upon the exclusive authority of the governor to commute sentences, a judge may enter an order setting aside such conviction after the sentence imposed by the court has been served providing that all of the elements required for such action by Act 213, P.A. 1965, supra, are present.

FRANK J. KELLEY,
Attorney General.

670713.2

ADMINISTRATIVE RULES: Legislature – Power to suspend under Act 88, P.A. 1943.

CONSTITUTIONAL LAW: Joint Committee on Administrative Rules – Power to suspend administrative rules under Mich. Const. 1963, Art. IV, Sec. 37.

Only the joint committee on administrative rules, acting between sessions under Mich. Const. 1963, Art. IV, Sec. 37, as to rules promulgated during that period, has the actual power to suspend an administrative rule.

During legislative sessions, the only true power of the legislature to suspend a pending administrative rule or regulation, is by bill, the "legislative disapproval" of a pending rule by concurrent resolution under Section 8c of Act 88, P.A. 1943, being no more than a recommendation to the promulgating agency to withdraw or amend the rule. If the recommendation is disregarded, the legislature must act by bill.

Because of Mich. Const. 1963, Art. IV, Sec. 22, requiring that all legislation be by bill, Act 88, P.A. 1943, may not constitutionally be amended to give either the legislature itself or its joint committee on administrative rules, acting by concurrent or other resolution, power to suspend an administrative rule promulgated during sessions.

Said Act 88, P.A. 1943, may, however, constitutionally be amended to give the joint committee on administrative rules the "legislative disapproval" authority given the legislature itself under Sec. 8c of said Act, because said authority amounts only to a recommendation.

No. 4586

July 13, 1967.

Honorable Robert J. Huber, Chairman
Joint Committee on Administrative Rules
State Senate
The Capitol
Lansing, Michigan

Your inquiry, under date of May 4, 1967, relative to the legislature's power to suspend administrative rules promulgated under Act 88, P.A. 1943, is respectfully acknowledged.

Since the inquiry comprehensively involves Article IV, Section 37 of the Michigan Constitution of 1963, as well as the provisions of said Act 88 itself, orderly treatment suggests that the applicable constitutional and statutory material first be generally recited, after which your several questions will be stated and answered seriatim.

A. Article IV, Section 37 of Michigan Constitution 1963 provides as follows:

"The legislature may by concurrent resolution empower a joint committee of the legislature, acting between sessions, to suspend any rule or regulation promulgated by an administrative agency subsequent to the adjournment of the last preceding regular legislative session. Such suspension shall continue no longer than the end of the next regular legislative session."

B. Article IV, Section 22:

"All legislation shall be by bill and may originate in either house."

C. Article IV, Section 27:

"No act shall take effect until the expiration of 90 days from the end of the session at which it was passed, but the legislature may give immediate effect to acts by a two-thirds vote of the members elected to and serving in each house."

D. Article IV, Section 17:

"Each house of the legislature may establish the committees necessary for the efficient conduct of its business and the legislature may create joint committees. On all actions on bills and resolutions in each committee, names and votes of members shall be recorded. . . ."

E. Section 1a of said Act 88, P.A. 1943, being M.S.A. § 3.560(7a) (C.L. 1948 § 24.71a), as amended, provides in part as follows:

". . . Prior to the adoption, amendment or repeal of any rule, the state agency *shall* publish or otherwise circulate notice of its intended action and afford interested persons opportunity to submit data or views orally or in writing. . . ." (Emphasis added)

F. Section 1b of said Act 88, P.A. 1943, being M.S.A. § 3.560(7b) (C.L. 1948 § 24.71b), as amended, provides as follows:

"The legislature reserves the right to approve, alter, suspend or abrogate any rule promulgated pursuant to the provisions of this act." (Emphasis added)

G. Section 4 of said Act 88, P.A. 1943, being M.S.A. § 3.560(10) (C.L. 1948 § 24.74), as amended, provides in part as follows:

