CRC Special Report

Michigan Constitutional Issues

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Eighth in a series of papers about state constitutional issues

Article V – Executive Branch

In Brief

At the November 2, 2010 general election, the voters of Michigan will decide whether to call a constitutional convention to revise the 1963 Michigan Constitution. The question appears on the ballot automatically every 16 years as required by the Constitution. The Constitution provides that a convention would convene in Lansing on October 4, 2011. If the question is rejected, it will automatically appear on the ballot again in the year 2026.

The Citizens Research Council of Michigan takes no position on the question of calling a constitutional convention. It is hoped that examination of the matters identified in this paper will promote discussion of vital constitutional issues and assist citizens in deliberations on the question of calling a constitutional convention.

State government powers are expansive and shared among three branches of government: legislative, executive, judicial. Executive power resides with the governor. With the exception of the three departments headed either by popularly-elected individuals (secretary of state and attorney general) or a board (state board of education), the governor exercises unified direction of all the departments and agencies in the executive branch.

For 47 years, Michigan state government has operated under a constitutional framework that centralizes executive power in a single office and provides for a strong governor. With the exception of two amendments to Article V, "Executive Branch", the original constitutional provisions governing the operations of the executive branch remain basically intact. Despite this consistency over the years, a number of issues might be considered by a potential constitutional convention charged with looking at Article V dealing with: executive reorganization powers, single versus plural executive, filling legislative vacancies, office vacancies of executive officials, the governor's role in the state budget process, and the governor's appointment powers.

Introduction

The separation of powers doctrine provides for three branches of government (legislative, executive, and judicial). In this model of governance, the executive branch is responsible for overseeing the execution of laws and the delivery of governmental services. Article V of the Michigan Constitution vests the executive power of state government in the governor and broadly defines the appointive, reorganizational, and budgetary powers of the office, and it also allows the governor to call the legislature into extraordinary session. In addition to the governor, Article V provides for four other popularly-elected executive branch officials to play roles in the execution of state government; lieutenant governor, attorney general, secretary of state, and state board of education (an eight-member plural head of the Department of Education). Article V also discusses the organization of the executive branch.

During the 1961 Constitutional Convention, considerable debate and action surrounded the topic of strengthening the power of the governor, which resulted in major changes in the executive article. The governor's role in governing state affairs was strengthened by: 1) extending the term of the office from two to four years; 2) reducing the number of elective executive branch officers from eight to four; 3) increasing the authority of the governor by capping the number of departments and allowing greater discretion in the organization of the executive branch; and 4) expanding the governor's role in the budget process.

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From a public policy standpoint, very few issues have arisen in the past 47 years pertaining to the proper functioning of Article V relative to the governor's ability to effectively carry out his or her executive powers. This fact is evidenced by the relatively few times that amendments have been offered to Article V; of the five contemplated amendments, only two were approved. The first successful amendment (1978) had the effect of further centralizing executive power in the governor by replacing the State Highway Commission with the State Transportation Commission and changing the Commission's primary function from administrative to policy making (Section 28). A 1992 amendment provided term limitations for the governor, lieutenant governor, secretary of state, and attorney general (Section 30). On the surface, such limitations theoretically diminished the power of the governor to the benefit of the legislative branch; however, term limits also were enacted at the same time for state legislators.

Constitutional Convention Issues

Despite the relatively few attempts to modify Article V over the years, a constitutional convention is likely to consider a number of issues surrounding the executive branch of government, including: 1) the reorganization powers of the governor; 2) single versus plural heads of departments and agencies; 3) the authority of the governor to call special elections to fill legislative vacancies; 4) issues related to executive office vacancies; 5) the governor's responsibility for maintaining annual budget balance, particularly as it relate to executive order reductions; and 6) the governor's appointment authority as it is limited by the Senate's advice and consent power.

