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Michigan Constitutional Issues

CITIZENS RESEARCH COUNCIL OF MICHIGAN IS A 501(C)(3) TAX EXEMPT ORGANIZATION

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THE EXECUTIVE BRANCH

THE ISSUE IN BRIEF

At the November 8, 1994 general election, the voters of Michigan will decide whether to call a constitutional convention to revise the Michigan Constitution of 1963. The question appears on the statewide ballot automatically every 16 years as required by the Constitution.

The executive branch is one of the three principal branches of government. As such, it is essential that voters have a clear understanding of the role of the executive branch and the issues associated with it that may be considered in a constitutional convention. Delegates to the 1961 Constitutional Convention were concerned with strengthening the office of governor. Major changes adopted to achieve this end included increasing the governors authority as it relates to the management of state government and the organization of the executive branch, reducing the number of elected officials, and enhancing the governor's role in the budget process.

The 1963 Constitution established two new constitutional commissions and retained another constitutional commission. The new commissions are transportation and civil rights, while the existing one is civil service. Each of the three commissions is the head of one of the principal departments of state government. There would be several major potential constitutional convention issues if the calling of a convention is approved by the people. These would include the governors executive reorganization power, the role of the Civil Service Commission, the election of state executive officials, and the need for a constitutional Transportation Commission.

Introduction

Article 5 of the Michigan Constitution entitled, "Executive Branch," establishes the constitutional framework for the executive branch of state government, one of the three principal branches of government along with the legislative and judicial branches. Under the separation of powers doctrine, the executive branch is responsible for overseeing the execution of the laws and delivering governmental services. A majority of delegates to the 1961 Constitutional Convention wanted to strengthen the office of governor and allow the governor to meet the evolving needs of state government. Opponents of strengthening the governor were concerned with the concentration of power in the governor. This concern manifested itself early in the Constitutional Convention when Delegate Brake offered an amendment to an executive committee proposal that read, "The executive power is vested in the governor." Delegate Brake wanted to insert the word "chief" before executive, which indicated that not all executive power rested in the governor. The proposed amendment was defeated, which set the tone for efforts to increase the governors executive powers.

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Strengthening the Office of Governor

Organization and Management In order to strengthen the governor's management role, a maximum of 20 principal departments was authorized; at the time of the Constitutional Convention, there were an estimated 120 executive agencies. For many years there were 19 principal departments, but in 1991 the Governor reduced the number to 18 through an executive order which abolished the Department of Licensing and Regulation and transferred its functions to the Department of Commerce.

Directly related to the establishment of no more than 20 principal departments was authorization for the governor to "make changes in the organization of the executive branch or in the assignment of functions among its units which he considers necessary for efficient administration." In order to effect a reorganization, the governor must issue an executive order outlining the specific organizational changes, then the Legislature has 60 calendar days to disapprove the executive order by both houses.

During the 26 year period 1965 through 1990, there were few substantive reorganizations by executive order, and most of the substantive executive orders transferred small organizational units from one principal department to another principal department. The current Governor has made extensive use of the executive reorganization power, including major reorganizations. In addition to the abolishment of the Department of Licensing and Regulation, examples of major reorganizations include the abolishment of the Corrections Commission and the restructuring of the Department of Natural Resources.

To improve the management of state government, the Constitution provided for gubernatorial appointment of most principal department heads and reduced the number of elected department heads from six to three (the attorney general, secretary of state and State Board of Education). Of the current 18 principal departments: three are headed by constitutionally elected officials (attorney general, secretary of state and State Board of Education); 11 department heads are directly appointed by the Governor; and, four are appointed by boards or commissions appointed by the Governor (civil rights and civil service, which are constitutional, and agriculture and natural resources, which are statutory). The Constitution provides that department heads appointed by the governor be subject to senate confirmation except for the Civil Service Commission.

State Budget A strong executive budget section was included in the 1963 Constitution. The governor is required to submit a balanced budget for all state operating funds. Michigan had a statutory executive budget prior to 1963. The governor's line item veto of appropriations was retained.