"No rule made by any state agency shall be *filed* with the secretary of state *until* it has been *approved* by the legislative service bureau as to form and section numbers and the attorney general as to legality *and* has been *subsequently confirmed and formally adopted* by the promulgating state agency in accordance with law." (Emphasis added)

"No rule made by a state agency shall *become effective until* an original and 2 duplicate copies thereof have been *filed* in the office of the secretary of state *and until such rule has been published* in the supplement to the Michigan administrative code, as provided in section 6. . . ." (Emphasis added)

H. Section 6 of said Act 88, P.A. 1943, being M.S.A. § 3.560(12) (C.L. 1948 § 24.76), as amended, provides in part as follows:

"The secretary of state shall:

"Compile, publish and index supplements to the Michigan administrative code, which supplements shall be published every 3 months. Such quarterly supplements shall contain *all rules filed in the office of the secretary of state not less than 30 days before the end of the preceding calendar quarter,* bear a publication date and certification of period covered by the rules contained therein."

"Quarterly supplements shall be published *not later than 45 days after the close of the period* covered thereby." (Emphasis added)

I. Section 8b of said Act 88, P.A. 1943, being M.S.A. § 3.560(14b) (C.L. 1948 § 24.78b), as amended, provides as follows:

"All rules *promulgated* by any state agency, *including* all rules *filed* with the secretary of state *and published* as provided by law, *shall be transmitted* to the secretary of the senate and the clerk of the house of representatives and to each member of the legislature *by the secretary of state* before the first day of the regular session of the legislature next following the promulgation or publication thereof. The secretary of state *shall similarly file during any regular session* of the legislature all rules promulgated between the first day of the regular session and the short adjournment thereof. The secretary of the senate and the clerk of the house of representatives *shall lay all such rules before* the senate and house of representatives, and the same *shall be referred* to the joint committee on administrative rules in the same manner as bills are referred to standing committees." (Emphasis added)

J. Section 8c of said Act 88, P.A. 1943, being M.S.A. § 3.560(14c) (C.L. 1948 § 24.78c), as amended, provides as follows:

"If the committee to which any such rule shall have been referred, *or any member* of the legislature, shall be of the opinion that such rule is violative of the legislative intent of the statute under which such rule was made, *a concurrent resolution* may be introduced declaring the legislative intent and *expressing the determination of the legislature that such rule should be revoked or altered. Adoption* of such concurrent resolution *shall constitute legislative disapproval* of the rule, but rejection of the resolution shall not necessarily be construed as legislative approval of such rule. *If any agency* shall *persist in a* rule disapproved by the legislature, *the same may be abrogated by legislation."* (Emphasis added)

K. Section 8d of said Act 88, P.A. 1943, being M.S.A. § 3.560(14d) (C.L. 1948 § 24.78d), as amended, provides as follows:

"The secretary of state shall transmit to the legislative service bureau a sufficient number of copies of *all rules and regulations* filed in the office of the secretary of state *from the time of the short adjournment* of the last regular session of the legislature *and during the interim until the next regular session* thereof, for the use of the joint committee on administrative rules." (Emphasis added)

L. Section 8f of said Act 88, P.A. 1943, being M.S.A. § 3.560(14f) (C.L. 1948 § 24.78f) provides in part as follows:

> "The *joint committee on administrative rules is created* which *may meet during sessions* of the legislature *and* during the interims *between sessions* and to which shall be referred all rules *promulgated* pursuant to this act.
>
> * * *
>
> "The committee *shall consider all rules* referred to it and shall conduct hearings on such rules as it deems necessary. *If authorized by concurrent resolution* of the legislature, *the committee may suspend any rule or regulation promulgated subsequent to the adjournment* of the last preceding regular session of the legislature. The *committee shall notify* the *promulgating state agency and the secretary of state* of any rule it suspends, *which rule shall not be published* in the administrative code or supplement while so suspended." (Emphasis added)

(1) Your initial inquiry asks the general power of the legislature, while in session, to suspend, amend or abrogate, first, rules filed but not yet effective; next, rules filed and effective.

