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Michigan Constitutional Issues

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THE JUDICIAL 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 judicial system of Michigan, composed of a Supreme Court, court of appeals and various inferior courts, is the branch of state government responsible for interpreting the law. This analysis examines several issues concerning provisions in Article 6, the "Judicial Branch," of the Michigan Constitution which a constitutional convention likely would be expected to resolve: judicial branch organization and administration; whether members of the Judicial branch should continue to be chosen through election; and the proper extent of state Supreme Court rulernaking authority.

Introduction

Within the constitutional context of separation of powers, the judicial power consists in general of the authority exercised by courts to interpret the law. The exercise of that authority generally is limited to specific cases and controversies brought before the courts for resolution by public and private parties and may involve momentous questions of public policy or merely pedestrian questions which are of importance only to the particular suitors. Due to the limited nature of the judicial power, Hamilton observed in early 1788 that of the three branches of government, the judicial posed the least threat to individual liberties since that branch held neither the power of the sword (as did the executive), nor of that of the purse (as did the legislative). While the sphere of judicial influence certainly has expanded since the time of Hamilton (rendering obsolete Montesquieu's observation that the judicial power "is next to nothing") the properly understood role of the courts remains a limited one.

Courts, whether state or federal, derive their powers from the constitution by which they are established. Section 1 of Article 6 of the Michigan Constitution (the "Judicial Branch" Article) declares the judicial power of the state "is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish by a two-thirds vote of the members elected to and serving in each house."

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 6 of the Constitution upon which the convention might wish to focus its attention.

Judicial Financing and Administration

As was noted earlier, the judicial system established by the Michigan Constitution is composed of "one court of justice" which is then divided into a number of separate courts. The intent behind this somewhat awkward constitutional phraseology was to establish a single, unified judicial structure composed of several divisions, but at the top of which would be a state Supreme Court with exclusive administrative and supervisory control over all lower courts. The 1850 and 1908 Michigan Constitutions granted the Supreme Court general superintending control over lower courts. However, by the time of the 1961 Constitutional Convention circuit courts, and to a lesser extent probate courts, had evolved into quasi-independent entities whose judges considered themselves accountable only to the local voters by whom they were elected. A majority of the delegates to the 1961 Constitutional Convention concluded that a more centralized judicial structure would be more efficient and economical. However, two issues have arisen regarding the one court of justice concept. One has to do with how state courts are funded; the other with how well they are managed.

The responsibility for funding trial courts in Michigan traditionally has been that of units of local government. However, Public Act 438 of 1980 provided among other things that the state would assume this responsibility over a six-year period beginning in 1983. Except for the three trial courts in Wayne County (third circuit court, 36th district court, and Detroit recorder's court), the state Legislature did not appropriate monies to meet the financial obligations apparently assumed under Act 438 and litigation ensued.

One of the arguments made by plaintiffs was that the one court of justice concept placed upon the state Legislature a constitutional obligation to fund the entire state judicial system. A current justice of the state Supreme Court has expressed the same opinion by way of dicta. **Frederick** v **Presque Isle County Circuit Court,** (439 Mich 1; 1991). However, in January of this year the Michigan court of appeals rejected that argument. The record of the 1961 Constitutional Convention indicates that the one court of justice concept was intended to be only an administrative, and not a funding, arrangement. If a state constitutional convention is approved, it might wish to clarify whether the concept should include state funding of judicial functions as well.

The second issue has to do with the administration and management of the state judicial system. The state Constitution lodges that responsibility exclusively in the state Supreme Court by means of the one court of justice concept and by the requirement that the chief justice appoint an administrator of the courts. There are differing opinions regarding the extent to which that system is well managed. The same may be said regarding the productivity of the state Supreme Court. However, whether the conditions which give rise to these opinions suggest inadequate resources or the inefficient use of existing resources remains an open question. Independence of the judicial branch has its virtues. However, because the administration of the judicial branch is lodged exclusively in the Michigan Supreme Court, the management and organization of the judicial branch probably receives less legislative and executive branch attention than would otherwise be

the case. A state constitutional convention might wish to revisit the issue of how the judiciary should be organized and administered.