One of the innovative provisions of the 1963 Constitution was a requirement that the governor, with the approval of the appropriating committees of the House and Senate, reduce appropriation authorizations when revenues fall below revenue estimates. This provision has been implemented statutorily by requiring the governor to issue executive orders reducing proposed spending. The executive orders become effective when approved by a majority of each of the two appropriating committees. Executive orders reducing general fund-general purpose appropriations in the amount of \$1.8 billion have been issued since the first one in 1971. These actions accompanied by other efforts has resulted in only two general fund deficits (\$310 million in 1989-90 and \$169 million in 1990-91) since the 1963 Constitution became effective. Prior to that time,

there were general fund deficits in each of the last six fiscal years before the 1963 Constitution became effective. The effect of the constitutional budgetary provisions have been salutary in that state officials generally have met their responsibility to balance the state budget.

Other Provisions Executive appointments with the advice and consent of the Senate require Senate action within 60 session days after the date of appointment. Any appointment not acted on within the 60 day period stands confirmed. There was no similar provision under the 1908 Constitution; thus an executive appointee not confirmed was subject to Senate rejection at any time.

The governor's powers of inquiry and removal of officers, except legislative or judicial officers, for specific causes was made effective for all time periods. Under the 1908 Constitution, this power was in effect only when the Legislature was not in session.

The governor, lieutenant governor attorney general and secretary of state are elected for a four year term rather than a two year term. In addition the governor and lieutenant governor are elected on a joint ballot rather than separately as was the requirement under the 1908 Constitution.

Constitutionally Established Commissions

The 1963 Constitution established two new commissions and retained another constitutional commission. The new commissions were transportation and civil rights, while the existing one was civil service.

State Transportation Commission Prior to the 1963 Constitution, Michigan had an elected state highway commissioner created by statute. One of the major debates in the Constitutional Convention related to the number of executive branch officials that should continue to be elected. A minority of convention delegates wanted to continue the practice of electing the highway commissioner. Instead the 1963 Constitution provided for a State Highway Commission of four members appointed by the governor, who in turn appointed a state highway director. A constitutional amendment was approved by the voters in 1978 changing the name to the State Transportation Commission, increasing its membership to six and providing that the director of the State Transportation Department be appointed as provided by law. Public Act 484 of 1978 authorized the governor to appoint the transportation director.

Civil Rights Commission Arguably, the most pressing domestic issue during the deliberations of the 1961 Constitutional Convention was civil rights. Delegates to the Convention were committed to guaranteeing the civil rights of all citizens. The result was the creation of an eight-member constitutional Civil Rights Commission appointed by the governor, with no more than four members from the same political party. The director, by statute, is appointed by the Commission. In accordance with law, the Commission is authorized "to investigate alleged discrimination against any person because of religion, race, color or national origin."

Civil Service Commission The Civil Service Commission is provided for in Section 5 of Article 11, but the civil service system is an integral part of the executive branch and the Department of Civil Service is one of the existing 18 principal departments of state government. The constitutional civil service provisions were adopted by the voters in 1940, and the substance of the provisions were retained in the Constitution of 1963. There continues to be a four member, non-

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salaried, bipartisan Commission appointed by the governor to set policy for the Department of Civil Service and the state personnel System. A state personnel director position is established in the classified service and is appointed by the Commission. The Legislature is required to appropriate to the Department not less than one percent of the aggregate payroll of the classified service for the preceding fiscal year.

In order to facilitate management flexibility and policy development, the Constitution Increased the number of positions exempt from the classified service from two to five for each department. This was in addition to the heads of principal departments and the principal executive officers of boards and commissions heading principal departments. Finally, eight exempt positions were authorized in the governors office, an increase of six. Another change modified the Commission's power to fix rates of compensation. The Commission is required to give prior notice to the governor of any increase in compensation. Such increases can take effect only at the beginning of a fiscal year, unless waived by a majority vote in the House and Senate. The Legislature within 60 days of the budget submission may reject or reduce a pay increase by a two-thirds vote in both houses of the Legislature.

State police troopers and sergeants were granted the right to bargain collectively by constitutional amendment in 1978. All conditions of employment, except promotions but including retirement and pensions, are subject to collective bargaining and binding interest arbitration.

Constitutional Convention Issues

If the calling of a constitutional convention is approved by the people, there are several issues concerning the executive branch that likely would generate intense debate. Several of these issues received scrutiny in the 1961 Constitutional Convention.