Under above reference I (Section 8b of the Administrative Code Act, being Section 8b of said Act 88, P.A. 1943, as last amended by Act 161, P.A. 1964), a promulgated but not yet published or effective rule is filed by the Secretary of State with the secretary of the senate and clerk of the house, who place it before senate and house respectively. The senate and house then refer it to the joint committee on administrative rules. Thereafter, under reference J (Section 8c of said Act, as amended), if either said joint committee or any legislator feels that the promulgated and pending (but not yet effective) rule violates the legislative intent of the statute under which the rule was made, "a concurrent resolution may be introduced declaring the legislative intent and expressing the determination of the legislature that *the rule should be revoked or altered. Adoption of such concurrent resolution shall constitute legislative disapproval of the rule . . .*" (The statute goes on to state that rejection of the resolution shall not necessarily be construed as legislative approval of the rule.)

You will note that the language of reference J (said Section 8c, as amended) restricts the legislature, by its concurrent resolution, to a determination that the "rule *should be* revoked or altered," and that such determination constitutes "disapproval." Relative then to that part of your inquiry which concerns "the power . . . to *suspend,* amend or abrogate," we find no such power under reference J, and (also, because any authority of the joint committee on administrative rules, to *suspend* a rule under reference A or reference L, exists only in the interim *between* legislative sessions [though such suspension itself may carry through a succeeding session]), must have recourse to the general authority of reference F (Section 1b of the Act). Under said general authority (particularly in the light of reference B), it is readily inferable that any action by the legislature to *amend* a rule must be by *bill* under regular legislative procedure. However, when you inquire (as does your first question) as to legislative action to *"abrogate"* a pending but not effective rule, it is my opinion that your first action should be under the earlier discussed "legislative disapproval" pro-

cedure of reference J. A bill will not be necessary if the promulgating agency itself acts to abrogate the rule. Similarly, authority to (effectively) "suspend" a promulgated rule which is not yet effective, lies, at least originally, in that same "legislative disapproval" procedure, because the promulgating agency is thus given opportunity to withdraw the rule. Under references G, H, and J, a pending rule would, unless withdrawn, clearly go on to publication and effective rule status. As the first effort, therefore, to avert such result, (and, accordingly, to "suspend" a pending rule), the disapproval procedure is indicated. At that point, of course, it is procedure by concurrent resolution. However, if that action fails (through neglect or refusal of the promulgating agency to withdraw the rule), your only recourse is to act by bill.

As to rules (under part b. of your aforesaid first question) that have already become effective, it is clear that any action by the legislature under its reserved power (reference F) to ". . . alter [amend], suspend or abrogate" such rules, would be legislation, and therefore must be by bill (reference B).

(2) Your second question is as follows: May the legislature when in regular session, suspend (not amend or abrogate) temporarily or permanently, rules or regulations by concurrent resolution?

As will possibly occur again herein, your question (2) converges upon question (1), or at least this opinion's treatment thereof. As earlier stated, administrative rules or regulations, *already* duly processed to *effective* status under the Administrative Code (said Act 88, P.A. 1943, as amended), may *not* be suspended, whether temporarily or permanently, by concurrent resolution. Though it has never been formally so adjudicated, the intent of said Administrative Code clearly appears to be to give the effect of law to an administrative rule duly adopted under its provisions. Certainly, as to both federal administrative agencies and those of many states, it has repeatedly been held that administrative rules have the force of law. The general rule is stated in 2 Am. Jur. 2d 119 (Administratvie Law, § 292) as follows:

