WILLIAM H. SORRELL
ATTORNEY GENERAL
JANET C. MURNANE
DEPUTY ATTORNEY GENERAL
WILLIAM E. GRIFFIN
CHIEF ASST. ATTORNEY GENERAL

TEL: (802) 828-3171
FAX: (802) 828-2154
TTY: (802) 828-3665
CIVIL RIGHTS: (802) 828-3657

http://www.atg.state.vt.us

STATE OF VERMONT
OFFICE OF THE ATTORNEY GENERAL
109 STATE STREET
MONTPELIER, VT
05609-1001

Formal Opinion #2008-1

June 20, 2008

Hon. Deborah L. Markowitz
Secretary of State
Redstone Building
26 Terrace Street
Montpelier, VT 05601-1101

Re: H. 267

Dear Secretary Markowitz:

This is in response to your request for advice on the official duties of the Secretary of State relative to the preparation and publication of acts of the General Assembly. In particular, you ask whether your office should accept H. 267, an act relating to industrial hemp, and prepare it for publication. It is the opinion of the Attorney General that you should do so.

The Secretary of State does not have a role in the enactment of legislation, but has several duties relating to the custody and printing of laws after they have been enacted. These duties are described in three statutes which provide as follows:

> After an act or resolution has been passed by both houses of the general assembly, signed by the presiding officers of both houses and by the governor, it shall be delivered to the custody of the secretary of state. The secretary shall cause the act or resolution to be reproduced in form suitable to be submitted to the printer designated in 29 V.S.A. § 1115. Before submission to the printer the secretary shall correct obvious typographical errors and assign a public law number to each act or resolution.

3 V.S.A. § 104.

> Immediately after the close of each session of the general assembly, the secretary of state shall furnish the printer designated by the commissioner of buildings and general services a copy of the acts and resolves of such session, duly certified by him or her, as secretary of state. ....

29 V.S.A. § 1115.

> Within one hundred and fifty days after the final adjournment of each session of the general assembly, the governor, president of the senate, speaker of the house of representatives, and the secretary of state shall convene at Montpelier and verify the acts and resolutions which have been engrossed, typewritten or printed as provided by law under the direction of such secretary by comparison with the original acts and resolutions which have passed both houses. ....

2 V.S.A. § 18.

In summary, your duties are to review the acts delivered to your custody, confirm that they have been properly signed, assign them numbers, correct obvious typographical errors, deliver certified copies to the printer and, in cooperation with the Governor and legislative officers, assure that the printed laws match the original acts. Your letter expresses concern that H. 267 "has not been returned to the General Assembly as contemplated by section 11 of chapter II of the Vermont constitution" and asks whether you should assign it an Act number and send it to the printer along with the other laws enacted this session.

Section 11 of Chapter II of the Constitution describes the process for the General Assembly to present bills to the Governor and for the Governor to approve or return them. It provides that:

> Every bill which shall have passed the Senate and House of Representatives shall, before it becomes a law, be presented to the Governor; if the Governor approve, the Governor shall sign it; if not, the Governor shall return it, with objections in writing, to the House in which it shall have originated; which shall proceed to reconsider it. If, upon such reconsideration, two-thirds of the members present of that House shall pass the bill, it shall, together with the objections, be sent to the other House, by which it shall likewise be reconsidered, and if approved by two-thirds of the members present of that House, it shall become a law.
>
> .... If any bill shall not be returned by the Governor, as aforesaid, within five days (Sundays excepted) after it shall have been presented to the Governor, the same shall become a law in like manner as if the

> Governor had signed it; unless the two Houses by their adjournment, within three days after the presentation of such bill shall prevent its return; in which case it shall not become a law.

