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## **IMAGINING WHAT SHOULD BE: ROBUST LEGISLATIVE OVERSIGHT IN MICHIGAN**

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# IMAGINING WHAT SHOULD BE: ROBUST LEGISLATIVE OVERSIGHT IN MICHIGAN

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# IMAGINING WHAT SHOULD BE: ROBUST LEGISLATIVE OVERSIGHT IN MICHIGAN

## Summary

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### In a Nutshell

- Many elements of effective and ongoing legislative oversight are already in place, including a constitutionally empowered Auditor General, the Legislative Council, oversight elements in the appropriations process, actions by standing policy committees, and reviews by both legislative oversight committees.
- Should Michigan want to move to a more active and comprehensive system of legislative review – one conducted by lawmakers themselves – lawmakers should consider making sunset legislation a more comprehensive aspect, rather than the current political tactic system.
- To take full advantage of the existing direct and implied oversight authority provided to the Michigan Legislature, lawmakers should, first, establish a framework for such authority in a formal setting; at a minimum, as part of legislative rules or through statute.

Michigan's legislative oversight system is considered relatively weak compared to many other states. Michigan has no significant statutory requirements for a robust, direct legislative oversight system of state government operations.

Much of the legislative oversight conducted of state government is done by the Office of the Auditor General, but even that admirable work is inconsistently reviewed or used by lawmakers.

Yet legislative oversight is and should be a critical function of state government, helping assure that executive operations are efficient and effective. It also provides lawmakers with the ability to look more intensively into critical issues facing state residents, businesses, and government, and to update or repeal laws as necessary.

Oversight is critical to assure the public that government is actively taking steps to effectively implement programs and policies. Through review, legislators, as well as the executive branch, can also get a greater understanding of new and evolving issues.

## Legislative Oversight History

The concept of legislative oversight goes back centuries and is premised on the need of lawmakers to have adequate information to properly legislate. It is, of course, a method of asserting authority over the co-equal executive branch, or at least, maintaining an equal position with the executive.

While oversight has been a permitted function of the legislative branch throughout U.S. history, it has taken a more prominent role with the increasing size and scope of government beginning in the early 20th century. For some, oversight is seen as a way of better rationalizing and if possible, reducing the size of government. For others, it's purpose is specifically to act as a check on the executive. Still others see it as the primary way to ensure government is run both efficiently and responsively. All the reasons are legitimate, but for oversight to be particularly effective it needs a structure and commitment.

Oversight is an implied and inherent authority, but not necessarily spelled out in either the United States

## LEGISLATIVE OVERSIGHT IN MICHIGAN

or Michigan Constitutions. Some aspects of how the legislature may use oversight could be spelled out constitutionally or statutorily.

Throughout much of Michigan's history, the oversight role was largely tackled by the regular legislative committee structure. With the adoption of the 1963 Michigan Constitution, the legislature began slowly to reduce and broaden the scope of its committees. However, specific oversight committees were not established until the 1999-2000 legislative session.

### Michigan's Overall Oversight System

Despite having various opportunities and structures already in place that could result in a stronger legislative oversight system, Michigan's legislative system is considered "generally lax" by researchers that have studied state systems.

The evidence bears out that conclusion. Michigan lawmakers are not doing nearly as much as they can to operate a good legislative oversight system that looks at the overall effectiveness of government structures.

Michigan's legislative infrastructure provides many of the key ingredients for a more robust and effective oversight system. For example, the legislature meets full-time, meaning it does not face the same time pressures that part-time legislatures in other states face to complete their work. Michigan legislators are paid well relative to their national colleagues, meaning they can dedicate their full attention to legislative business as opposed to having to maintain another occupation.

### Ancillary Authorities

The Michigan Constitution's explicit and implied authorities to the Legislature are broad. It provides for two ancillary authorities the legislature can employ to help conduct oversight: the Office of the Auditor General (OAG) and the Legislative Council.