> "Rules, regulations, and general orders enacted by administrative agencies pursuant to the powers delegated to them have the force and effect of law, . . . [citing]
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> *Public Utilities Com. v. United States,* 355 U.S. 534, 2 L. ed. 2d 470, 78 S. Ct. 446, reh den 356 U.S. 925, 2 L. ed. 2d 760, 78 S. Ct. 713;
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> *Atchison, T. & S.F.R. Co. v. Scarlett,* 300 U.S. 471, 81 L. ed. 748, 57 S. Ct. 541, reh den 301 U.S. 712, 81 L. ed. 1365, 57 S. Ct. 787;
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> *United States v. Michigan Portland Cement Co.,* 270 U.S. 521, 70 L. ed. 713, 46 S. Ct. 395;
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> *Aldridge v. Williams* (U.S.) 3 How. 9, 11 L. ed. 469;
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> *State v. Friedkin,* 244 Ala. 494, 14 So. 2d 363;
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> *McSween v. State Live Stock Sanitary Bd.* 97 Fla. 750, 122 So. 239, 65 A.L.R. 508;
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> *Pierce v. Doolittle,* 130 Iowa 333, 106 N.W. 751;
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> *Union Light, Heat & Power Co. v. Public Service Com.* (Ky.) 271 S.W. 2d 361;

Connell v. Bauer, 240 Minn. 280, 61 N.W. 2d 177, 40 A.L.R. 2d 776;

Bailey v. State Bd. of Public Affairs, 194 Okla. 495, 153 P. 2d 235;

Foley v. Benedict, 122 Tex. 193, 55 S.W. 2d 805, 86 A.L.R. 477;

Smith v. Highway Board, 117 Vt. 343, 91 A. 2d 805.

Such administrative rules, then, may be suspended (or amended or abrogated) only by constitutionally ordained legislative process, namely by bill.

The same view has been expressed at some length by a predecessor in my office in the course of an extended opinion on the subject of rules adopted pursuant to the Administrative Code. Please see O.A.G. 1957-58, Vol. II, Op. No. 3352, p. 246, wherein at pp. 253 and 254 it was stated as follows:

> *"Clearly, when the legislature delegates the rule-making power to a state agency, it is pursuant to a legislative act initiated by a bill. Such delegated power may be suspended or entirely revoked in any particular instance at any time the legislature may see fit. But to suspend or entirely revoke a law conferring rule-making power requires the passage of another law, initiated by bill and subject to the veto power. In my opinion the rule itself, being the product springing from the exercise of the rule-making power, cannot lawfully be suspended, altered or abrogated by the legislature except by the passage of a bill by the legislature which becomes a law.* To hold otherwise permits the legislature to circumvent the conditional mandate imposed on the passage of legislation and to deprive the governor of veto power by use of the concurrent resolution. What the legislature is prohibited from doing directly, it is prohibited from doing indirectly.
>
> "' * * * nothing becomes law simply and solely because men who possess the legislative power will that it shall be, unless they express their determination to that effect, in the mode pointed out by the instrument which invests them with the power, and under the forms which that instrument has rendered essential.' *1 Cooley, Constitutional Limitations, 8th Ed.,* p. 266.
>
> "Based on what has been said hereinbefore, I am of the opinion that the legislature by the adoption of a concurrent resolution may not constitutionally suspend, alter or abrogate a rule or regulation promulgated by a state agency and in effect pursuant to delegated rule-making power. * * *." (Emphasis added)

(3) This question inquires whether the legislature may give to the joint committee on administrative rules the same power to suspend rules or regulations promulgated *during regular session* (to no longer than the end of the next session), which that committee now has, by force of constitution (reference A) and statute (reference L), but only as to rules or regulations promulgated *subsequent to adjournment.* The answer is no. The legislature may not of course accomplish indirectly what it cannot do directly. As earlier recited herein, the only existing "authority" of the legislature itself (other than acting by bill) to suspend rules or regulations filed during session, is the "legislative disapproval" procedure under reference J, more

specifically the adoption of a concurrent resolution that "such rule should be revoked or altered." As also indicated however, such action, rather than *suspending* the rule, effects "legislative disapproval." It should be noted that this entire procedure *assumes* that, upon such legislative disapproval being recorded, the promulgating agency will either withdraw the rule from further processing toward effective status, or alter it as desired. This is made clear by reference J's final sentence which (to cover the contingency of a recalcitrant agency) provides as follows:

> "If any agency shall persist in a rule disapproved by the legislature, the same may be abrogated by legislation."