Thus, a bill can become law in three ways: 1) it can be passed by both houses and signed by the Governor; 2) it can be passed by both houses by two-thirds majorities after the Governor has returned it with objections; and 3) it can be passed by both houses and not returned within five days. As explained by the Vermont Supreme Court, "[f]ailure to return the bill within five days (Sundays excepted) is made equivalent to approval." *Hartness v. Black,* 95 Vt. 190, 199 (1921). H. 267 was not signed by the Governor and was not returned with objections, so the issue is whether it became law by the Governor's failure to return it within five days.

The legislative history of H. 267 shows that it passed the House on February 8, 2008 and passed the Senate on May 1, 2008. It was presented to the Governor on May 23, seventeen days (Sundays excepted) after the Legislature adjourned on May 3. On May 29, the fifth day (Sundays excepted) after the bill was presented to him, the Office of the Governor informed the House of Representatives that:

> ... [The Governor] did not approve and *allowed to become law without his signature* a bill originating in the House of the following title:
>
> H. 267 An Act Relating to Industrial Hemp

Message from the Governor, House Message #73, 05/29/08 (emphasis in original).

Therefore, absent an exception to the five day rule imposed by Section 11 of Chapter II of the Vermont Constitution, H. 267 became law without the Governor's signature because the Governor did not return it with objections within the time allowed. Given the Governor's message to the House, that is the result that the Governor intended. The only question is whether the bill was defeated by the exception to the five day rule created by the adjournment clause.

The adjournment exception to the five day rule provides that the Governor's failure to return a bill within that time limit will not be treated as approval if a legislative adjournment "within three days after the presentation of such bill shall prevent its return...." By its terms this exception does not apply to the present circumstances because the Legislature adjourned more than two weeks *before* H. 267 was presented to the Governor. The adjournment exception applies only when the Legislature adjourns "within three days *after* the presentation." (emphasis added)

It has been suggested that the adjournment clause could be interpreted to defeat unsigned bills not only when the Legislature adjourns within three days after the presentation of a bill, but also when the Legislature adjourns before a bill has been presented. The suggestion is that the Legislature has prevented the return of a bill

in both instances and should suffer the same consequence; that is, the bill should fail. The argument for this result might be that the rush of business at the end of a session presents a risk that the Legislature will pass flawed bills, the Governor needs more than the usual five days to review these bills and, therefore, end-of-session bills should never become law without the Governor's signature.

The problem with this interpretation is that it stretches the plain meaning of the constitutional language. In effect it adds words to Section 11 and expands it to include adjournments "before the presentation" of a bill as well as adjournments "within three days after the presentation." This is a problem because the plain meaning of "after" does not include "before."

The Vermont Supreme Court has cautioned against an "excessive reliance on a plain meaning approach to constitutional interpretation." *Chittenden Town School District v. Department of Education,* 169 Vt. 310, 327 (1999). Still, the constitutional text is an essential consideration and the usual starting point for constitutional analysis. *See, id.* at 324 ("In performing this analysis, we turn first to the text of Article 3..."); and 348-49 ("Plain language should be our first resource in interpreting the law, particularly when it provides as clear a guide as the plain language of the Compelled Support Clause does here.") (Johnson, J. dissenting.)

Other resources that the Court uses to resolve constitutional claims are its own decisions, the historical context of the relevant constitutional language and judicial precedents from other states. *Id.,* 169 Vt. at 321-42. We should of course use the same approach, and there is a Vermont case that discusses Section 11 generally and the five day rule in particular. *See Hartness v. Black, supra.* However, the facts in that case were significantly different from those presented here. And, unfortunately for our purposes, the Court was able to decide that case without venturing beyond the plain meaning of the adjournment clause.

In *Hartness* the Court considered the validity of several bills that had been challenged by the Secretary of State. All of the disputed bills had been signed by the Governor and all but one of them had been signed within five days of presentment. The Court's first holding was simply that the bills signed within the five day period became law by virtue of their signing. The Court rejected arguments that they were invalid because they had been signed, and in some cases presented and signed, after the Legislature had adjourned. 95 Vt. at 204-05.

