exempting a certain specified portion of a taxpayer's net income nor from providing exemptions for a taxpayer and his dependents similar to those provided for under the Internal Revenue Code.

The provision of § 3 of Article IX applicable to other than general ad valorem taxation provides that

> "* * * Every tax other than the general ad valorem property tax shall be uniform upon the class or classes on which it operates."

This language is no different in substance from that contained in § 4 of Article X of the Constitution of 1908.

Since an income tax in this state is not an ad valorem property tax,[1] it is clear that the legislature can exercise its traditional power to classify tax objects and grant exemptions therefor for income tax purposes, except as restricted by § 7 of Article IX. This power is stated thusly in *Banner Laundering Co. v. State Tax Administration,* 297 Mich. 419, 432-433 (quoting from *Citizens' Telephone Co.* v. *Fuller,* 229 U.S. 322, 33 Ct. 833, 57 L. ed. 1206):

> "'* * * In Michigan the legislature has the power of prescribing the subjects of taxation and exemption, notwithstanding the Constitution of the State requires the legislature to provide a uniform rule of

[1] *Dooley* v. *City of Detroit,* 370 Mich. 194.

taxation, except on property paying specific taxes. *People* v. *Auditor General,* 7 Mich. 84; *Board of Supervisors* v. *Auditor General,* 65 Mich. 408; *National Loan & Investment Co.* v. *City of Detroit,* 136 Mich. 451. The power of exemption would seem to imply the power of discrimination, and in taxation, as in other matters of legislation, classification is within the competency of the legislature. We said in *American Sugar Refining Co.* v. *Louisiana,* 179 U.S. 89, 92 (21 Sup. Ct. 43, 45 L. Ed. 102), that from time out of mind it has been the policy of this Government to classify for the purpose of taxation.* * *

" 'Granting the power of classification, we must grant Government the right to select the differences upon which the classification shall be based, and they need not be great or conspicuous. *Keeney* v. *Comptroller of New York,* 222 U.S. 525, 536 (32 Sup. Ct. 105, 56 L. Ed. 299, 38 L.R.A. [N.S.] 1139). The State is not bound by any rigid equality. This is the rule; its limitation is that it must not be exercised in "clear and hostile discriminations between particular persons and classes." See [*Quong Wing v. Kirkendall*] 223 U.S. 59, 62, 63 (32 Sup. Ct. 192, 56 L. Ed. 350). Thus defined and thus limited, it is a vital principle, giving to the Government freedom to meet its exigencies, not binding its action by rigid formulas but apportioning its burden and permitting it to make those "discriminations which the best interests of society require." ' * * *"[2]

While many pages of the Constitutional Convention Record were devoted to the propriety of the restrictive language in § 7 of Article IX, the Record discloses no definition of the terms employed. The term "graduated rate" was used in reference to the Federal income tax rate structure. The term "graduated base" was used to prevent the imposition of a flat rate tax on Federal income tax liability, which, in effect, would impose a graduated tax on the underlying taxable income that produced the Federal tax liability.[3] The base restriction was to prohibit graduation by indirection. As stated by Delegate Van Dusen at page 894 of the proceedings:

"* * * Without the words 'or base' you do not really have any protection against an indirectly graduated state income tax, because a flat rate tax imposed upon the federal tax liability would simply pick up all of the graduation of the federal liability. Without these words

[2] To the same effect: *Auditor General* v. *MacKinnon Boiler & Machine Co.,* 199 Mich. 489; *Lucking* v. *People,* 320 Mich. 495; *Williamson* v. *Lee Optical of Oklahoma,* 348 U.S. 483, 99 L. ed. 563, 75 S. Ct. 461; *McGowan* v. *Maryland,* 366 U.S. 420, 6 L. ed. 2d 393, 81 S. Ct. 1101; *Wisconsin* v. *J. C. Penney Co.,* 311 U.S. 435, 85 L. ed. 267, 61 S. Ct. 246; *Bell's Gap RR Co.* v. *Pennsylvania,* 134 U.S. 232, 33 L. ed. 892, 10 S. Ct. 533; *O.A.G.* 1850, dated November 15, 1954; and *O.A.G.* 187, dated March 12, 1947.