The 1963 Michigan Constitution provided for the creation and powers of the Auditor General, a provision not commonly found in other state constitutions.

Much of the ongoing oversight in Michigan is conducted, in fact, by the Office of the Auditor General

(OAG). Yet there are no requirements that the legislature respond to the results of the audits. And there is no requirement, nor expectation, that the legislature review and respond to how departments react to the audits.

The Constitution provides the legislature authority to direct the OAG to conduct investigations based on its auditing authority.

An explosive audit can result in direct legislative action to compel changes. But the OAG has considerable influence on compelling agency changes to improve performance. It has, therefore, the practical effect of legislative oversight and power albeit without the statutory and appropriations authority.

And the OAG can negotiate with the agency prospective changes to correct performance deficiencies. An agency negotiating those changes and following through with the agreed changes can stave off direct legislative action that might result in statutory changes and/or funding cuts dealing with the program(s) or service(s) being audited.

The Legislative Council is created by Article IV, Section 15 of the Michigan Constitution to be a bi-partisan body. As statutorily implemented, it is made up of six members from each chamber with not less than two from each chamber coming from the minority party.

While the council's primary function is drafting legislation and resolutions at the request of House and Senate members, and providing legal history and background to lawmakers, the Constitution also specifically states the council "shall periodically examine and recommend to the Legislature revisions of the various laws of the state."

Inherent in that stricture is oversight on how laws are working, how they affect the public, how they are implemented and followed, and how the courts have interpreted those laws. This specific requirement was partly implemented when the state created the Law Revision Commission (which itself is an oversight system dealing with the specific task of reviewing and proposing changes to Michigan's laws).

An ongoing problem that faces the OAG, the Leg-

islative Council, and legislative oversight in general in Michigan is how to get and maintain legislators' attention.

Legislators are swamped with information and materials to review. Staff are often tasked with reviewing the reports themselves, though they also feel lawmakers should spend more time on the issues.

A structured oversight system in Michigan, where it becomes the specific task of at least some legislators and staff to study oversight and revision questions, could help attack that problem.

### Other Oversight Tools

The Michigan legislature also provides oversight through the appropriations process, relying on the fiscal agencies to provide vital services and analyses as the legislature develops the state budget. Much of the oversight activity through the appropriations process, however, is reflected in "boilerplate" language sections accompanying appropriation line items. Generally, boilerplate language both establishes policies for departments and requires reports on policies and agencies.

Standing policy committees also perform oversight functions, through both investigations and review of legislation. Much of the oversight function consists of committee hearings of public issues, designed to both inform committee members as well as the general public, instruct members and the public, and provide a place to question authorities.

There are also the oversight committees. But as already indicated, the state's legislative history with oversight committees is relatively brief. And their activity is not prescribed, but reliant on the committee chair and House and Senate leadership.

### Sunset Provisions

Sunset legislation is a policy action that creates a structure for legislators to assert oversight on executive branch agencies as well as the overall effectiveness of enacted legislation, premised on the fact an agency's existence or statute could end automatically without that review.

The principle of sunset legislation states a specific time an agency or program will be eliminated, if not renewed by an affirmative action on the part of legislators and the executive. The concept and practice have been in place for hundreds of years, though not generally referred to as sunset.

### Sunset Legislation Currently Among the States

Most states have enacted an overall sunset system, many enacted during the period when the system was most touted. There is no one consistent model for the sunset provisions, though, as the states vary in how extensive the oversight process outlined shall be in their government structures.

At its height of popularity, sunset legislation was seen by supporters not only as a way of helping ensure efficient and cost-effective government, but as a way of establishing and ensuring the legislative and executive branches were more co-equal. It is no coincidence that much of the push for sunset legislation occurred following the Watergate scandal, the resignation of former President Richard Nixon and worries about growing executive authority both at the federal and state level.

As of 2018, according to the Council for State Governments, 25 states had well defined sunset legislation. These legislative models specifically define an entity that will conduct preliminary evaluations of state agencies and programs. In most of those states, there is also either a specific or general life expectancy to each agency under review. In several of the other states the legislature determines the life expectancy of the agency.