The Court's second holding was that the remaining bill, which was not signed until the sixth day after presentment, was not valid. The Court reasoned that the signing after the five days allowed by Section 11 was ineffective and that if the bill became law it did so by virtue of the Governor's inaction during the five day period. The Court concluded without reservation that the five day rule did not apply and that the bill did not become law because it had been presented to the Governor

"within three days before the adjournment"; that is, within the specific time period described in the exception clause. *See* 95 Vt. at 205. [1]

In the course of its opinion the Court noted that "[t]he effect of an adjournment of both houses when there are bills awaiting executive approval is to cut off the opportunity for [legislative] reconsideration...." 95 Vt. at 199-200. The Court also expressed a general concern that "numerous bills, some of them important, containing many sections and intricate provisions are passed in the closing days, often in the closing hours of the session...." *Id.* at 202. These statements suggest that the adjournment clause should be given an expansive reading so that all bills presented after adjournment would fail if not signed by the Governor.

However, other statements in the opinion suggest otherwise. For example, when the Court framed the issue respecting the bill that was signed after the five day period, it underscored the limited time frame of the exception to the five day rule. *Id.* at 193 ("a bill which has been presented to the Governor within three days *before* final adjournment") (emphasis in original). The Court went on to describe the exception clause as "a concession in favor of the executive, and not as a limitation of his power of approval." *Id.* at 199.

Finally, the *Hartness* Court commented on a practical aspect of Section 11. The Court observed that, "[t]he Constitution has provided for defeating an act of Assembly when the Governor disagrees with the two houses of the Legislature; but where they all agree, it contains no provision for defeating their united will." *Id.* at 202. In our context there may be some disagreement between the legislative and executive branches about the wisdom of H. 267, but the "united will" was to enact a law. The House of Representatives and the Senate passed the bill and the Governor messaged his intent that it should "become law without his signature."

In the final analysis the *Hartness* Court did not have to decide whether the adjournment clause applied to bills presented to the Governor after adjournment and so did not provide definitive guidance on the issue. The case is more instructive in its discussion of the constitutional history. As the Court explained, Section 11 of Chapter II of our present constitution had its origins in a constitutional amendment first proposed in 1793. *See* 95 Vt. at 195-96. That proposal would have added a Senate to the General Assembly and provided for the automatic enactment of bills presented to the Governor and not returned within four days.

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[1] The bill in question, S. 30 of the 1921 session, was presented to the Governor on March 30, 1921. 95 Vt. at 204. The final adjournment that year was March 31. *Id.* at 192. Thus, the Legislature adjourned within three days after the bill was presented to the Governor. The Governor did not sign the bill until April 6, which was "more than five days after presentation (the intervening Sunday excepted) ...." 95 Vt. at 204.

More to the point, the 1793 proposal included an unqualified exception to the rule that bills not vetoed, or "returned," by the Governor within a certain number of days would become law. It provided that:

> If any bill shall not be returned by the governor, as aforesaid, within four days (Sundays excepted) after it shall have been presented to him, the same shall become a law, *unless an adjournment of the Legislature shall prevent its return*, in which case it shall not be a law.

95 Vt. at 196 (emphasis added). This language clearly provided that any adjournment of the Legislature preventing the return of a bill, including an adjournment before the presentment date, would override the provision for the automatic enactment of bills not returned on time. Such bills would not become law.

The substance of this 1793 proposal was added to our constitution in 1836, but the critical language changed. The adjournment clause was qualified so that only adjournments "within three days after the presentment of such bill" would prevent a bill from becoming law. Art. Amend. 11, 1836. That is the same qualified language that appears in Section 11 of Chapter II of our present constitution. [2] *See* Vt. Const. ch. II, § 11.

This history does not foreclose the argument that the constitutional intent was to apply the adjournment clause whenever an adjournment prevented the return of a bill, but it does weaken that argument. The Constitutional Convention that approved the amendments adopted in 1836 was aware of the proposed amendments that were rejected in 1793. *See* Collected Papers of Daniel Chipman, Speech of Hon. Daniel Chipman, January 6, 1836 at pp. 6, 18. The fact that the 1836 Convention adopted the qualifying language suggests an intent to limit the scope of the Section 11 adjournment clause.