All of this serves only to emphasize the basic reality that, by force of Michigan Constitution 1963, Article IV, Section 22 (reference B), the legislature acts effectively only by *laws*. A concurrent resolution does not have the force and effect of law, and is "not a competent method of expressing the legislative will, where that expression is to have the force of law, and bind others than the members of the house or houses adopting it." See *Becker v. Detroit Savings Bank*, 269 Mich. 432, at 434, 435.

Our mention of a "statutory" source of the power of the joint committee on administrative rules to suspend rules or regulations promulgated *between* sessions, should not be misunderstood. Except for Michigan Constitution 1963, Article IV, Section 37 (reference A), specifically authorizing the legislature to confer this power on said joint committee between sessions, the power could not exist. The statute (reference L) represents nothing more than legislative action pursuant to said constitutional authorization. Finally, since the constitutional authorization is specifically restricted to rules and regulations promulgated *between* sessions, the legislature is without authority to confer the power on the joint committee *during* sessions.

(4) a. As already indicated, the legislature's "authority" to *suspend,* by concurrent resolution, a rule or regulation filed *during session,* lies indirectly in the "legislative disapproval" procedure under reference J, whereby said resolution expresses "the determination of the legislature that such rule should be revoked or altered." It depends, of course, on cooperative action of the promulgating agency to withdraw or amend the rule.

Because of reference B ("All legislation shall be by bill"), Act 88, P.A. 1943, may not constitutionally be amended to give either the legislature itself or its joint committee on administrative rules the actual legal *power* to suspend, by concurrent or other resolution, rules or regulations filed *during session.*

b. Since, however, the very "authority" of the legislature itself to record "legislative disapproval," constitutionally accomplishes, as we have noted but risk repetition to emphasize, no more than a recommendation to the administrative agency to withdraw or amend its pending rule, and since the legislature might conceivably find it useful, in the area of pending administrative rules, to have some such authority of recommendation reposed in its joint committee, I hasten to add that I see no constitutional obstacle to the amendment of Act 88, P.A. 1943, to that innocuous end. Former Section 8e of the Act (M.S.A. § 3.560(14e); C.L. 1948 § 24.78e; repealed by Act 161, P.A. 1964) gave such authority to the joint committee, but only

between sessions and as to "rules . . . which have not been theretofore considered by the legislature."[1] Neither 1947-48 O.A.G. No. 458, p. 378 (considering a comparable statutory provision) nor earlier quoted 1957-58 O.A.G. No. 3352 (Vol. II) p. 246 (at which time Section 8e was in the same form as when finally repealed) undertook to pass on the constitutionality of such a statute as to pending but not yet effective rules. As you will note, Section 8e authorized a resolution which was not only a mere recommendation ("ought to be revoked or altered"), but actually a *preliminary* recommendation, that is, preliminary to the full legislature's later recommendation (by joint resolution) of "legislative disapproval," in the event the agency persisted in the offending rule. You may, of course, if you wish, use former Section 8e as the model for your amendment of said Act 88, suitably providing, however, for the joint committee to act *during* rather than *between* sessions. It will of course be necessary to remove the clause, "and which have not theretofore been considered by the legislature."

