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**GOVERNOR: Appointments by**
**LEGISLATURE: Advice and consent of senate to appointments.**
**PUBLIC OFFICES AND OFFICERS: Appointments by Governor.**
**CONSTITUTIONAL LAW: Time for senate to give advice and consent defined.**

**The time for the senate to give advice and consent to an appointment commences on the day after the appointment is submitted to it, the senate being in session.**

**If an appointment is made during the time the senate is in session filling a newly created office or a vacancy in an office which has heretofore been occupied by an incumbent, requiring the advice and consent of the senate, the appointee can assume the duties of his office immediately upon the filing of his oath of office.**

**The senate, in exercising its power to give advice and consent to an appointment, is performing a legislative duty and therefore neither the executive nor judicial branch of government may impose its will upon the legislature in regard to the form which such action takes. Thus the senate validly disapproves an appointment if a majority of its members serving vote against giving advice and consent.**

No. 4531 December 27, 1966.

Hon. George Romney
The Governor
Capitol
Lansing, Michigan

You have asked my opinion on the following questions:

1. Under Section 6 of Article V of the Michigan Constitution of 1963, when does the time of the 60 session days provision commence to operate for the senate to disapprove an appointment made by the governor requiring the advice and consent of the senate?

2. If the governor makes an appointment to office requiring the advice and consent of the senate during the time that the senate is in session, must the appointed person, before he assumes the duties of the office, either receive the advice and consent of the senate or have 60 session days elapse and thus stand confirmed?

3. Assuming that the answer to question 2 is that the person so appointed can assume the office forthwith upon filing of his oath, would such answer apply to appointments made by the governor by and with the consent of the senate to fill all vacancies?

4. Does the senate validly disapprove an appointment where the senate votes on a question which is put to that body to advise and consent to the nomination of office of an appointee and a majority of members elected to and serve in the senate vote not to advise and consent to the appointment?

1. Your first question relates to the appointment of Blaque C. Knirk to the office of member of the state agriculture commission for a term

expiring December 31, 1969. This appointment was presented for consideration of confirmation by the senate pursuant to a communication from your office dated January 10, 1966 and read to the senate on January 12, 1966. *Journal of the Senate No. 1*, Regular Session of 1966, page 7.

The legislature created the department of agriculture pursuant to Section 175 of Act 380, PA 1965, being MSA 1965 Cum Supp § 3.29 (175), and designated the commission of agriculture as the head of the department of agriculture in Section 176, being MSA 1965 Cum Supp § 3.29 (176). The commission of agriculture consists of 5 members, not more than 3 of whom shall be members of the same political party, appointed by the governor by and with the advice and consent of the senate, as set forth in Section 179, being MSA 1965 Cum Supp § 3.29 (179).

The Attorney General has ruled in opinion No. 4485, dated November 5, 1965, that by means of Section 179 of Act 380, PA 1965, the legislature created the office of member of the commission of agriculture and the governor was authorized to appoint such member.

Section 504 of Act 380, PA 1965, being MSA 1965 Cum Supp § 3.29-(504), empowered the governor to establish from time to time by executive order the effective date of each section of Act 380.

You indicate that pursuant to executive order dated November 22, 1965, the department of agriculture was created to come into existence on January 1, 1966. You advise further that on December 30, 1965, you made certain appointments to the agriculture commission, including the appointment of Mr. Blaque C. Knirk effective January 1, 1966. Mr. Knirk executed and filed his oath of office on January 9, 1966 and assumed his duties as a member of that commission.

The senate considered the nomination of Mr. Knirk to the office of member of the state agriculture commission on March 10, 1966. The question was put to the senate as "being on advising and consenting to the nomination to office of Mr. Blaque C. Knirk as a member of the State Agriculture Commission." The roll was called, ayes 13 and nays 21. This is recorded in *Journal of the Senate No. 41*, page 454, and the record concludes:

> "A majority of the Senators serving not voting therefor, The Senate rejected the nomination to office of Mr. Blaque C. Knirk."

Thereafter Senator Lockwood moved to reconsider the vote by which the senate rejected the nomination of Blaque C. Knirk to the state agriculture commission. Senator Dzendzel moved to postpone the consideration of the motion to the next day. The motion prevailed. *Journal of the Senate No. 41*, page 456.

The motion to reconsider the vote by which the senate, on March 10, 1966 rejected the nomination of Mr. Blaque Knirk to the state agriculture commission prevailed on March 11, 1966 *Journal of the Senate No. 42*, Regular Session of 1966, page 465.

A message from the Governor was then read into the Journal of the Senate, as follows:

> "It has been requested by the majority leader of the Senate that the name of Blaque C. Knirk as a member of the State Agriculture Com-

mission be withdrawn. Consequently, I request that his name be withdrawn and returned to this office.

"The purpose of this withdrawal request is to allow the Senate additional time to consider this appointment.

"It is my intention to resubmit the name of Mr. Knirk for appointment to this commission within a few days."

Mr. Dzendzel moved that the request of the Governor be granted and the motion prevailed. *Journal of the Senate No. 42*, Regular Session of 1966, page 466.

By written communication dated March 14, 1966, you addressed the Honorable William G. Milliken, and said:

"There is herewith presented for consideration and confirmation by the Senate, the following nomination to office:

*"State Agriculture Commission*

"Mr. Blaque C. Knirk of Quincy, member, for a term expiring December 31, 1969."