As noted above, it is appropriate to interpret our Constitution in light of legal precedents from other states as well as from Vermont. Unfortunately the precedents from other states have limited value here because the adjournment clause in the Vermont Constitution appears to be one of a kind. This point is brought home in a standard legal treatise that includes Vermont on a list of states whose constitutions provide that a bill does not become law when its return "is prevented by adjournment of the legislature...." Sutherland Statutory

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[2] The 1836 amendment also increased the time for the Governor to return a bill with objections, from four to five days. A subsequent amendment required a two-thirds majority vote of both houses to override a gubernatorial veto. *See* Art. Amend. 29,1913.

Construction, § 16:4. Vermont's inclusion on that list is distinguished by a parenthetical reference to the qualifying language in Vermont's adjournment clause. *Id.*, n. 1 ("if legislature adjourns within three days after presentment").

The adjournment clauses in other state constitutions use unqualified language that defeats legislation without regard to the sequence of presentment and adjournment. *See, e.g.,* N.H. Const. pt. 2, art. 44 ("unless the legislature, by their adjournment, prevent its return"); Me. Const. art. IV, pt. III, § 2 ("unless the Legislature by their adjournment prevent its return"). The federal constitution uses similar, unqualified language, making the federal precedents inapposite as well. *See* U.S. Const. art. I, § 7 ("unless the Congress by their Adjournment prevent its Return").

You are probably aware that one of your predecessors accepted, numbered and certified another bill in circumstances like those in our case. In 1994, the Legislature passed a bill that was not presented to the Governor until June 15, three days after the final adjournment. *See* 1994, No. 236, An Act Relating to Fish and Wildlife Licensing. On June 21, the fifth day (Sundays excepted) after presentment, the Office of the Governor informed the House that "[the Governor] did not approve and *allowed to become law without his signature* a bill originating in the House of the following title: H. 153. An act relating to fish and wildlife licensing...." *See* Journal of the House dated June 12, 1994.[3] (emphasis in original) On August 5, 1994, the Secretary of State published the bill as Act No. 236 in a volume of laws that he certified as "true copies of the Public Acts and Resolves passed by the General Assembly...."

This 1994 precedent is not binding on you and is not a legal precedent with the stature of a court opinion. It is, however, a public and formal interpretation that two high state officials have given to Chapter II, Section 11. They acted in the scope of their offices and so were bound to "not directly or indirectly, do any act or thing injurious to the Constitution." Vt. Const. ch. II, § 56 (Oath or Affirmation of Allegiance).

In summary, there are several considerations that make it more likely than not that the courts would sustain H. 267 against a claim that it was not properly enacted. These considerations include: the plain meaning of the constitutional provision allowing bills to become law without the Governor's signature, the historical context of that provision, the fact that the Legislature has approved H. 267 and that the Governor has indicated it should be "allowed to become law," the lack of judicial

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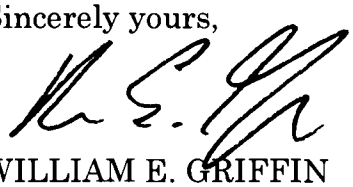
[3] This message was recorded along with several others received "after adjournment of the House," explaining why a message dated June 21 appears in a Journal dated June 12. The record shows that the bill in question was passed by the Legislature on May 24, 1994; that the Legislature adjourned on June 12; that the bill was presented to the Governor on June 15; and that the message from the Governor was sent on June 21.

precedents to demonstrate the bill should not become law and the parallel circumstances of the enactment of H. 153 fourteen years ago.

For all of these reasons the Attorney General's Office would advise you to accept H. 267 as a valid bill and to assign it a number and prepare it for publication.

Sincerely yours,



WILLIAM E. GRIFFIN
Chief Assistant Attorney General