FRIDAY, July 28, 1972.

The chief clerk makes the following entries under the above date.

COMMUNICATIONS

The State of Wisconsin
Department of Justice
Madison 53702

July 18, 1972.

The Honorable, The Senate
State Capitol
Madison, Wisconsin 53702

The Honorable, The Assembly
State Capitol
Madison, Wisconsin 53702

Gentlemen: Chapter 100, Laws of 1971, provides for merger of the Boards of Regents of (1) the University of Wisconsin, (2) the State Colleges and (3) provides a basis for implementation of merger of other aspects of these two State systems of higher education. Section 25 of such chapter directs the Attorney General to "commence an action seeking a declaratory judgment as to whether the constitution permits the merger * * * as provided in this act." The Attorney General is therein further directed to "petition for leave to commence the action as an original action before the Wisconsin supreme court."

On October 26, 1971, Governor Patrick J. Lucey appointed Mr. Laurence C. Hammond, Jr. of the law firm of Quarles, Herriott, Clemons, Teschner & Noelke to assert the side of such test case alleging unconstitutionality. Personnel of my office have met with Mr. Hammond and other members of his firm to implement the commencement of the original action requested in ch. 100. Mr. Hammond has authorized me to indicate that he is in agreement with the following recommendations.

As a general principle, ch. 100 does not provide for immediate merger of aspects other than the two Boards of

Regents but requires specific steps to be taken by the new merged Board of Regents and by the 1973 legislature to implement the merger. While there is the real probability that constitutional questions will arise as a result of implementation of the merger, similar changes in the Chapter 36 and 37 Institutions have not heretofore been made which raise any substantial constitutional issues. It is therefore my opinion that there are not, at this time, substantial justiciable issues which upon determination by the court would result in determination of the question as to whether the merger is constitutional; nor is there the required exigency that makes such constitutional determination ripe for litigation at this time. It is, therefore, consistent in accordance with my duties as Attorney General and as an officer of the court to resist commencement of the action requested by sec. 25 of ch. 100 until the merger contemplated is implemented to the point of raising substantial constitutional issues.

Chapter 100, Laws of 1971, and the implementation of merger up to the present time do not provide the *justiciable controversy* necessary for the courts to entertain the question of constitutionality. Constitutionality must be brought into question by the provisions of ch. 100 itself or implementation, thereof, upon actual, not hypothetical facts. The Supreme Court will not entertain the question of constitutionality when presented by a hypothetical fact situation, through contentions based on speculation, or based on eventualities which have not yet arisen and may never arise. *Stearns v. State Committee on Water Pollution* (1956), 274 Wis. 101, 106, 109, 110. The court will, as a general rule, not deal in advance with questions which may arise during administration of an act. *Petition of State ex rel. Attorney General* (1936), 220 Wis. 25, 44. The Supreme Court declines to render advisory opinions even though such opinion is requested by a coordinate branch of government; nor will the court take original jurisdiction where the uncertainty or controversy which gave rise to the proceeding will not be terminated by the decision. *State ex rel. La Follette v. Dammann* (1936), 220 Wis. 17, 22, 24.

Finally, there must be a present emergency or present need for action which is sufficient to induce the court to take original jurisdiction. *State ex rel. State Central Committee*

v. Board (1942), 240 Wis. 204, 213; *Income Tax Cases* (1912), 148 Wis. 456, 499.