*Journal of the Senate No. 43,* Regular Session of 1966, page 472.

The Senate considered the nomination of Mr. Knirk on May 12, 1966, and the *Journal of the Senate No. 82,* Regular Session of 1966, page 1294, records the following:

"The Committee on Senate Business, to whom were referred the messages of the Governor, submitting for consideration of the Senate the following nomination to office, namely:

*"State Agriculture Commission*

"Mr. Blaque C. Knirk of Quincy, member, for a term expiring December 31, 1969.

"Respectfully report the same back to the Senate with the recommendation that the Senate do not advise and consent to the said nomination."

The question being on advising and consenting to nomination to office of Mr. Blaque C. Knirk as a member of the State Agriculture Commission, the roll was called and the vote was recorded as follows: Yeas 10, Nays 16.

"The President pro tempore announced that in accordance with the provisions of section 6 of Art. V of the constitution and Senate Rule 22:

"A majority of the Senators serving not voting to reject the nomination,

"The Senate neither advised and consented nor rejected the nomination to office of Mr. Blaque C. Knirk.

"Mr. B. Brown moved to reconsider the vote on the nomination of Mr. Blaque C. Knirk.

"The motion prevailed.

"The question then being on advising and consenting to the nomination to office of Mr. Knirk,

"Mr. B. Brown moved that consideration of the nomination be postponed until tomorrow.

"The motion to postpone prevailed."

*Journal of the Senate No. 82,* Regular Session of 1966, page 1294.

On May 13, 1966, the Senate again considered the nomination of Mr. Blaque C. Knirk to the office of member of the State Agriculture Commission, as set forth in *Journal of the Senate No. 83,* Regular Session of 1966, pages 1314 and 1315. The President laid before the Senate the nomination of Mr. Blaque C. Knirk and the question being on advising and consenting to the nomination. Senator Lockwood made a point of order that 60 days having elapsed since the appointment was received on March 14, 1966, the nomination was no longer before the Senate for consideration. The President of the Senate ruled that because nomination was submitted to the Senate on March 14, 1966, and 60 days having elapsed as of May 12 at midnight, the question on advising and consenting to the nomination was not now before the Senate. An appeal from the decision of the Chair was duly taken and by vote of yeas 11, nays 21, the decision of the Chair did not stand as the judgment of the Senate.

"The question being on advising and consenting to the nomination to office of Mr. Blaque C. Knirk as a member of the State Agriculture Commission,

"The roll was called and the Senators voted as follows

YEAS—11

* * *

NAYS—21

* * *

"A majority of the Senators serving not voting therefor,

"The Senate rejected the nomination to office of Mr. Blaque C. Knirk."

*Journal of the Senate No. 83,* Regular Session of 1966, page 1315.

The people have commanded in Article V, Section 3 of the Michigan Constitution of 1963, that when a board or commission is at the head of the principal department, unless elected or appointed, as otherwise provided in the Constitution, the members thereof shall be appointed by the Governor, by and with the advice and consent of the Senate.

Under Section 176 of Act 380, PA 1965, being MSA 1965 Cum Supp § 3.29(176), the legislature has prescribed that the head of the department of agriculture is the Commission of Agriculture. It follows that the appointment of members to the Commission of Agriculture is by and with the advice and consent of the Senate.

The term "advise and consent of the Senate," as used in Article V, Section 3, has been defined by the people in Article V, Section 6, as follows:

"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)

The Attorney General has ruled in opinion No. 4329, OAG 1963-1964, page 494, that the term "60 session days" includes the day the legislature convenes in regular and special session, the day that the legislature adjourns the regular or special session without day, and all intervening days, including Sundays.

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 (1964).

The constitutional history of Article V, Section 6 was extensively reviewed in the opinion of the Attorney General No. 4329, and such history need not be repeated in full here. Only the pertinent parts should be set forth in this opinion. When Article V, Section 6 was first considered by the Constitutional Convention of 1961 as Committee Proposal 71, Sec. g, second paragraph, Delegate Martin, Chairman of the Committee on the Executive Branch, submitted the following reasons in support of the proposal:

"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 concerning 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."* Official Record, Constitutional Convention 1961, Vol I, p. 1768.
(Emphasis supplied)

The reason for the proposed constitutional language was further amplified by Delegate Martin in the debate that ensued. The Chairman of the Committee, Mr. Martin, made the following pertinent comments:

"Mr. Chairman, this paragraph is a part of the majority report because the committee felt that it was desirable to give a definition to advice and consent which would in effect require that some action be taken with respect to appointments. The committee examined this present situation with respect to advice and consent rather carefully. We asked a good many questions of different people who appeared before the committee, and we concluded that the major defect in the present operation of the advice and consent provision, where it exists in many statutes and so on, was that in a great many cases the senate did not act on these appointments. In fact, out of about some 570 cases in the last 5 years, some 170 were not acted upon. Only 11 were rejected. And the committee felt that this is a sort of twisting of the advice and consent power to, in effect, keep in office existing appointees where they receive their appointment under a statute which says that

they shall hold their office until a successor shall be appointed and approved and qualified. The result has been that in certain cases—some of them not serious but some of them rather serious—persons have remained in office for long periods of time even though an appointment was made because no action was taken on that appointment, and under the statute under which the incumbent was holding office he could continue holding office until an appointment had been made and confirmed.