[3] For a discussion of the Finance and Taxation Committee Proposal No. 51, which includes a discussion of the language finally appearing in Article IX, Section 7, see the Constitutional Record, pp. 724, 853-854, 855, 862, 866, 877-881, 882-891, 893-894, 908 and 909.

'or base' there is no question but what in my judgment a nominally flat rate tax could be made a graduated income tax."[4]

Both restrictions prohibit the imposition of an income tax law that would have the effect of imposing a graduated tax with rates increasing as taxable income increases.[5]

The graduation of a tax as to rate means varying the effective rate of taxation by the amount of income received within a tax period. Graduation as to base means producing the effect of a tax graduated as to rate by reducing the tax base for lower incomes and increasing it for higher incomes received by a particular class of taxpayers within a tax period. In either instance, the result forbidden by the Constitution is the imposition of a proportionately greater income tax burden on the income of high income groups than on that of low income tax groups. Granting of a deduction and/or applying a uniform rate to all in a class is valid so long as the classification is reasonable and is not made in reference to the amount of income received in a tax period. This could not result in payment of a higher proportion of income tax by higher income groups than by lower income groups within the same classification.

Therefore, it is the opinion of this office that the legislature can, in enacting an income tax statute, classify taxpayers as natural persons, corporations and financial institutions and apply different rates, exemptions and/or deductions to each class so long as such rates would be uniform within the class.

You further request this office to outline the procedure necessary to invoke the provisions of § 8 of Article III of the Constitution of 1963, relating to obtaining an advisory opinion from the Supreme Court. This provision reads:

> "Either house of the legislature or the governor may request the opinion of the supreme court on important questions of law upon solemn occasions as to the constitutionality of legislation after it has been enacted into law but before its effective date."

While no particular manner for making the request is provided, the request must be from the Senate, the House of Representatives or the Governor, and it must pertain to important questions of law "upon solemn occasions" and to the constitutionality of legislation after it has been enacted into law and prior to its effective date. The request should be so framed as to show on its face that it is made in conformity to these constitutional requirements. An appropriate manner of making the request would be by

[4] Delegate Austin expressed the fear that the base restriction would preclude the granting of exemptions that would have the effect of making the tax rate progressive by base adjustments (Constitutional Record, page 893).

[5] The language of the majority report reads as follows: "A further advantage of the limitation is that with it a legislator who votes for an income tax will do so with the knowledge that it will fall proportionately as heavily on himself as upon others—a safeguard which the majority of the committee deems important." (page 854) To the same effect, see the statement of Delegate Van Dusen, pages 878, 879 of the Conventional Record.

resolution of either house of the legislature stating the questions to be answered or by a comparable request of the governor.

FRANK J. KELLEY,
Attorney General.

650406.2

PUBLIC OFFICES AND OFFICERS:
CONSTITUTIONAL LAW:
Senate disapproval of executive appointments.

Under Article V, Section 6 of the Michigan Constitution of 1963 a majority vote of the members, elected to and serving in the senate is necessary to disapprove an appointment of the governor which requires the advice and consent of the senate.

No. 4407 April 6, 1965.

Hon. John T. Bowman
State Senator
The Capitol
Lansing, Michigan

By letter dated January 11, 1965 you have asked my opinion with reference to Article V, Section 6 of the Michigan Constitution of 1963. Specifically you are concerned with whether:

> "* * * on the question of advising and consenting to a nomination to office by the Governor, if a majority vote in the negative is needed for disapproval."

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."

The Michigan Supreme Court in *Burdick v. Secretary of State,* 373 Mich. 578, has indicated that the language of the Address to the People is pertinent in considering the meaning of a constitutional provision.

The Address to the People states, in part, with reference to this section:

> "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