Chapter 100, Laws of 1971, provides the following aspects of completed merger. The Board of Regents of the University of Wisconsin System is created to take the place of the University of Wisconsin Board of Regents and Board of Regents of State Universities. Sections 6 and 7. All powers, duties, and functions previously vested in the two separate Boards by statute are transferred to the new Board as to the merged systems. Section 20 (1). The two prior systems are consolidated and a single system created to be known as the University of Wisconsin System with the requirement that the principal office of the system and one (not the) campus be located at or near the seat of government. Sections 11 and 12. Rules, matters, and orders pending before the two former Boards are transferred to the System Board. Section 20 (7). Records, property, gifts, assets, and liabilities of the two Boards become those of the System Board "except that any grant, contractor, (sic) gift, endowment, trust or segregated funds bequeathed or assigned to individual campuses for any purpose whatsoever shall not be commingled or reassigned." Section 20 (6). The System Board is directed to consolidate the central administrative staffs of the former two systems before July 1, 1973. Section 20 (12) (b). General policy is set forth in sec. 20 (13) (a) in these words, "The legislature finds it in the public interest to create a single board of regents to administer the state's public universities." These, then, are the initial requirements of merger in ch. 100 and, as will be later shown, is the status of the merger at the present time.

There are, additionally, a substantial number of provisions in ch. 100 which either provide for merger of certain areas at a later date or preclude merger of certain aspects until further action of the System Board or of the legislature. The System Board is required, until further action by the legislature, to maintain those campuses which constitute the former State University System separate from those campuses which constitute the former University of Wisconsin, and further to operate the former State university campuses under ch. 37, Wis. Stats., and the former University of Wisconsin campuses under ch. 36, Wis. Stats., sec. 20 (10). The appropriations to the former two systems

are made available to the System Board but are maintained separate and are required to be used separately for the purposes for which appropriated under chs. 36 or 37, as the case may be. Section 20 (2) (a). Missions and programs of the various campuses "shall be those set forth and approved by the coordinating council for higher education as of July 1, 1971, and shall remain as the missions and programs until changed by formal action of the board of regents." Section 19. The System Board is required to maintain separate central administrative offices for each of the former systems until July 1, 1973. Section 22. "All existing policies, rules and traditional practices of the former university of Wisconsin and the Wisconsin state universities and of the individual institutions shall continue until changed." Section 20 (13) (d). Chapter 100 at sec. 26 provides for a merger implementation study committee to make recommendations to the regents and the legislature by January 31, 1973, on various listed aspects of merger including "the practicability, feasibility and wisdom of merger."

The actual present state of implementation of merger mainly covers factors not controlled by provisions of the Wisconsin Constitution. A new System Board of Regents has been established. Such System Board has provided for a president and other administrative officers. Vice Presidents were named to be in charge of the ch. 37 institutions, the former State universities, and of the ch. 36 institutions, the former University of Wisconsin. The names of the various campuses were changed to University of Wisconsin —(campus designation). Bylaws have been passed to control the meetings of the System Board. It has been further resolved by the System that the former University of Wisconsin bylaws relating to student disciplinary procedures will apply for ch. 36 institutions, and the bylaws of the former State University Regents on disciplinary procedures will continue to control in ch. 37 institutions until changed in the future. This basically is the state of the implementation of the "merger" as of this date. Other than the change of name of the various institutions of the System, there is no change in the missions, program, financing or operation of the various campuses.

I provide the following as examples of potential constitutional questions which are not presently raised by ch.

100, Laws of 1971, but may be raised by later implementation of such chapter.

Is the use of the income of the Normal School Fund and the University Fund by the merged schools constitutionally prohibited?

Article X, secs. 2 and 6, Wis. Const., read in material part:

"SECTION 2. The proceeds of all lands * * * shall be set apart as a separate fund to be called 'the school fund,' * * * shall be exclusively applied to * * *:

"1. To the support and maintenance of common schools, in each school district, and the purchase of suitable libraries and apparatus therefor.

"2. The residue shall be appropriated to the support and maintenance of academies and normal schools, and suitable libraries and apparatus therefor."

"SECTION 6. * * * The proceeds of all lands that have been or may hereafter be granted by the United States to the state for the support of a university shall be and remain a perpetual fund to be called 'the university fund,' the interest of which shall be appropriated to the support of the state university, * * *"

The potential constitutional question is whether the merger of all of the universities into one system precludes the former "normal schools," from drawing on the funds for "academies and normal schools." A second collateral question is whether the fact that the System Board of Regents control the functions of the former State Universities Board relating to the trust fund set forth by Art. X, sec. 2, makes the merger unconstitutional. The difficulty with the raising of this argument is the fact that ch. 100 does not merge the trust funds of the two university systems. There is no merger of the budgets of the University of Wisconsin and State universities since at sec. 20 (2) the appropriations are to be used by the System Board "for the purpose for which appropriated." Moreover, under sec. 20 (6) of ch. 100, we find language contemplating a maintenance of separation of trusts assigned to individual campuses in these words:

"* * * except that any grant, contractor, (sic) gift, en-

dowment, trust or segregated funds bequeathed or assigned to individual campuses for any purpose whatsoever shall not be commingled or reassigned."

The income of the "Normal School Fund" is presently paid into the general fund as general purpose revenue. Section 25.25, Stats. The income from the "University Fund" is appropriated to the present Board of Regents of the University as additional monies for general operations. Section 20.285 (1) (u), (w), Stats. The general practice has been for the University Administration to deduct the income of the "University Fund" from the proposed budget prior to submitting to the legislature.

There is nothing in ch. 100 that requires any commingling of the two trust funds and therefore it does not raise the question of use of the monies in a constitutionally prohibited manner. Section 20 (10) requires the System Board to operate chs. 36 and 37 institutions separately, and section 20 (2) (a) requires the appropriation for the former university under sec. 20.285, Stats., and for the former State universities under 20.265, Stats., to be used by the System Board for the purpose for which appropriated.

Does Chapter 100, Laws of 1971, violate the constitutional requirements that the University of Wisconsin be located at Madison?

The material part of Art. X, sec. 6, Wis. Const., reads:

"*State university; support.* SECTION 6. Provision shall be made by law for the establishment of a state university at or near the seat of state government, and for connecting with the same, from time to time, such colleges in different parts of the state as the interests of education may require. * * *"

Chapter 100 at sec. 11 repeals and recreates sec. 36.01, Stats., to read as follows:

"*36.01 SYSTEM.* There is created in this state a system of institutions of learning to be known as the university of Wisconsin system. The principal office of the system shall be located at or near the seat of state government and one campus of the system shall be located at or near the seat of state government."

In *State ex rel. Warren v. Reuter* (1969), 44 Wis. 2d 201, 221, the court held consistently with earlier cited cases that Art. X, sec. 6, was not a grant of power to the legislature, but a mandate to compel the legislature to exercise its power to the extent indicated. The minimum required in the language of sec. 6 is that the legislature establish "a state university at or near the seat of government." Chapter 100 requires that the principal office of the system and one campus be so located. I am informed that there has at this time been no change in the operation, program, or mission, or practically anything else at the Madison campus since the merger, except the change of name to University of Wisconsin—Madison. Consequently, this constitutional argument when applied to the facts results in the question as to whether the name change and establishing the former University of Wisconsin at Madison as one of the campuses violates the minimum requirement that a state university be at the seat of government. Without question there is, in fact, a state university at Madison since no change has been made in such facility. It must be noted that the constitution does not require or establish any specific type of governing body for the state university. The parties to the litigation, ch. 100 seeks to have initiated, could present sufficient stipulated facts and legal authority upon which the Supreme Court could determine what was intended by the language "a state university at or near the seat of government." However, the parties cannot speculate and stipulate as to the function and character of the System's Madison campus after the merger is implemented under the terms of ch. 100.

As Attorney General, I am cognizant of the duty imposed upon me by the legislature to test the constitutionality of ch. 100, Laws of 1971. I must, however, resist commencement of such action until the steps of implementation specified in such chapter are completed to the extent that a justiciable controversy is present. I am, therefore, advising you that it is not appropriate to seek a court determination of constitutionality of the proposed merged until substantial action is taken towards the implementation of merger, as contemplated by ch. 100, Laws of 1971.

Sincerely yours,

ROBERT W. WARREN,
Attorney General.