Executive-Reorganization Power As was indicated above, the current Governor has made more extensive use of the executive-reorganization power than any of his predecessors. There are two areas where efforts may be made to reduce the extent of the governor's reorganization power. There was lengthy discussion in the 1961 Constitutional Convention concerning whether a reorganization proposal should be disapproved by majority vote in both houses or by either house. Prior to the constitutional authority, there was statutory executive-reorganization authority that provided for disapproval of a reorganization proposal by either house of the Legislature. Persons wanting to increase legislative power may seek to reduce the current requirement for disapproval by both houses to one house.

Two 1991 executive reorganization orders were challenged in the courts. One related to the employment security commission and the second involved a major restructuring of the Department of Natural Resources. Both cases contended that the Governor exceeded the constitutional authority and the enabling law relating to executive reorganization. Ultimately, the Michigan Supreme Court in **House Speaker v Governor** (443 Mich 560; 1993) upheld the Governor's actions in reorganizing the Department of Natural Resources. In the case involving the employment security commission, the Michigan Court of Appeals recently ruled that the Governor could abolish the commission. This decision has been appealed to the Michigan Supreme Court. There may be efforts in a constitutional convention to restrict the governors authority to abolish existing statutory departments and commissions, and to create new departments through the

promulgation of executive reorganization orders. In any event, the current Governor's use of the executive reorganization authority has focused attention on this constitutional power.

Civil Service Commission Although other states provide a constitutional basis for their merit system, no state has as strong a constitutional system as Michigan. The existing provision is detailed enough so there is no need for any enabling legislation, and it allows the Commission to adopt rules and regulations implementing its authority. The automatic one percent appropriation provision exempts the Department of Civil Service from the rigors of the appropriation process. The Constitutional Convention of 1961 reviewed the constitutional status of civil service, but made no significant substantive changes. A new convention might give consideration to three modifications to the existing system.

Provision for an automatic appropriation of one percent of classified payroll was included in the 1940 civil service amendment to guarantee an adequate source of funding, and was included after the Legislature gutted a statutory civil service system. It is considered good public policy for governmental agencies to undergo the scrutiny occurring through the budget process. It may be that the state civil service system is well enough established so that the automatic appropriation is no longer necessary.

A second issue concerns state employment and collective bargaining. Prior to 1978, the Commission was of the view that it had no authority, absent constitutional amendment, to extend collective bargaining to classified employees because to do so would involve an unauthorized delegation of the Commission's authority. After approval of the 1978 constitutional amendment authorizing collective bargaining for state police troopers and sergeants and a 1978 letter opinion of the Attorney General stating that the Civil Service Commission did possess the authority to grant collective bargaining to classified employees, the Commission, in 1980, authorized collective bargaining for the majority of classified employees. The Commission's authority to establish a collective bargaining system for classified employees has not been addressed by Michigan courts and would be an appropriate subject for clarification in a constitutional convention.

A third area for review is the Commission's role in reviewing and approving personal service contracts. The purpose of the existing review is to protect the merit system from abuse through the use of contractual service employees in lieu of classified employees. Downsizing the state work force and privatization of state services has raised concerns that the merit system may be undermined by the expanded use of contractual personal services. The existing wording relating to Commission approval or disapproval of personal service contracts is an appropriate subject for review in light of the changing environment concerning the delivery of state services.

Other Areas of Consideration An issue in the 1961 Constitutional Convention concerned elective versus appointive state officials. The committee on the executive branch recommended changing the method of selection of six state administrative officials from elective to appointive. The six were the attorney general, auditor general, highway commissioner, secretary of state, superintendent of public instruction and state treasurer. In the Constitution, the attorney general and secretary of state were retained as elected officials. In a constitutional convention, the election or appointment of administrative officials, probably, would focus on the attorney general, the secretary of state and possibly the superintendent of public instruction who is appointed by

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the State Board of Education. The need for constitutional status for the Transportation Commission also might be reviewed.

The governor is responsible for calling elections to fill vacancies in the House and Senate. Concern has arisen that elections are not always called in a timely manner. Legislative vacancies result in citizens not being represented when public policy is established. A constitutional convention might consider proposals that establish a timetable for calling special elections when legislative vacancies occur.