The inescapable legal fact of this situation of administrative rules is that the promulgating agency is exercising its lawful, statutorily-conferred, rule-making power. As suggested by earlier-quoted 1957-58 O.A.G. No. 3352 (Vol. II) p. 246 at pp. 253, 254 (though that opinion addressed itself exclusively to rules already effective), only a comparable legislative act, specifically a *statute,* can revoke that rule-making power, and accordingly only a *statute* can lawfully (except for Michigan Constitution 1963, Article IV, Section 37) suspend, or alter or abrogate a rule or regulation lawfully promulgated under that rule-making power. (See emphasized portion of said quotation.) In other words, the legislature may take away what it has *given by law,* but it must *take it away by law.* Any "law" purporting to authorize the legislature to revoke or suspend or amend either the rule-making power or its lawful product through the medium of committee, or even legislative, resolution, would be unconstitutional and void.

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[1] "The legislature may provide by concurrent resolution for the creation of a joint committee on administrative rules which shall be empowered to meet during the interim between sessions of the legislature, and to which shall be referred all rules promulgated pursuant to this act and which have not been theretofore considered by the legislature. The committee so created shall consider all such rules referred to it, and shall conduct hearings on those rules which in the opinion of the committee appear violative of the legislative intent of those statutes under which they were made. If, after hearing, the committee is of the opinion that any such rule ought to be revoked or altered, it may adopt a resolution to that effect setting forth the reasons therefor, and shall transmit such resolution to the agency affected. If, after such committee action, the agency involved persists in the offending rule, the committee or any member thereof, or any member of the legislature, may introduce at the next legislative session a concurrent resolution declaring the legislative intent and expressing the determination of the legislature that such rule should be revoked or altered. Adoption of such concurrent resolution shall constitute legislative disapproval of the rule, but rejection of the resolution shall not necessarily be construed as legislative approval of such rule. If any agency shall persist in a rule disapproved by the legislature, the same may be abrogated by legislation. The committee shall in every case report to the legislature at the commencement of its next session its doings in the interim. The committee shall also have such powers as are granted to it by any other statute."

(5) Your final question inquires as to the changes, if any, necessary to be made in Michigan Constitution 1963, Article IV, Section 37 (reference A) to give the legislature power to suspend a pending but not yet effective administrative rule, promulgated *during* session, by concurrent resolution or by a resolution of the joint committee on administrative rules.

We should of course bear in mind that the present constitutional provision is obviously only a stop-gap device, designed to prevent the taking effect of administrative rules promulgated *between* sessions. The joint committee's power to suspend a rule "to the end of the next legislative session," is clearly intended only to defer that rule for legislative consideration at the following session. Thus, ultimate *legislative* action is not only contemplated, but constitutes the very purpose of the provision. In no way does that interim constitutional power envision the joint committee assuming the final constitutional responsibility and function of the legislature itself to consider and pass upon the rule. The language, "suspend," is that of postponement only, not an expedient of indirect legislative disapproval or rejection.

Moreover, in the context of present law, it takes no more than a concurrent resolution to express the "legislative disapproval" which will, in all likelihood, persuade the promulgating agency to withdraw or amend its rule. Legislation will rarely be necessary.

If, however, constitutional amendment is deemed necessary by you in the respect inquired, subject Article IV, Section 37, may be changed to read as follows:

> "The legislature may, by either its concurrent resolution or the resolution of its joint committee on administrative rules, temporarily or permanently suspend any rule or regulation of an administrative agency, promulgated but not yet effective. Said joint committee may exercise such power as to rules or regulations promulgated between sessions."

This completes my answers to the several questions you have presented.

FRANK J. KELLEY,
Attorney General.

670814.2

MOTOR VEHICLES: Test of driver for alcohol content. Performance of test by physician, nurse and medical technician.

The term "direction" in section 625a of the Motor Vehicle Code does not require the personal presence of a licensed physician when a licensed nurse or medical technician withdraws blood from a person for chemical analysis provided appropriate directions have been given by a licensed physician.

No. 4559 August 14, 1967.

Mr. John H. Butts
Prosecuting Attorney
Cheboygan, Michigan 49721

You have asked my opinion on the following question pertaining to Act 104, P.A. 1964, relating to the withdrawal of blood from a person for the purpose of analysis for alcohol content: