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Michigan Constitutional Issues

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THE LEGISLATIVE 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 Michigan Legislature, composed of a senate and a house of representatives, is the lawmaking body of state government. This analysis examines several issues concerning provisions in the "Legislative Branch" Article of the Michigan Constitution which a constitutional convention likely would be expected to resolve: legislative apportionment, legislative immunity from civil process, pay setting procedures, legislative disposition of administrative agency rules and legislative authorization to enact public sector collective bargaining laws.

Introduction

The powers of state government, because they derive from the nature of sovereignty itself, are plenary except in so far as they may be limited by a state constitution or by the Constitution of the United States. In the absence of a state constitutional provision to the contrary these powers belong to the legislative branch of state government. The Michigan Constitution divides these powers among three distinct branches: legislative, executive, and judicial.

Given the expansive scope of legislative power, neither the Michigan Constitution nor this analysis attempts to mark its outer boundaries. Rather, Section 1 of Article 4 (the "Legislative Branch" Article) simply declares the legislative power of Michigan is vested "in a senate and a house of representatives." The Michigan Constitution need not contain any specific grants of authority to the legislative branch of state government, in contrast with the executive and judicial branches which, in the main, exercise powers specifically enumerated. In theory, if the Michigan Constitution did no more than establish the Legislature, that institution could engage in all acts that are embraced within the concept of the general powers of government.

Constitutional Convention Issues

If the people of Michigan decide at the general election this November to call a constitutional convention, there are several provisions of Article 4 of the Constitution upon which the convention might wish to focus its attention.

Legislative Reapportionment

Legislative apportionment is the process by which a state is divided into geographic districts from which voters elect state senators and state representatives. With regards to legislative apportionment, the Michigan Constitution is deficient in two respects: it neither specifies what official is responsible for legislative apportionment, nor what standards are to govern the process.

Less than one year after the Michigan Constitution was adopted, a majority of the apportionment provisions (Sections 2 through 6 of Article 4) were declared unconstitutional by the United States Supreme Court in 1964 as in violation of the Equal Protection Clause of the Fourteenth Amendment. Even though Michigan has been without valid apportionment provisions for the past 30 years, neither the Legislature, nor the voters through their power to propose constitutional amendments, has chosen to address the issue. As a result, after the 1970, 1980 and 1990 federal decennial censuses, the Michigan Supreme Court was prevailed upon to develop an apportionment plan since neither the legislative apportionment commission (which the Michigan Supreme Court declared unconstitutional in 1982) nor, later, the Legislature itself could reach agreement.

Each of the four state Constitutions that have been adopted by Michigan voters since 1835 has contained specific legislative apportionment provisions. This fact suggests voters have deemed it unwise to leave the matter entirely to the discretion of any branch of government. The 1961 Constitutional Convention suffered the misfortune of drafting legislative apportionment standards at the very point in time when the federal case law on the matter was evolving. That case law, at least in so far as basic standards are concerned, is now settled. Thus, due to the fundamental importance of legislative apportionment and given the fact that Michigan voters have historically believed it should be governed by the state Constitution, a constitutional convention might propose language specifying what official should bear responsibility for legislative apportionment and, consistent with federal case law, what standards should govern the process.

Legislative Immunity from Civil Arrest and Process

The first sentence of Section 11 of Article 4 provides state senators and representatives a privilege of immunity from civil arrest and civil process while the Legislature is in session and for the five days both before and after session. The three predecessor Michigan Constitutions, dating back to 1835, also contained similar provisions. However, neither the drafters of the present or former legislative immunity provisions, nor the voters who adopted the respective Michigan Constitutions which contained them, contemplated that the Legislature routinely would be in session throughout the year. Given the reality of continuous legislative sessions, Section 11 of Article 4 provides legislators with an uninterrupted immunity from civil arrest and civil process. (Since the term “session” or “session day” has been construed to include the first day of session, the day upon which the Legislature adjourns sine die, and each day in between,, the Legislature technically is “in session” even while in recess.)

In 1982, voters adopted an amendment to Section 11 proposed by the Legislature which authorized legislative immunity “except as provided by law.” However, to date the Legislature has not utilized this amendatory language to restrict the scope of legislative immunity. A state constitutional convention might wish to reconsider what the appropriate scope of such immunity ought to be in light of the current practice of year round legislative sessions. One option would be to

limit legislative immunity to "working sessions" of the Legislature, which would allow civil arrest or civil process while the Legislature was in recess.