Selection of Supreme Court Justices

Section 2 of Article 6 provides that the Supreme Court is to consist of "seven justices elected at non-partisan elections as provided by law." However, justices are nominated by their respective political parties at conventions which tend to be highly partisan affairs. (While Section 2 of Article 6 allows incumbent justices to renominate themselves by filing an affidavit of candidacy, this approach poses the practical disadvantage of forfeiting political party support and, thus, is not utilized with great frequency as the sole method of renomination.) Given the method by which state Supreme Court justices are nominated, the requirement that they be elected on a nonpartisan basis appears to serve no discernible purpose except to provide an illusion of nonpartisanship which, in reality, may not exist.

If a constitutional convention is approved, it might wish to examine different methods of selecting Supreme Court justices and other judges. One alternative would be to require that state Supreme Court justices be nominated (as well as elected) on a nonpartisan basis, which is what the state Constitution now requires for judges of the court of appeals, circuit courts, and probate courts. Such an approach would remove partisanship from the nominating process where, arguably, it should have no place. An alternative at the other extreme would be to dispense altogether with electing Supreme Court justices and provide instead that they be appointed by the governor... subject to advice and consent of the senate as is done at the federal level. Indeed, four of the seven current justices of the state Supreme Court were initially appointed by a governor (as were one-third of the 24 current judges of the court of appeals) and there has been no indication that those justices who initially were appointed have performed in a manner inferior to those justices who initially won their seats by election.*

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* A state constitutional convention might consider providing for gubernatorial appointment of all judges as one means of shortening the election ballot. At present, Michigan voters are asked to elect 609 members of the judicial branch of state government: seven Supreme Court justices; 24 court of appeals judges (28 as of November 8, 1994); 179 circuit judges; 107 probate judges; 259 district judges; and 29 Detroit recorder's court judges. Considering the plethora of judicial positions and of the individuals who wish at any given time to occupy them, voters often may have little more to distinguish one candidate from another than a well-known surname.

It is noteworthy that the states follow several approaches with respect to how supreme court justices initially are selected. According to data compiled by the Council of State Governments, supreme court justices In 23 states are appointed by the governor, often from a list of names provided by a judicial selection commission; justices in ten states are elected on a partisan ballot; in 13 states they are elected on a non-partisan basis; and in the remaining four states supreme court justices are selected by the state legislature. In a number of instances where the initial method of selection is by appointment, justices subsequently must stand for election.

Supreme Court Rulemaking Authority

Section 5 of Article 6 provides that the Supreme Court "shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state." Similar provisions were contained in the 1850 and 1908 state Constitutions. While the provision appears to be straightforward, it poses two problems. First, there is as a practical matter no bright line to distinguish questions of practice and procedure on the one hand from questions of substantive law on the other. (For example, what evidence may be admissible at trial and under what circumstances may be viewed as a matter of practice and procedure, but also may have a direct impact upon the substance of legal recourse.)

Second, the Michigan Supreme Court has taken the position since 1959 that when there is a conflict concerning practice and procedure between one of its rules and a statute, the former prevails. In effect, the Michigan Supreme Court has claimed the authority to strike down a statute adopted by the Legislature, not through the customary means of declaring it unconstitutional in the context of a particular lawsuit but simply by finding that statute to be in conflict with a court rule governing practice or procedure. Under such a circumstance, there would no practical recourse since the final authority to interpret and fix the meaning of the state Constitution rests with the Michigan Supreme Court.

A constitutional convention might wish to provide that a statute would prevail over any conflicting court rule, irrespective of the subject matter involved. While such an approach was proposed but not adopted at the 1961 Constitutional Convention, the matter may be worthy of reconsideration.