Executive Reorganization Power

One popular criticism of the 1908 Constitution was that it provided for a de-centralized executive branch which lacked clear lines of authority in the executive powers of state government. Proponents of a new constitution sought to centralize executive power in the governor and through a new structure for the executive branch. However, concerns were raised about the organizational powers pertaining to the executive branch and how to balance the new political power of the governor. The 1961 Constitutional Convention resolved this by establishing the broad framework for the executive branch in the new constitution and granting organizational authority to both the legislative and executive branches. Initial "organizational" authority was provided to the legislature via the temporary provisions of the new constitution and required this power to be exercised within two years of the effective date of the new document (Schedule and Temporary Provisions, Section 12). After this initial organization by law, the constitution provided the governor with "reorganizational" power. The legislature's initial actions, as codified in the Executive Organization Act of 1965 (Public Act 380 of 1965), and any subsequent reorganizations by the governor were limited by the provisions of Article V, Section 2, which capped the number of principal departments at 20.

In addition to the cap on departments, Section 2 further allows 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." Five principal departments are established in the 1963 Constitution, either by specific reference (e.g., state transportation department and state department of education) or because language requires certain individuals to head a principal department (e.g., attorney general, secretary of state, and state treasurer). Outside of the five constitutionally-established departments, the gov-

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ernor has substantial authority to structure the executive branch in the manner he or she desires.

The governor's reorganization authority is not absolute; it is subject to legislative "veto" in that executive orders contemplating organizational changes can be nullified if disapproved by a majority vote in both chambers of the legislature. Until the early 1990s, Michigan state government operated with 19 departments (original allocation by The Executive Organization Act of 1965) and there were few changes to the organization of the executive branch; however, over the past 20 years, the organization of state government has undergone substantial changes, with the stated goal of reducing the number of departments through consolidations and eliminations. The executive branch is currently organized into 15 principal departments. Given the changes to the executive branch over the last two decades, issues have arisen regarding the governor's reorganization powers contained in Article V that might be considered by a constitutional convention.

Given the general trend towards fewer departments, consideration might be given to further limiting the number of state departments. Although justification for most departmental consolidations and eliminations to date have been made on the grounds of efficiency and cost savings, these changes entail governance issues as well. Proponents of further centralizing and strengthening the powers of the governor would likely support efforts to reduce the number of department heads that directly report to the state's chief executive. Opponents of strengthening the governor would raise concerns about concentration of power.

A second issue, the legislature's role in executive branch reorganization, arises because some executive branch reorganizations have generated considerable legislative scrutiny, especially in recent years. Heightened legislative scrutiny dates back to 1991 when two executive orders were challenged in court on the grounds that the governor exceeded his constitutional authority and violated state law. In one case brought by the speaker of the House of Representatives against the governor, the Michigan Supreme Court ultimately upheld the governor's power to restructure the Department of Natural Resources. More recent reorganization efforts that abolished the Department of History Arts and Libraries and changed the authority of the Commission of Agriculture and Natural Resources Commission, although not subjected to judicial review, received considerable attention by the legislature. A constitutional convention may review the governor's authority to abolish and modify existing statutory departments and commissions, and to create new departments through the executive order process. Consideration might be given to the constitutional requirement that both legislative chambers must disapprove executive order reorganizations by changing the threshold to disapproval by either house, a position that proponents of stronger legislative control over the executive branch structure might advocate.

Single versus Plural Executive

The 1963 Constitution favored the "single head" over the "plural head" form of governance for principal departments within the executive branch. This represented a departure from the previous constitution that placed control of executive branch departments and agencies with various boards and commissions. Section 3 of the current document states, "The head of each principal department shall be a single executive unless otherwise provided in this constitution or by law." While the 1963 Constitution allows for the plural form of department head, it requires the governor to appoint members of such boards or commissions, unless these members are elected or appointed pursuant to other constitutional provisions.

Since the adoption of the current constitution, the number of plural heads of departments has declined, in part due to departmental consolidations and eliminations. For example, the Department of Civil Service was eliminated in 2007, and the constitutionally-established Civil Service Commission, which previously served as the head of the department, was transferred to the Department of Management and Budget. More recently, executive reorganization orders changed how the directors of the Department of Agriculture and the Department of Natural Resources and the Environment are selected to provide direct gubernatorial appointment of these positions. As a result of these recent changes, only two principal de-

partments (of 15 currently) are headed by the plural form of governance, the Department of Education (elected) and the Department of Civil Rights (appointed).