State Officers Compensation Commission

In August of 1968, voters adopted an amendment to Section 12 of Article 4 proposed by the Legislature establishing a state officers compensation commission which recommends compensation for the Legislature, governor, lieutenant governor, and justices of the state Supreme Court. Commission recommendations automatically take effect January I of each odd-numbered year unless rejected by a two-thirds vote in both houses of the Legislature by February 1 of that year. Candor compels the conclusion that the chief object of the present arrangement was to permit increases in compensation for the Legislature, and incidentally for other state officers, but in a manner which would, and in fact does, avoid direct legislative responsibility. A constitutional convention might consider returning to the former constitutional arrangement whereby the Legislature set its own pay and was held accountable to voters by virtue of the fact that such pay increases could not take effect until after an intervening election.

Administrative Rules

Section 37 authorizes the Legislature to permit a joint legislative committee, acting between legislative sessions, to suspend administrative rules. However, periodically the Legislature has asserted the authority to empower a committee not only to suspend administrative rules, but also to approve or reject rules. In fact, since the late 1970s, the Legislature has taken the position that administrative rules cannot take effect unless they are approved by a joint committee on administrative rules.

The present legislative treatment of administrative rules not only is contrary to Michigan Attorneys General opinions (by which the Legislature is not bound) but also is contrary to the Michigan Constitution (by which the Legislature <u>is</u> bound.) Concerning the former, Michigan Attorneys General have ruled consistently (in 1953, 1958, and 1967) that since administrative rules have the force and effect of law, the Legislature cannot act upon them except through constitutionally ordained legislative process, "namely by bill." (Before a bill becomes law it must be passed by both houses of the Legislature and be presented to the governor for approval or disapproval.) Concerning the latter, clearly Section 37 of Article 4 does no more than authorize the Legislature to empower a joint committee to <u>suspend</u> administrative rules <u>between</u> sessions of the Legislature. When Section 37 was drafted, a typical legislative session lasted about six months, with long intervals between sessions. Therefore, a procedure whereby a legislative committee could suspend temporarily administrative rules until the Legislature reconvened was eminently understandable.

That the present practice is of questionable constitutionality is reflected by the fact that on two occasions (in 1984 and 1986) the Legislature found itself in the odd position of asking voters to adopt a proposed constitutional amendment to authorize the very practice in which the Legislature was already engaged. Both of the proposed constitutional amendments were rejected by voters, but the Legislature has continued the practice unabated. Given the history of legislative abuses of Section 37 and the fact that sessions of the Legislature now extend year rounds a constitutional convention should consider prohibiting the Legislature from acting upon administrative rules except by bill.

Resolution of Public Employment Disputes

Section 48 of Article 4 authorizes the Legislature to enact laws providing for the resolution of public employment disputes, except those involving the state civil service. While the Legislature was doubtless possessed of such authority absent Section 48, a majority of the 1961 Constitutional Convention thought it prudent to remove any doubt as to the authority. It was under the auspices of Section 48 that the Legislature enacted Public Act 379 of 1965, the public employment relations act.

Act 379 is the dominant statute governing public employment relations in Michigan. Furthermore, the Michigan Supreme Court has held consistently that the public employment relations act prevails over conflicting statutes, municipal charters, and ordinances notwithstanding contentions by cities, counties, public universities, local school districts, and inferior state courts that other laws or even the state Constitution carve out exceptions to the act. (Indeed, the only governmental institution about which the question has arisen that the Michigan Supreme Court held was not subject to the public employment relations act is the Court itself.)

Due to the manner in which the Michigan Supreme Court has interpreted the public employment relations act, state Attorney General opinions have stated that public employers and their affected employees in effect have the right through the process of collective bargaining "to negotiate a statute out of existence as to the contracting parties." It is doubtful that the people of Michigan, by approving Section 48 of Article 4, intended that all other state statutes and, indeed, other provisions of the state Constitution were to become mere appendages to the Legislature's authority to resolve public employment disputes. A constitutional convention might wish to ponder the extent to which public sector collective bargaining agreements should supersede state statutes, charter provisions, or ordinances.