"We don't think this is good for government, and we think that the senate should be required to take some action within a reasonable period of time. So we have provided that where an appointment is made the senate should have a period of 60 legislative days—and this means that if the appointment were made during a time when the legislature was not in session the legislative days would not begin to run until the legislature came into session—to give the senate ample time to consider the appointment; that where that appointment was made, after a period of 60 legislative days, unless it was disapproved during that time, it would, in effect, be confirmed. We think this cures a rather serious defect in the procedure for using the advice and consent power and that it is desirable."

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

Thereafter, Committee Proposal 71, Sec. g, second paragraph was adopted by the framers as Article V, Section 6 of the Constitution without substantial change.

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 the 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."
(Emphasis supplied)

Official Record, Constitutional Convention 1961, Vol. II, page 3379.

Because of the history of exercise of the power of advice and consent by the senate, as set forth by Delegate Martin at page 1901 of the Official Record of the Constitutional Convention of 1961, supra, the framers and the people limited the time in which the senate could exercise its authority

to give advice and consent so that failure to act would constitute advice and consent by operation of law.

Article V, Section 6 requires the term "appointment by and with the advice and consent of the senate," when used in the Constitution or in law, to mean 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.* The key phrase in Article V, Section 6 is the phrase "after the date of such appointment." In the Address to the People the framers have explained to the people that the senate must act to disapprove within 60 session days after the appointment is submitted to it.

Because appointments by the governor by and with the advice and consent of the senate are subject to disapproval by the senate, it must follow that for the purposes of Article V, Section 6 "the date of such appointment" must be the date that the appointment is submitted to the senate for confirmation.

A state constitutional provision that provided for appointment to a vacancy in public office until a successor was elected at the first annual election that occurs more than "thirty days after the vacancy shall have happened" was construed by the Minnesota Supreme Court in *State of Minnesota, ex rel Luther L. Baxter v. Luther M. Brown,* 22 Minn 482 (1876) to exclude the day on which the vacancy occurred.

It has also been held that when a time is to be computed after a certain date, such date is excluded in the computation. *Holt v. Richardson,* 67 SE 798 (Ga 1910); *Vorwerk v. Nolte,* 24 P 840 (Cal 1890).

Therefore, it is the opinion of the Attorney General that appointment by and with the advice and consent of the senate under Article V, Section 6 requires that the senate must take action within 60 session days after the date that an appointment is submitted to the senate for confirmation. The date that the senate receives a notice of appointment is excluded in counting the 60 session days.

Applying such construction of Article V, Section 6 to the facts concerning the appointment of Mr. Knirk to the office of member of the State Agriculture Commission, we need concern ourselves only with the fact that on March 14, 1966 the nomination of Mr. Knirk was submitted to the senate. The first appointment had been made and was subsequently withdrawn by you. The date of submission of the appointment on March 14, 1966 is excluded in counting the 60 session days. Counting the session days commencing on March 15, 1966 to and including May 13, 1966 and all intervening days, totals 60 session days. Because May 13, 1966 was the 60th session day after the date of the appointment, it was lawful for the senate to act upon that appointment.

Therefore, in answer to your first question, it is the opinion of the Attorney General that the time for the senate to give advice and consent to an appointment commences on the day after the date an appointment is submitted to the senate, it being in session, for confirmation.

2. Because I construe your third question, which follows, as referring to an appointment to fill a vacancy in an office which has theretofore been

occupied by an incumbent, I answer the foregoing second question as referring to an appointment to a newly created office not previously occupied. Accordingly, my answer to your second question is limited to newly created positions.

Article V, Section 3, Constitution of 1963, in connection with the organization of the executive branch of the state government into not more than 20 principal departments provides in part as follows:

> "When a single executive is the head of a principal department, unless elected or appointed as otherwise provided in this constitution, he shall be appointed by the governor by and with the advice and consent of the senate and he shall serve at the pleasure of the governor."

In the process of establishing the principal departments, single executive heads have been created as new positions to be filled by you by appointment by and with the advice and consent of the senate.[1] Appointments to these respective newly created positions serve to illustrate the foregoing question 2.

Article V, Section 6, Constitution of 1963, reads as follows:

> "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."

This section should be considered with Section 7 in the same Article which is:

> "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."

Your letter of inquiry draws attention to the definitional feature of foregoing Section 6. You note that corresponding language does not appear in the Constitution of 1908 and you request to be informed if this has brought about a change in the procedure of gubernatorial appointment and senate action.

The Constitution of 1908 did not contain any section which undertook to define the senate function of "advice and consent." Its only references to advice and consent appear in Article VI, Section 10, relating to appointments for the filling of vacancies and in Article V, Section 17 which stated that:

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[1] Article V, Section 3, Constitution of 1963, also provides that when a board or commission is at the head of a principal department, unless elected or appointed as otherwise provided in the Constitution, the members thereof shall be appointed by the governor by and with the advice and consent of the senate. Since the appointing process in this situation is not substantially different from that relating to the appointment of a single executive as the department head, no further reference to appointments to newly created boards or commissions as heads of principal departments will be made.