The single executive structure has not been universally applied to the state administrative agencies that exist within the principal departments. A host of plural bodies established within the departments exercise administrative and/or advisory functions. Nearly all of these bodies are established within state law, while some have constitutional status (e.g., Civil Service Commission). Two issues arise here that might be considered by a constitutional convention. The first issue relates, in a similar fashion, to that discussed above regarding "single head" versus "plural head" for administrative agencies. Should all administrative agencies exist with a single executive to foster greater management control and efficiency? Plural bodies serving in advisory capacities are probably best to ensure that different perspectives and points of view are considered when public policy is debated.

Another issue that arises concerns the number of plural-headed entities that exist at the sub-department level. Unlike the principal departments, the maximum number of which is capped in the constitution, the executive branch is not bound by a specific number of boards or commissions that can exist within each department. These entities are very common in both the private and public sector governance models and advocates for them contend that they provide a level of independence and insulation from political manipulation. Bipartisan representation on these bodies, which is often required, can ensure that a minority voice in the policy debate is heard. On the other hand, critics suggest that such bodies lack accountability and make timely decision-making difficult to achieve. The widespread and disparate use of these bodies throughout state government results in little consistency. The various bodies share little in common in terms of internal operations, membership selection, or general roles and responsibilities, all issues which can make it difficult for citizens to understand how their government is structured and operates.

Legislative Vacancies

Section 13 requires the governor to call elections to fill vacancies that occur in the House of Representatives and the Senate. This method for filling legislative vacancies has been in operation dating back to the 1908 Constitution. The constitutional language is written in a way that provides the governor with considerable flexibility in the application of this long-standing power. While the language requires the governor to call such elections, it does not provide any sense of timing for such elections. Vacancies in either the House or Senate can leave constituents with a sense of underrepresentation in Lansing, which can be especially problematic when the length of a vacancy is extended because of the political motives of the governor. While long-standing vacancies can damage citizens' sense of representation in the halls of government, conducting special elections to fill vacancies can prove problematic and costly, especially if a vacancy occurs near the end of a term.

Some of the issues surrounding timing have been attended to with the consolidation of election dates in Michigan, but the governor is not bound by such limitations and may call special elections when he or she wants. Generally, filling a vacancy requires a primary election followed by a general election; however, the Michigan Election Law (Public Act 116 of 1954) permits the governor to direct that the vacancy be filled at the next general election if the vacancy occurs after the primary election and before the general election. By statute, candidates from each political party to fill the unexpired term are nominated by county committees of the respective political parties. In view of the desirability of the governor to have discretion in this matter, a constitutional convention might consider modifying the mandatory intent of the language to reflect the flexibility that has been afforded to the governor in practice.

A constitutional convention might also consider practices in other states and craft a new method for filling legislative vacancies. According to the National Conference of State Legislatures, 25 states, including Michigan, have provisions to fill legislative vacancies by special election and the remaining states use an appointive process. In 11 of the "appointive" states, the governor makes the appointment, while seven states give this authority to county commissioners. Another five states grant the appointment authority

to the same political party as the legislator that vacated his office. In two states, the legislature appoints the replacement to complete the term of the individual that left office.[1]

Office Vacancies of Statewide-Elected Officials

Timely and clear lines of succession relating to vacancies in elective office are hallmarks of democracies. Vacancies in the offices of statewide-elected executive branch officials can be either permanent (resignation, death) or temporary (absence from state, incapacitation). Article V covers these issues, but it is deficient with respect to vacancies in the office of lieutenant governor and it could be updated to reflect the modern day roles and responsibilities of the governor.

Section 26 discusses how temporary gubernatorial vacancies, such as out-of-state travel or "inability" to serve, are to be handled. With respect to such vacancies in the office of the governor, the 1963 Constitution makes no distinction. Whenever such scenarios arise, the governor's duties devolve to the lieutenant governor, or whoever is currently serving as the "next in line". In light of modern day communication and travel speeds, and the frequency and reasons for the state's chief executive to travel, it seems somewhat antiquated that temporary vacancies and the devolution of gubernatorial powers caused by travel should be treated the same as those caused by an "inability" to serve.

Section 26 provides a clear line of succession to the office of the governor when a vacancy occurs. The first person to fill a gubernatorial vacancy is the lieutenant governor, followed by other statewide-elected officials. However, the Constitution is silent with respect to filling a void in the office of lieutenant governor. The lack of specific constitutional provisions for filling a vacancy in this office was a change from the 1908 Constitution, which allowed the governor to appoint a replacement. A constitutional convention might revisit the issues surrounding vacancies in the office of lieutenant governor.

The lieutenant governor is one of four statewide-elected officials serving in the executive branch. However, unlike the secretary of state and attorney general, the lieutenant governor appears on the same ballot as the governor, thereby ensuring that the chief executive and his or her lieutenant are from the same political party. The lieutenant governor has both executive and legislative roles, but does not possess any unique executive branch powers and only performs those duties assigned by the governor. In fact, Section 25 prohibits the governor from delegating any vested powers to the lieutenant governor. In terms of constitutional legislative powers, the lieutenant governor serves as the president of the Michigan Senate and its presiding officer, and is allowed to vote only to break a tie in the 38-member body.

Vacancies in other statewide-elected offices are filled according to provisions contained in the 1963 Constitution. Section 21 requires the governor to appoint replacements for vacancies in the offices of secretary of state and attorney general. Without a means to fill a vacancy in the office of lieutenant governor, it must remain unfilled until the next gubernatorial election, a scenario that occurred when Lieutenant Governor Milliken ascended to the chief executive post after Governor Romney resigned to become Secretary of the U.S. Department of Housing and Urban Development in 1969.

Vacancies in the office raise both practical and political issues. Positions on statutorily-created boards, such as the State Administrative Board, that the lieutenant governor serves on would have to remain vacant until after a gubernatorial election. Similarly, tie votes in the Michigan Senate could not be broken because the constitution entrusts only the lieutenant governor with this responsibility. (The decision making process in the Michigan House of Representatives does not provide a procedure, constitutionally or statutorily, to break a tie.)

The current system of gubernatorial succession introduces a political consideration: when a lieutenant governor ascends to the chief executive post and the lieutenant position is left vacant, the "next in line" for gubernatorial succession is the secretary of state, who may

[1] National Conference of State Legislatures, *Filling Legislative Vacancies*, January 2010. www.ncsl.org/default.aspx?tabid=19495

or may not be from the same political party as the new governor. In the absence of a lieutenant governor, the secretary of state would also serve as governor in the event that the governor leaves the state or is unable to perform the duties of the office. Under the provisions of the 1908 Constitution, the new governor would appoint a lieutenant governor to fill his or her vacated position, thus ensuring political party continuity in the governor's office. However, this "appointive" process for filling vacancies in the lieutenant governor's office could result in a person serving as governor who was not directly elected by Michigan voters.

While it is unlikely that a constitutional convention would find major problems with the practical issues associated with lieutenant governor vacancies, it might find the political concerns of sufficient weight to merit addressing how to fill vacancies in the office when they occur.

State Budget

In addition to the provisions designed to strengthen the office of the governor from an organizational and management standpoint, the 1963 Constitution included new provisions that strengthened the governor's role in the state's fiscal affairs. Specifically, the Constitution included a new section that requires the governor to submit to the legislature for its consideration a balanced budget for all state operating funds (Section 18). Previously, executive budget submittal was governed by statutory law, not constitutional law. This balanced-budget provision was supplemented by other language (Section 20) that requires the governor, with the approval of the appropriations committees of the House and Senate, to reduce appropriation authorizations when revenues fall below the estimates on which appropriations were based. This constitutional requirement is implemented through statutory provisions contained in the Management and Budget Act (Public Act 431 of 1984) that direct the governor to issue executive order spending reductions when estimated revenues fall short of spending. Appropriation reductions ordered by executive order require approval of the two appropriations committees only; appropriation reductions effected through appropriation acts, on the other hand, require a majority vote in each chamber and signature by the governor, who has line-item veto authority.

The use of executive order spending reductions has become a key component in the state's arsenal for maintaining balanced budgets throughout the year, especially during economic downturns when actual state tax receipts deviate substantially from the original estimates. For the fiscal year 2008-2009 budget, and in response to fiscal effects of the "Great Recession", executive orders were used mid-year to reduce general fund spending by $356 million. The executive order process enables the state budget to be modified in an expedited way, avoiding some of the delays that can accompany the full legislative process. However, the process also removes certain state fiscal decisions from the scrutiny of the entire House and Senate.

Appointment Power

Under the 1963 Constitution, the governor's appointment power was considerably expanded from what existed in the 1908 Constitution, mainly as a result of the centralization of executive authority and the elimination of certain elected positions in the executive branch. Appointive positions are created both in the Constitution (e.g., certain department heads and university board members) as well as in state law (e.g., certain boards and commissions within principal departments). In some cases, the governor exercises the appointment power unilaterally, while in other cases the power is limited.

In many states and the federal government, the appointment power held by the chief executive is subject to legislative scrutiny, effectively creating a system of checks and balances between the two branches of government. In Michigan, the governor and the Senate share in the responsibility for selecting certain qualified persons exempted from the state civil service to serve in the executive branch of state government. The foundation for shared appointment power exists in the "advice and consent" provision of Section 6. Under this section, a gubernatorial appointment subject to advice and consent can be nullified only if disapproved by a majority vote within 60 days of the appointment being made. Absent such action, an appointment stands. Michigan's process is different from the federal government's process, in that individuals nominated by the President to serve in senior govern-

mental positions generally can not do so until they are confirmed by the U.S. Senate. (Article II, Section 2 of the U.S. Constitution grants the President the authority to appoint individuals to positions when the Senate is in recess; however, such appointments must be confirmed by the end of the next session, otherwise the position becomes vacant again.) In Michigan, gubernatorial appointees assume their appointed positions upon taking the oath of office as required by Article XI, Section 1 and continue to serve unless the full Senate votes to disapprove the appointment.

As a matter of practice, the advice and consent process has been used to varying degrees over the years. In some cases, appointments have been subject to little if any legislative scrutiny. In recent years, however, a quasi-formal process has been developed and it has been applied more uniformly. There is no state statute governing the process; however, some attorney general opinions have been rendered on the subject. Ultimately, the process is a political one in that disapproval results from a vote of the Senate.

Recent appointments have raised issues regarding the timing of the governor's use of appointment authority, which might be considered by a constitutional convention. Nothing in current law discusses the question of "when" a governor can make an appointment. This can prove problematic when a term for a position subject to gubernatorial appointment expires at or near the end of the current governor's term in office. In such cases, and when there is turnover in the governor's office, the appointee, although appointed by the previous governor, effectively serves "at the pleasure" of the new governor. In theory, nothing under current law prevents a governor from making appointments for terms that expire well-after he or she leaves office, although as a practical matter this is most likely to occur nearer the end of a governor's time in office.

Another issue relating to the governor's appointment power that might be considered by a constitutional convention concerns the state administrative organization for the supervision of elementary and secondary education. The 1963 Constitution provides for a statewide election of the eight-member State Board of Education, a body responsible for supervision and policy over all public education, except higher education institutions. The Board is responsible for appointing the superintendent of public instruction. Consideration might be given to centralizing the governor's executive authority over education policy matters by moving to an appointed state school board and superintendent.

Other states vary in their use of appointive versus elective methods to select public education officials. Of the states with boards of education, 36 use some sort of appointive (usually by the governor) process. (Minnesota and Wisconsin do not have boards and the board in New Mexico is advisory only.) Nine states, including Michigan, employ elections to select board members while two states use a combination of appointments and elections. In 24 states, the chief state school official is appointed by the state board, while in 12 other states the governor appoints this official. Fourteen states provide for a separately-elected chief state school official.[2]

[2] Education Commission of the States, *State Education Governance Models,* March 2008. www.ecs.org/clearinghouse/77/78/7778.pdf

Conclusion

Unlike other articles in the 1963 Constitution, Article V does not include provisions that have been ruled unconstitutional or inoperable. From this standpoint, a constitutional convention would not be tasked with developing conforming language with the U.S. Constitution or U.S. Supreme Court decisions. A constitutional convention would likely examine the broad issues dealing with the powers of the governor and executive branch structure and organization. Nothing in Article V has prevented the executive branch from governing effectively over the past 47 years and no related issues have risen to the level of crisis that would suggest immediate modification is necessary.