"All votes on nominations to the senate shall be taken by yeas and nays and published with the journal of its proceedings."

It was common practice under the Constitution of 1908 for the legislature in creating new boards or commissions to provide for appointment of members by the governor with the advice and consent of the senate. For example, one such act (Act 147, PA 1935) created the State Bridge Commission to consist of three members "who shall be appointed by the governor, with the advice and consent of the senate." That act contained a further provision that the governor should make the appointments as soon as may be after the act became effective and that the bridge commissioners should immediately enter upon their duties and hold office until the expiration of their respective terms. The act came under the scrutiny of the Supreme Court in the case of *Attorney General, ex rel. Eaves v. State Bridge Commission,* 277 Mich 373 (1936). Involved in that case was the status of the members of the commission who had received interim appointments from the governor while the senate was not in session. On this phase of the case the Supreme Court said:

"The question of the legal capacity of the members of the [state bridge] commission, although of slight consequence, can be answered by saying that although the act requires that these individuals be appointed by the governor with the advice and consent of the senate, the advising and consenting body has not been in session since their appointment. It is only reasonable to assume that the appointees have all the powers granted by the act until such time as the senate may pass adversely upon the appointments. We cannot presume the legislature intended the act to remain in suspension until their next session."
(bracketed material added)
(pages 385 and 386)

Under the Constitution of 1908, if the senate was in session at the time the appointment was made by the governor, it was the accepted practice as confirmed by the Attorney General in a number of opinions[2] that the appointee could not take office while the senate had the appointment under consideration. As a consequence, when the senate was in session the governor's appointment became in effect a nomination submitted to the senate for its advice and consent, which if granted permitted the executive, if he chose, to then make the appointment and allow the commission to issue. This established practice was similar to that followed by the President of the United States pursuant to the appointing power conferred on him by Article II, Section 2, Clause 2 of the Constitution of the United States, by which the president shall nominate, and by and with the advice and consent of the senate, shall appoint. A clear statement of the federal procedure appears in the case of *The United States v. LeBaron,* decided by the Supreme Court of the United States in 1856 and reported in 60 U. S. (19 Howard) 73. It was there said:

"When a person has been nominated to an office by the President, confirmed by the Senate, and his commission has been signed by the

[2] Summary of the opinions of the Attorney General appear *infra* at page 15, *et seq.*

> President, and the seal of the United States affixed thereto, his appointment to that office is complete. Congress may provide, as it has done in this case, that certain acts [oath and bond] shall be done by the appointee before he shall enter on the possession of the office under his appointment. These acts then become conditions precedent to the complete investiture of the office; but they are to be performed by the appointee, not by the Executive; all that the Executive can do to invest the person with his office has been completed when the commission has been signed and sealed; and when the person has performed the required conditions, his title to enter on the possession of the office is also complete."[3]
>
> (bracketed material added)
> (page 78)

Henry Stanbery, when serving as Attorney General of the United States, made the following comment in an opinion to the Postmaster General:

> "Whether the President appoints in the session or in the recess, he cannot and does not *fill the office* without the concurrence of the Senate. He may *fill the vacancy* in the recess, but only by an appointment which lasts until the end of the next session."[4]

A subsequent Attorney General of the United States, Mr. P. C. Knox, in an opinion to the President, said:

> "I am unable to see any distinction between an appointment and a nomination other than the fact that the President nominates for appointment when the Senate is in session and appoints when he fills a vacancy temporarily during the recess of the Senate."[5]

The Michigan procedure in effect as it related to gubernatorial appointments under the Constitution of 1908 and which had evolved from opinions by the Attorney General was not unlike that outlined in the foregoing federal authorities.

> On April 28, 1911, Attorney General Kuhn gave an opinion to the governor that recess appointments made by his predecessors were subject to confirmation or rejection by the senate at the next regular session of the legislature. If the recess appointment is to fill a vacancy and the law under which the appointment is made prescribes how long

[3] An elaborate discussion of the presidential appointment process appears in the opinion of Chief Justice Marshall in the case of *Marbury v. Madison,* 5 U.S. (1 Cranch) 137.

[4] Official Opinions of the Attorneys General of the United States, Vol. XII, page 32 at page 41.

[5] Official Opinions of The Attorney General of the United States, Vol. XXIII, page 599 at page 600.

such vacancy appointee shall hold the office, such as the next session of the legislature, that law governs.[6]

*OAG 1911, page 289.*

On May 21, 1934, Attorney General O'Brien advised the governor that he may not appoint a person to office if such person had once been rejected by the senate for such office. Where an appointment is made by the governor with the advice and consent of the senate, it is necessary that the senate take favorable action before the person receiving the nomination will be entitled to the office.

*OAG 1933-34, page 483.*

On July 19, 1937, Attorney General Starr issued his opinion to the governor in which he concluded that an appointee not confirmed by the senate at the session next following the appointment could not continue in office, the appointment having become inoperative; that a recess appointment became inoperative at the close of the next session of the legislature where the senate failed to act; that the governor could not give a recess appointment to a person whose appointment for the same office had been rejected by the senate during the session.

*OAG 1937-38, page 270.*

On June 28, 1939, Attorney General Read issued his opinion that the governor was not precluded from resubmitting to the senate the name of the person previously rejected by the senate at the same session but the governor could not wait until the senate had adjourned and then make a recess appointment of the same person whom the senate had rejected.

*OAG 1939-40, page 134.*

On July 7, 1939, Attorney General Read further advised the governor that where an appointment had been made while the senate was in session for a full term and the advice and consent of the senate requested but the senate adjourned sine die without acting, such appointment was rendered ineffective. The governor however could reappoint the same person to fill the vacancy after the legislature had adjourned.

*OAG 1939-40, page 141.*

On January 21, 1941 Attorney General Rushton issued his opinion No. 18590 upholding the right of the senate to confirm the appointment by Governor Dickinson of Howard N. Warner as Commissioner

[6] The appointment which was the concern of the Attorney General in the foregoing opinion was considered by the Supreme Court in the case of *People, ex rel. Attorney General, v. Haggerty*, 167 Mich 682, (1911), where the Court held that an appointment for the remainder of the term made by the outgoing governor to fill a vacancy caused by death and made after adjournment of the legislature but confirmed by the senate at the next regular session was ineffectual because under the pertinent statute a recess appointment could continue only until the next regular session of the senate and accordingly the appointee's title to the office ceased when the senate convened.

of the Michigan Corporation and Securities Commission. The facts are not set forth in the Attorney General opinion but the opinion of Attorney General Kuhn issued April 28, 1911, supra, is distinguished on the basis that the statute there under consideration provided that the appointment would be in effect only until the next regular session of the senate.[7]

*OAG 1941-42, page 40.*

On November 18, 1947 Attorney General Black issued his opinion No. 648 in which he concluded that a recess appointment continued to be effective until senate rejection thereof is made. As to the appointment there involved, the senate had adjourned without acting and Attorney General Black construed such inaction as not being the equivalent of a rejection, thereby disagreeing with the opinion of Attorney General Read dated July 7, 1939, supra.

*OAG 1947-48, page 552.*

On December 29, 1950, Attorney General Roth by his opinion No. 1341 advised the governor that where an appointment by the governor is not confirmed by the senate, the governor may reappoint the same person to the same office. Senate Rule 28 then in effect and purporting to make failure of the senate committee to report on a nomination by the governor before sine die adjournment tantamount to rejection of the nomination by the senate was declared to be unconstitutional. The rule was said to violate that portion of Article V, Section 17 of the Constitution of 1908 which provided: "All votes on nominations to the senate shall be taken by yeas and nays and published with the journal of its proceedings." The conclusions of Attorney General Read in his opinion of July 7, 1939, supra, were reaffirmed and followed.

*OAG 1951-52, page 153.*

On January 10, 1951 Attorney General Millard issued his opinion No. 1348 in which he concluded that the incoming governor may appoint to office and submit to the incoming senate the name of a person rejected as an appointee by the previous senate.

*OAG 1951-52, page 156.*

On May 22, 1951 Attorney General Millard issued his opinion No.

[7] The appointment of Mr. Warner by Governor Dickinson came before the Supreme Court in the case of *Attorney General, ex rel. McKenzie v. Warner,* 299 Mich. 172 (1941). From the facts in that case it appears that Governor Dickinson appointed Mr. Warner for a full four year term, such appointment being made when the senate was not then in session. A commission was issued, Warner qualified and took office. Governor Dickinson was not reelected but before the end of his term he signed and delivered to the secretary of the senate a message advising of the recess appointment of Warner and requested consideration of the action. Governor Van Wagoner, upon taking office, appointed Walter McKenzie as commissioner to succeed Warner and informed the senate of the appointment seeking confirmation. The Senate confirmed the appointment of Warner. McKenzie's action in the nature of quo warranto was dismissed, the Court being equally divided.

1411 in which he discussed the meaning to be given to Article V, Section 17 of the Constitution of 1908, supra, and by reference to the convention debates and to the practice over the years disposed of the contention that Section 17 related only to nominations for the United States senate by finding a yea and nay vote for that purpose would be unworkable. It was concluded that the constitutional section applied to nominations sent to the state senate. In the opinion a communication from the governor to the senate was quoted in which the governor said that he nominated a person for office. It was then said by the Attorney General: "The same communication also contains the 'nomination' of six other public officials submitted to the Senate for its confirmation. Apparently, as long ago as 1907, submission by the Governor of the names of persons whom he desired to appoint to public office were considered by both the Governor and the Senate as 'nominations to the Senate.' "
(page 263)

*OAG 1951-52, page 259.*

On February 3, 1956 Attorney General Kavanagh issued his opinion No. 2168 dealing with the situation where the governor had submitted to the senate while in session the names of 5 persons for appointment to the Michigan State Apple Commission. The senate confirmed 2 of the appointments but adjourned sine die without acting on the remaining 3. After sine die adjournment the governor reappointed the 3 persons as to whom the senate had not acted. The Attorney General decided that the 3 persons receiving the recess appointments were entitled to hold office until such time as they were rejected or confirmed by the senate. During the period of senate inaction such appointees continued to serve in the offices to which they were appointed.

*OAG 1955-56, Vol. II, page 51.*

The foregoing summary of opinions issued by Attorneys General over a period of approximately 45 years demonstrates the lack of uniformity in the conclusions that were reached. It seems a fair deduction to say that if an appointment required the advice and consent of the senate, both the Attorneys General and the members of the senate over the years had accepted the practice under the Constitution of 1908 to be that when the senate was in session the governor submitted to it the nomination of a person for appointment to office; if the senate took favorable action it had the effect of the senate advising that the appointment be made and consenting thereto; if the senate action was favorable, the governor could then proceed to make the appointment if he chose to do so and if he did the commission issued. The fact that under the Constitution of 1908 the governor frequently named the same person to office by recess appointment where the senate had failed to act on his appointment while the senate was in session indicates that the "appointment" had not been construed as conferring upon the appointee the right of immediate office holding. Otherwise, the device of the recess appointment would have been unnecessary.

The painstaking care with which the drafters of the Constitution of 1963

undertook to define the function of advice and consent of the senate by the language appearing in Article V, Section 6 of that Constitution shows their concern over the unsatisfactory practice in this regard which had developed under the Constitution of 1908. The Address to the People which was furnished by the delegates to the Constitutional Convention by way of explanation of the purpose and meaning of Article V, Section 6 is as follows:

> "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."
>
> *Official Record Constitutional Convention of 1961, Vol. 2, page 3379.*

In my opinion the language of Article V, Section 6, Constitution of 1963, effectuated a change in the procedure for gubernatorial appointment by and with the advice and consent of the senate and that such a change was intended. I construe the language of the foregoing section, supported as I believe it to be by the Address to the People, to authorize a person receiving an appointment from the governor to a newly created office to assume immediately the duties of that office upon filing the constitutional oath. As I construe this constitutional section, the governor's appointment is immediately effective and continues to be effective subject only to disapproval by a majority vote of the members elected to and serving in the senate, if such action by the senate is taken within 60 session days after the date of appointment.

The Official Record of the debates in the Constitutional Convention of 1961 have been examined for the purpose of ascertaining the intent of the delegates and in conformity with the rule announced by our Supreme Court in the case of *Burdick v. Secretary of State,* 373 Mich. 578 (1964).[8]

Article V, Section 6, Constitution of 1963, had its origin in the Constitutional Convention as Section g of Committee Proposal 71.[9] Delegate Martin, Chairman of the Committee on the Executive Branch, in submitting the reasons in support of the Committee Proposal, said in part concerning Section g:

> "* * * the senate acts to disapprove within 60 legislative days

[8] The rule of the *Burdick* case is that resort may be made to the constitutional Debates and Address to the People explaining changes made in the new Constitution for the purpose of ascertaining the intent.

[9] Official Record Constitutional Convention of 1961, Vol. 1, page 1767.

[subsequently changed to session days] after the appointment is submitted to it. * * * 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."[10]
(bracketed material added)

A portion of the members of the Committee on the Executive Branch submitted a minority report to Committee Proposal 71.[11] In the minority report it was said in part:

"Another reason for opposing the majority report is the veto power by the senate over appointments, a form of 'advice and consent'."[12]

The use of the word "appointee" in the explanation given by the chairman of the Committee of the Executive Branch regarding Section g of Committee Proposal 71, plus the consistent reference to "appointment" by the governor made by both the members of the majority and the minority of the Committee on the Executive Branch convinces me that it was the understanding and the intent of the delegates to the Constitutional Convention that the action to be taken by the governor was to be an appointment as distinguished from a nomination for appointment.

Clear evidence of the intention to make a change by the delegates to the Constitutional Convention in the appointing process appears also in connection with another portion of Committee Proposal 71, supra. Section b of Committee Proposal 71 as initially submitted to the Constitutional Convention contained the following paragraph as a part thereof:

"The head of each principal department shall be a single executive unless otherwise provided in this constitution or by law. The single executives heading principal departments shall include a secretary of state, a state treasurer, and an attorney general. At the conclusion of the term of office of all state officers elected under the constitution of 1908, as amended, when a single executive is the head of a principal department, he shall be nominated and, by and with the advice and consent of the senate, appointed by the governor and he shall serve at the pleasure of the governor."[13]

No substantial change in the above-quoted language was made when under consideration in the Committee of the Whole and the provision for nomination by the governor still appeared in this portion of Committee Proposal 71 at the time it was referred to the Committee on Style and Drafting.[14] The Committee on Style and Drafting in reporting back to the Convention Committee Proposal 71 made no change in the language of this paragraph except for punctuation.[15] No change was subsequently made in the Con-

[10] Official Record, Constitutional Convention of 1961, Vol. 1, p. 1768.
[11] Official Record, Constitutional Convention of 1961, Vol. 1, p. 1769.
[12] Official Record, Constitutional Convention of 1961, Vol. 1, p. 1771.
[13] Official Record, Constitutional Convention of 1961, Vol. 1, p. 1766.
[14] Official Record, Constitutional Convention of 1961, Vol. 2, p. 2211.
[15] Official Record, Constitutional Convention of 1961, Vol. 2, p. 2743.

vention. However, when the Convention received and considered on third reading the entire proposed revised Constitution as reported by the Committee on Style and Drafting[16] the pertinent language had been changed and appeared in Article V, Section 3 of the proposed Constitution. The pertinent part of Section 3 as reported by the Committee on Style and Drafting is set forth below with the portion deleted enclosed by brackets and the new language added shown in full capitals, being the same manner of identification as was used by the Committee on Style and Drafting in its report:

> "Sec. 3. The head of each principal department shall be a single executive unless otherwise provided in this constitution or by law. The single executives heading principal departments shall include a secretary of state, a state treasurer and an attorney general. When a single executive [other than an elective official,] is the head of a principal department, UNLESS ELECTED OR APPOINTED AS OTHERWISE PROVIDED IN THIS CONSTITUTION, he shall be [nominated and,] APPOINTED BY THE GOVERNOR by and with the advice and consent of the senate [, appointed by the governor] and he shall serve at the pleasure of the governor."[17]

No further change was made in the language reported by the Committee on Style and Drafting and it was adopted by the delegates to the Constitutional Convention and now appears as the first paragraph of Article V, Section 3 of the Constitution of 1963.

One additional act on the part of the delegates to the Constitutional Convention is worthy of notice and comment as evidencing their intent to consistently confer on the governor the power to appoint as distinguished from the requirement to nominate. The language of Article V, Section 17 of the Constitution of 1908 read, in part:

> "All votes on nominations to the senate shall be taken by yeas and nays and published with the journal of its proceedings."

This was changed in the Constitution of 1963 and as it appears in Article IV, Section 19, reads:

> "* * * all votes on appointments submitted to the senate for advice and consent shall be published by vote and name in the journal."

This portion of my opinion relates to appointments to fill newly created positions. I find nothing in the Constitutional Convention Debates, in the Address to the People, or in the law that indicates that the people in adopting the Constitution of 1963 intended or understood that a person appointed by the governor to fill such a position could not qualify for the office at once by filing the constitutional oath. It is not in accord with sound government to require such an appointee to refrain from taking office for 60 session days of the legislature while the period for possible disapproval by the senate is running its course. Obviously the 60 session days could carry over into a subsequent calendar year depending on the time of appointment and the time of sine die adjournment. I conclude as to your second question

[16] Official Record, Constitutional Convention of 1961, Vol. 2, p. 3046.
[17] Official Record, Constitutional Convention of 1961, Vol. 2, p. 3057.

that a person appointed by you as governor to a newly created public office, such appointment being made while the senate is in session, may assume the duties of that office immediately upon filing the constitutional oath but such appointment is subject to subsequent senate disapproval and if disapproved the right to hold the office will cease.

3. Article V, Section 7, Constitution of 1963, is as follows:

> "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 Address to the People in explanation of foregoing Section 7 makes this comment:

> "This is a revision of Sec. 10, Article VI, of the present constitution clarifiyng 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 Section 6 of this Article.
>
> "In the event of senate disapproval, the same person is not eligible for another interim appointment to the same office."[18]

Article IV, Section 38, Constitution of 1963, reads in its entirety as follows:

> "The legislature may provide by law the cases in which any office shall be vacant and the manner of filling vacancies where no provision is made in this constitution."

The legislature has specified the events which shall create a vacancy in office.[19] These may be summarized in the following basic categories:

death,
resignation,
removal from office,
ceasing to be an inhabitant of this state,
conviction of any infamous crime, or of any offense involving a violation of his oath of office,
the decision of a competent tribunal declaring his appointment to be void,
his refusal or neglect to take his oath of office, or to give, or renew his official bond where required.

In *Toy, ex rel. Elliott v. Voelker,* 273 Mich. 205 (1935), the Michigan Supreme Court held that the above statutory enumeration of events resulting in a vacancy of a public office was not an exclusive enumeration. Thus a vacancy existed where an officer, a member of the executive branch, completed his term of office and no one was legally authorized to succeed

[18] Official Record, Constitutional Convention of 1961, Vol. 2, p. 3379.

[19] The statutory provision appears in Section 3 of Chapter 15 of the Revised Statutes of 1846 as last amended by Act 40, P.A. 1954; C.L.S. 1961 § 201.3; M.S.A. 1956 Rev. Vol. § 6.693.

him. It must follow that there is a vacancy in a public office where an officer completes his term of office and no one is legally authorized to succeed him.

The legislature has also provided by Act 199, P.A. 1923 for the filling of vacancies in appointive and elective public offices.[20] Section 1 of that act reads:

> "Whenever a vacancy shall occur in any elective or appointive state office, other than the office of senator or representative in the state legislature or representative or senator in congress or a judge of a court of record, the governor shall fill such vacancy by appointment for the remainder of the unexpired term of such office."

It becomes obvious from a reading of Article V, Section 7, supra, that appointments by the governor to fill vacancies in office require the advice and consent of the senate only where such requirement is imposed by the Constitution itself or by statute. An example of where the requirement is imposed by the Constitution appears in Article V, Section 3, Constitution of 1963, supra, relating to the appointment of the heads of principal departments but by the language of foregoing Section 3 there is excepted therefrom single executives who are elected or appointed as otherwise provided in the Constitution. One such exception appears in Article V, Section 21, Constitution of 1963, which says in part:

> "Vacancies in the office of the secretary of state and attorney general shall be filled by appointment by the governor."

Article V, Section 7, Constitution of 1963, is derived from Committee Proposal 71 as submitted and recommended to the delegates at the Constitutional Convention, being Section e thereof.[21] As initially proposed the language of Section e read:

> "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."
> (page 1767)

In submitting the reasons to the delegates for support of Committee Proposal 71, Mr. Martin, Chairman of the Committee on Executive Branch, said:

> "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."[22]

[20] C.L. 1948 § 201.31; M.S.A. 1956 Rev. Vol. § 6.711.
[21] Official Record, Constitutional Convention of 1961, Vol 1, pages 1766, 1767.
[22] Official Record, Constitutional Convention of 1961, Vol. 1, p. 1768.

When Section e of Committee Proposal 71 was considered in the Committee of the Whole, Mr. Martin included the following remarks in his explanation:

> "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."[23]

No change in the language of Section e was made by the Committee of the Whole and it was referred in its original form to the Committee on Style and Drafting as a part of Committee Proposal 71.[24] The Committee on Style and Drafting reported Section e to the Convention with minor changes in phraseology but with no change of substance.[25] When the Convention received for consideration on third reading the entire proposed revised Constitution as reported by the Committee on Style and Drafting, the language of former Section e had been changed and then appeared as Section 6 of Article V of the proposed Constitution. Section 6 as reported for inclusion in Article V of the new Constitution is set forth below with the portion of former Section e which was deleted enclosed by brackets and the new language added shown in full capitals, being the same manner of identification as was used by the Committee on Style and Drafting in its report:

> "Sec. 6. [When the senate is not in session, the governor shall fill a vacancy] VACANCIES in any office, appointment to which requires advice and consent of the senate, [by appointment which may be disapproved by the senate in the manner provided for other] SHALL BE FILLED BY THE GOVERNOR BY AND WITH THE ADVICE AND CONSENT OF THE SENATE. [appointments requiring such advice and consent.] A person [who] WHOSE APPOINTMENT has been disapproved by the senate shall not be eligible for [another] AN interim appointment to the same office."[26]

No change on third reading was made in the language as reported by the Committee on Style and Drafting and it now appears as Article V, Section 7, Constitution of 1963.

In my opinion the foregoing extracts from the proceedings of the Constitutional Convention of 1961 clearly demonstrate that the delegates to that Convention intended that the same procedure should apply to appointments to fill vacancies in any office where the appointment requires the advice and consent of the senate as prevails where the appointment is to fill a newly created position. It is my judgment that the language appearing in Article V, Section 7, Constitution of 1963, fulfills this intent. I therefore answer your third question by advising you that the same procedure for appointments which permits the immediate entry upon the duties

[23] Official Record, Constitutional Convention of 1961, Vol. 2, p. 1897.
[24] Official Record, Constitutional Convention of 1961, Vol. 2, pages 2211, 2212.
[25] Official Record, Constitutional Convention of 1961, Vol. 2, p. 2744.
[26] Official Record, Constitutional Convention of 1961, Vol. 2, p. 3057.

of office upon filing of the oath applies to appointments to fill vacancies where the appointment requires the advice and consent of the senate.

4. Article III, Section 2 of the Michigan Constitution of 1963 divides the powers of government into three branches, legislative, executive and judicial. This section of the Constitution also prescribes that no person exercising the power of one branch shall exercise powers properly belonging to another branch except as expressly provided in this Constitution.

Article V, Section 6 of the Michigan Constitution of 1963 gives a constitutional definition to the power of the senate to give advice and consent to appointments by the governor. Such definition requires that the senate act within 60 session days after submission of appointment to disapprove by a majority vote of the members elected to and serving in the senate. Any appointment not disapproved within such period shall stand confirmed.

The senate in exercising its power to give advice and consent to an appointment is performing a legislative duty, subject to its own rules. *Attorney General, ex rel. Dust v. Oakman,* 126 Mich. 717 (1901). Article V, Section 16 of the Michigan Constitution of 1963 empowers each house of the legislature to make the rules for its proceedings, subject only to the Constitution.

The drafting of resolutions is a matter for the senate and courts will not prescribe rigid rules for legislative bodies to follow in drafting resolutions. *Watkins v. United States,* 354 U.S. 178 (1957); *Allen v. Superior Court of State of California in and for County of San Diego, et al,* 340 P 2d 1030 (Cal. Ct. of App. 1959).

While it may be desirable for the senate to act upon a resolution or motion so formed as to expressly indicate disapproval of an appointee, Article III, Section 2 bars either the executive or the judicial branch of government from imposing its will upon the legislature in this regard. Neither branch of the government can dictate to the senate how their resolutions are to be put. *The People on the relation of John L. Sutherland and Others v. The Governor,* 29 Mich. 320 (1874).

An examination of the Journals referred to in answer to question 1 indicates that there was no doubt as to what action the senate took on May 13, 1966 to disapprove the nomination of Mr. Knirk to the office of member of the Commission of Agriculture. *Journal of Senate No. 83,* Regular Session of 1966, page 1315, shows:

> "A majority of the senators serving not voting therefor, The senate rejected the nomination to office of Mr. Blaque C. Knirk."

It is noted that no senator chose to appeal the rule of the Chair in announcing the action of the senate on the nomination of Mr. Knirk on May 13, 1966, nor was there any objection to the way the question was put to the senate.

It is the opinion of the Attorney General that such action by the senate is in compliance with Article V, Section 6 of the Michigan Constitution of 1963.

FRANK J. KELLEY,
*Attorney General.*