Michigan is among 10 states (the others being Idaho, Minnesota, Montana, Nebraska, Nevada, New Jersey, New York, Virginia and Wisconsin) that have not enacted a specific sunset law but use sunset provisions in various sections of law for specific programs.

Sunset legislation has also been repealed in some states that had overall laws. Oregon repealed its law early on, in 1993. Overall legislative oversight is discretionary in that state.

And South Carolina, which is considered to have one of the better legislative oversight systems, repealed its general sunset law in 1998.



In terms of sunset's success in controlling or reducing government's costs, particularly state government costs, there has not been much specific research on the subject. One exception was a 2009 dissertation by Jonathan Waller of Auburn University who concluded there was little statistically different results in per capita expenditures between sunset states and non-sunset states. His research, however, showed that sunset laws do cut expenditures, but those reductions come more from the oversight practice rather than closing agencies.

### Recommendations to Strengthen Legislative Oversight

Both Michigan House and Senate current leadership have expressed a renewed commitment to legislative oversight in recent years. These efforts are important to the checks and balances among the branches of government and to the pursuit of an economical, accountable state government.

Many elements of oversight are already in place – a constitutionally empowered Auditor General, the Legislative Council, oversight elements in the appropriations process, actions by standing policy committees, and oversight committees.

Should Michigan want to move to a more active and comprehensive system of legislative review – one conducted by lawmakers themselves – making sunset legislation a more comprehensive aspect rather than the current political tactic system will be a judgment for lawmakers.

One thing also appears clear: if lawmakers wish to have greater oversight authority, they need to set the framework for such authority in a formal setting, at a minimum as part of legislative rules, ideally the joint legislative rules, or through statute.

Based on the experiences of other states, the legislature should consider a number of actions to enhance oversight. These concepts can be adopted as part of any legislative oversight plan, with or without a general sunset concept:

- The system should have a clear, institutionalized structure. Whether by statute, joint rules or sepa-

rate rules of each house, a legislative oversight system must have an established, written, ongoing, institutionalized purpose and structure that outlasts the strictures of term limits. The details of how and what and why a committee or commission acts and decides must have an established, agreed-upon and written basis behind it.

- To combat some of the ill effects of term limits, if a specific oversight committee – either a bicameral panel or one each in the House and Senate -- is created, its members should serve on the committee for their entire terms of office. If House members of the committee are elected to the Senate, they should be appointed to the Senate committee once there is a vacancy. Doing so will reduce the chance of institutional amnesia.
- Also to combat the ill effects of term limits, the legislature should adopt a practice to add to bills statements of the problems being addressed or legislative intent. Depending on the sunset dates adopted, the legislators creating agencies or enacting laws today are not likely to be part of the legislative body reviewing their effectiveness. Statements of legislative intent will give future legislators a basis to better perform legislative oversight.
- If separate oversight committees are created in the House and Senate, they should both have the same overall rules and structures. They don't need to review the same agencies or programs at the same time, but they should each review them following the same process.
- Staff will be needed. Whether the staff is specific to that committee, made a part of the OAG or the fiscal agencies, an oversight committee needs to have staff dedicated to its functions. The size of legislative staff was reduced to address the budget balancing difficulties common in the first decade of this century. It is likely that additional staff will be needed to carry out oversight activities and funding for that staff should be insulated to protect against the whims of budget balancing exercises.
- True bipartisanship must be established. Doing so helps create both credibility as well as over-



all buy-in of results from both parties. If equal numbers of Democrats and Republicans is unfeasible, then the committee should create a chair and one vice-chair, both from the opposite parties. Oversight hearings held to promote partisan purposes instead of policy improvements weaken perceptions of oversight as a legitimate legislative activity. Similarly, a non-partisan, objective decision-making process should be developed to guide the use of sunset provisions.

- Transparency is vital, and every step to ensure it in transparency's fullest form needs to be established. Oversight is a tool to ensure accountability to the people. Actions that occur behind closed doors are contrary to this objective.
- The public should be invited to participate, both by appearing and testifying in hearings, but also by proposing agencies or programs that should be reviewed.
- If sunset legislation is adopted, the legislature should consider fixing deadlines to eliminate a program or agency if it fails to meet requirements ordered of it in a review. However, the legislation should steer clear of eliminating whole departments or attempting to limit the governor's ability to reorganize state government. Such legislation should also
- If instead of legislative committees conducting or overseeing the oversight function, lawmakers want the oversight process handled by the Auditor General, the Legislative Council, or the fiscal agencies, then they should show the same level of commitment to their efforts. They should commit that reports and reviews generated by any of those agencies will be subject to public review and hearings. The committees should be empowered to direct the Auditor General or Legislative Council or fiscal agencies to conduct certain reviews, get more information if needed, and to take the first steps in directing corrective action if needed based on those findings. And this process too must be structured and bipartisan.

- Legislative commitment to act on findings should be assured. This report documented information gathered in pursuit of oversight and accountability that seemingly gains little attention from legislators. Auditor General reports without policy actions and reports filed in compliance with appropriations boilerplate provisions can further the goals of legislative oversight, but not if they are filed only to sit on shelves.
- To meet the constitutional issues former Attorney General Kelley raised, and to assist in an oversight process, however the legislature decides to undertake that process, lawmakers should also include specific authority to end a program or agency in a bill's title, and then include an opening section on legislation creating new programs, agencies or policies, explaining why the action is being enacted.

### Conclusion

Michigan citizens need the assurance state government is operating as effectively as it can, and a robust system of legislative oversight would be critical to providing that confidence.

But the public should also have the assurance any oversight is as free from overt partisanship as possible. The public also has to have confidence Michigan's legislature handles oversight in a professional manner, not at the whim of a committee chair or caucus leader.

Michigan's constitution and laws, as well as the structure of its legislature, provide the basics for a good oversight system. Lawmakers can build off the impressive work done by the Legislative Auditor General's office, just for one example, to create a system of authoritative oversight.

Michigan's lawmakers have to be the ones to determine they do want to seem to be lax in dealing with what could prove to be an important function and benefit to the state.



# Imagining What Could Be: Robust, Bipartisan Legislative Oversight in Michigan

## Introduction

Michigan's legislative oversight system is considered relatively weak compared to many other states. Michigan has no significant statutory requirements for a robust and bipartisan direct legislative oversight system of state government operations. The last serious effort to create any kind of a statutory system of ongoing legislative oversight occurred decades ago when the legislature passed a "sunset" bill. That bill was vetoed for various reasons by Governor William Milliken.

While both the Michigan House of Representatives and Michigan Senate have oversight committees, those committees are a relatively recent development. These committees have not operated consistently. And depending on one's viewpoint there have been accusations of partisan advocacy, some following the 2020 election.

Much of the legislative oversight conducted by state government is done by the Office of the Auditor General, but even that admirable work is inconsistently reviewed or used by lawmakers.

Yet legislative oversight is and should be a critical function of state government, helping assure that executive operations are efficient and effective. It also provides lawmakers with the ability to look more intensively into critical issues facing state residents, businesses, and government. Additionally, oversight is a key activity to update or repeal laws as necessary.

The separation of powers inherent in the American system of government provides that one branch will

make the laws, another will execute those laws, and a third will adjudicate the laws and their application. These and other checks and balances are bedrock elements of the American federal government and the state systems modeled after it. Such a structure is elemental to a democratic republic, providing the needed tension that in turn leads to or forces constructive cooperation on policy decisions that should work to the public's benefit.

In many states, their constitutions may delegate far more authority to one branch or another, but in

Michigan all three branches are constitutionally strong. Each of the three branches can have a degree of oversight over the others. The governor can not only propose legislation, but the governor may veto bills passed by the legislature and develop the administrative rules overseeing their implementation. The courts have the authority to rule whether a law or gubernatorial action is constitutional, and the other branches can push for the people to amend the Constitution to override the courts.

But the Michigan legislature, thus far, has not fully executed its ability to oversee how laws and programs are administered. In not fulfilling its responsibilities, it has effectively abdicated power to the other branches of government.

Oversight comes with historic tensions, particularly between the legislative and executive branches. In Michigan alone there have been several disputes between its governors and lawmakers over appointments, administrative rules, and overall oversight

**The Michigan legislature, thus far, has not executed its ability to the fullest extent it can to oversee how laws and programs are administered. In not fulfilling its responsibilities, it has effectively abdicated power to the other branches of government.**

functions.

Other states have instituted a variety of legislative oversight methods, some including sunset laws, others with special or directed joint committees to conduct reviews.

As Michigan and the rest of the nation are fighting to emerge from a deadly pandemic, having an effective legislative oversight system will be critical to review how the state approached ensuring public safety – from both the legislative and executive positions – as well as keeping the economy vitally active during the crisis.

It is equally critical that such review be done with as little overt partisanship as possible. The primary focus should be on how to prepare state government to react more effectively, plan more thoroughly, and execute more efficiently for whatever future crises may arise.

Oversight is critical for more than just disaster review and preparation. It is important to assure the public that government is actively taking steps to effectively implement programs and policies. Through review, legislators, as well as the executive branch, can also

get a greater understanding of new and evolving issues.

Standing policy committees of the House and Senate can, and do, handle review functions. Those committees can also be given more authority to conduct review, to mirror what several states have done to empower legislative committees with specific oversight functions.

Michigan's legislative oversight system has been more haphazard in its overall organization and execution. This may be a function of the adoption of term limits because term-limited lawmakers lack some necessary institutional knowledge and constant member turnover leaves an inconsistent body of officials looking at government operations.

This paper examines key elements of legislative oversight history, including some of the tools lawmakers have embraced, with a particular emphasis on sunset legislation, both nationally and in Michigan. It also looks at the history of how other states have approached oversight. And finally, it suggests some ideas for Michigan to strengthen its legislative oversight system.

### Legislative Oversight History

The concept of legislative oversight goes back centuries. It is premised on the need of lawmakers to have adequate information to properly legislate. Additionally, it is a method of asserting authority over the co-equal executive branch, or at least, maintaining an equal position with the executive. But the essential founding premise of legislative oversight is to ensure the legislative branch has sufficient information with which to enact legislation.

While oversight has been a permitted function of the legislative branch throughout U.S. history, it has taken a more prominent role with the increasing size and scope of government beginning in the early 20th century. For some, oversight is seen as a way of better rationalizing and,

if possible, reducing the size of government. For others, it's purpose is specifically to act as a check on the executive. Still others see it as the primary way to ensure government is run both efficiently and responsively. All the reasons are legitimate, but for

oversight to be particularly effective it needs a structure and commitment.

Legislation presumes that the incorporated policy solution will adequately address the public policy problem and that the implementation of a law by the executive branch is consistent with legislative intent. Similarly, the creation of departments, offices,

commissions, and agencies to carry out public policy objectives does not come with the assumption that those policy issues are perpetual. The powers

**The essential founding premise of legislative oversight is to ensure the legislative branch has sufficient information with which to enact legislation.**

and processes of legislative oversight are important to ensure that the policies and their implementation address the appropriate issues and that government is operating in an economic and efficient manner.

Oversight is an implied and inherent authority, but it is not necessarily spelled out in either the United States or Michigan constitutions. Some aspects of how the legislature may use oversight should be spelled out more explicitly either constitutionally or statutorily.

For example, Article IV, Section 1 of the 1963 Michigan Constitution, says that except for the provisions detailing the Independent Citizens Redistricting Commission and the governor's authority to reorganize executive departments, the "legislative power" of the state is encompassed in the House and Senate. The full authority of the "legislative power" is not spelled out there or anywhere else in the Constitution.

The British Parliament held some of the first legislative inquiries in the 17th century. The practice of oversight continued with colonial legislatures before the adoption of the U.S. Constitution.

In the 1920s, the U.S. Supreme Court, in *McGrain v. Daugherty*, speaking of Congress, held that:

[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it."

And again, in 1955, the U.S. Supreme Court held, in *Quinn v. United States*, Congress had wide authority to perform oversight, including its investigative authority. The Court said the authority was "co-extensive with the power to legislate."

In U.S. history, a major example of legislative oversight included the so-called Truman Committee. This special U.S. Senate committee was created in early 1941 to provide an ongoing investigation into U.S. war production, to ensure that it was conducted efficiently and honestly. Sen. Harry Truman chaired

the committee, and when the committee concluded its work in 1948 (Truman had become U.S. President by this time) the body had held more than 430 hearings, all through World War II, and had heard from nearly 1,800 witnesses.

Nationwide, and in Michigan, a huge interest in legislative oversight erupted in the 1970s following the Watergate scandal. Most of that interest was focused on the development of sunset legislation, which will be reviewed below.

Throughout much of Michigan's history, the oversight role was largely tackled by the regular legislative committee structure. During the decades when the legislature met part-time, both chambers might have dozens of committees, involving a wide range of specific subjects, from K-12 education to colleges, state taxes to local taxes, cities and municipalities to ports and maritime affairs, overall government operations to printing. Members on these committees conducted information gathering hearings and developed subject matter expertise. They regularly interacted with citizens, local government officials, business executives, industry workers, academic experts, and service providers to understand policy issues and ongoing attempts to address them.

Following the adoption of the 1963 Michigan Constitution, the legislature slowly reduced the number of committees, while also broadening the scope of many of its standing committees empaneled over subsequent legislative sessions.

Despite these general changes in legislative committee makeup and scope following adoption of the new constitution, specific oversight committees were not established until the 1999-2000 legislative session. The Senate and House each created Gaming and Casino Oversight Committees with a keen focus on the legalized gambling issues in the state. The House dropped the casino committee in the 2001-02 session for an Oversight and Operations Committee. Beginning in 2005-06, the House created an Oversight, Elections and Ethics Committee. In the 2013-14 session, the House created an Oversight Committee. Since the 2015-16 session, both the House and Senate have had standing Oversight Committees.



### Michigan's Overall Oversight System

Despite having various opportunities and structures already in place that could result in a stronger legislative oversight system, Michigan's legislative system is considered "generally lax" by researchers that have examined state systems.<sup>1</sup>

The evidence bears out that conclusion. Michigan lawmakers are not doing nearly as much as they can to operate a good legislative oversight system that looks at the overall effectiveness of government structures.

It is a system often driven more by personalities, especially of committee chairs, than of structure. If a committee chair, or legislative leader, pushes for oversight actions, there is a greater chance of such reviews occurring. But this makes continued, ongoing oversight dependent on individual determination, not a requirement established by state laws or rules.

There is no standardized system affecting how the House and Senate, working together, will conduct oversight of executive branch departments. Neither of the oversight committees in either house, nor the committees collectively, have established a formal procedure for determining how and when to review agencies.

Michigan's legislative infrastructure provides many of the key ingredients for a more robust and effective oversight system. For example, the legislature meets full-time, meaning it does not face the same time pressures that part-time legislatures in other states face to complete their work. Michigan legislators are paid well relative to their national colleagues, meaning they can dedicate their full attention to legislative business as opposed to having to maintain another occupation.

The Michigan Legislature also has well-educated and trained staff, who handle many of the duties and research required for oversight. On the other hand, compared to other states, Michigan has fewer overall state and local government employees. In effect, the potential scope of oversight activities is relatively narrower in a national context. (A 2014 study by Governing Magazine showed Michigan had 68 state employees per 10,000 people. By comparison, Min-

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nesota had 76 employees, Pennsylvania 77, North Carolina 80, New York 91, and New Jersey 100.<sup>2</sup>)

### Ancillary Authorities

The Michigan Constitution's explicit and implied authorities to the legislature are broad. It provides for two ancillary authorities the legislature can employ to help conduct oversight: the Office of the Auditor General (OAG) and the Legislative Council.

**Auditor General.** The 1963 Michigan Constitution provided for the creation and powers of the Auditor General, a provision not commonly found in other state constitutions.

Much of the ongoing oversight in Michigan is conducted by the OAG. Yet, there are no requirements that the legislature respond to the results of its work products, including various audits and other special reports. And there is no requirement, nor expectation, that the legislature review and respond to how departments react to the OAG's work.

In 2020, the OAG released 77 audits, follow-up reports, letters, and other materials. Of those, 12 were specifically listed as performance audits. The rest were financial related. Financial audits often recommend improvements to overall agency performance, similar to performance audits.



Among the performance audit topics addressed in 2020 were Flint Emergency Expenditures, the Bureau of Finance and Administration in the Department of Transportation, and the Office of Land Survey and Remonumentation in the Department of Licensing and Regulatory Affairs. In the public eye, many, if not most, of these reports go completely unnoticed.

However, some performance audits, such as the one dealing with the Grand Rapids Home for Veterans, rocked state government. The original audit, released in February 2016<sup>3</sup>, immediately resulted in the director of the state's Veteran's Affairs Agency resigning as well as the legislature enacting a significant funding increase for the home. The public and legislative interest in this particular issue prompted a follow-up report in 2020 on the Grand Rapids Home for Veterans.

It's not just the public that pays more attention to performance audits. Officials with the OAG said legislators pay more attention to performance audits. Doug Ringler, the Legislative Auditor General, said in an interview that financial audits do not generate as many questions from lawmakers.

In the same interview, Mr. Ringler said the constitutional provision establishing the auditor general's office envisioned the office performing both financial and performance audits. The office is strong in both, he said.

Critically, the 1963 Michigan Constitution establishes independent authority for the OAG, something not authorized in all state constitutions. That independence is reflected in the fact the OAG was forced to issue subpoenas in 2018 against the Department of Health and Human Services over getting access to adoption records that state law said were to be held in confidence. The legislature subsequently passed legislation authorizing the OAG full access to confidential documents.

The Constitution provides the legislature authority to direct the OAG to conduct investigations based on its auditing authority. The language in Article

IV, Section 53 describing the OAG's powers as Mr. Ringler suggested, gives implied authority to conduct performance audits. Section 53 reads, in part:

... The auditor general shall conduct post audits of financial transactions and accounts of the state and of all branches, departments, offices, boards, commissions, agencies, authorities and institutions of the state established by this constitution or by law, and performance post audits thereof.

Auditor General officials said any audit involves significant planning and considers issues such as topics to be covered, time since the last audit, and public interest.

**The 1963 Michigan Constitution establishes independent authority for the Office of Auditor General, something not authorized in all state constitutions.**

An explosive audit, such as that of the Grand Rapids Home for Veterans, can result in direct legislative action to compel changes. But the OAG has considerable influence on compelling agency changes to improve performance even without direct legislative involvement. It has, therefore,

the practical effect of legislative oversight and power albeit without the statutory and appropriations authority. Copies of an audit are released to lawmakers, the Executive Office, and the audited agency one day before anticipated public release. Those being audited can respond to the findings for two weeks afterwards.

And the OAG can negotiate prospective changes to correct performance deficiencies with the agency. An agency negotiating and following through with



*Michigan State Capitol*

the agreed changes can stave off direct legislative action that might result in statutory changes and/or funding cuts dealing with the program(s) or service(s) being audited.

**Legislative Council.** The Legislative Council is the second ancillary authority the legislature can employ to help conduct oversight programs. It is created by Article IV, Section 15 of the Michigan Constitution to be a bipartisan body. As statutorily implemented, it is made up of six members from each chamber with not less than two from each chamber coming from the minority party.

While the council's primary function is drafting legislation and resolutions at the request of House and Senate members, and providing legal history and background to lawmakers, the Constitution also specifically states the council "shall periodically examine and recommend to the legislature revisions of the various laws of the state."

Inherent in that stricture is oversight on how laws are working, how they affect the public, how they are implemented and followed, and how the courts have interpreted those laws. This specific requirement was partly implemented when the state created the Law Revision Commission (which itself is an oversight system dealing with the specific task of reviewing and proposing changes to Michigan's laws).

An ongoing problem that faces the OAG, the Legislative Council, and legislative oversight in general in Michigan is how to get and maintain legislators' attention.

Legislators are swamped with information and materials to review. In the Wayne State University study, legislators interviewed said they could get as many as 12 reports a week, but due to time constraints and other obligations could only possibly read one or two of them. Staff are often tasked with reviewing the reports themselves. But staff are stretched as well, as the size of legislative staff has shrunk significantly (the National Conference of State Leg-

islatures' census of legislative staff indicates that the staff in Michigan declined by 42 percent from 1996 to 2015<sup>4</sup>). Legislative business officials have said there has been high turnover of House and Senate staff for several years.

A structured oversight system in Michigan, where it becomes the specific task of at least some legislators and staff to study oversight and revision questions, could help address the problem of maintaining legislative interest in oversight generally, and specifically those agencies and programs

in need of ongoing review.

### Other Oversight Tools

**Appropriations.** Michigan's appropriation process provides another major avenue for legislative oversight but also can fall into some of the same problems as other forms.

Appropriations committee members can rely on the House and Senate Fiscal Agencies – nonpartisan bureaus that provide vital services and analyses as the legislature develops the state budget and considers changes to tax laws. They also provide various analyses, including fiscal impacts of proposed and existing programs and services. The various documents and work products of the agencies pack a lot of detail into often brief memos or reports, providing a thorough overview of the law, the policy, and fiscal implications of an issue.

For example, in June 2020 the Senate Fiscal Agency issued a two-page memo on Governor Gretchen Whitmer's Executive Orders 2020-94, 2020-98 and 2020-105. The executive orders declared states of emergency in four counties and several cities following the catastrophic collapse of the dams north of Midland.

That memo concisely described how the executive orders would work, how the officials would respond, what exactly the authority of the legislature was in the situation, and what the potential fiscal effects might be.

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Much of the oversight activity through the appropriations process, however, is reflected in “boilerplate” language sections accompanying appropriation line items. Generally, boilerplate language both establishes policies for departments and requires myriad reports on new and ongoing policies and agencies. Hundreds of reports annually are generated through the boilerplate process, with some issued monthly for various programs. Generally, language sections have been added to a given department’s budget as a way for the two appropriations committees specifically, and the legislature more broadly, to monitor agency performance.

Consider Michigan’s 2020-21 fiscal year budget for the Department of Agriculture and Rural Development. The department was appropriated a total of \$121.3 million, making it one of the smaller overall departments. The legislative boilerplate required at least 18 different reports and communications of the department, covering everything from bovine tuberculosis to environmental stewardship to food and agriculture investment to county fairs.

A department such as Health and Human Services, which is the largest non-education budget at \$28.5 billion is required to provide far more reports on its various activities.

It is unclear that the sheer number of reports on their own lead to many changes or overall reviews. Rarely are many, if any, of the reports cited as the impetus for statutory changes.

The volume of reports, sometimes required by rote repetition of previous boilerplate language, can be itself overwhelming. Some are issued with no real context or explanations, including just the basic data required by the appropriations statute followed by a series of numbers which can prove baffling to someone stumbling on to the report.

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**Standing Policy Committees.** Standing policy committees also perform oversight functions, through both investigations and review of legislation. Much of the oversight function consists of committee hearings of public issues, designed to both inform committee members as well as the general public, instruct members and the public, and provide a place to question state department authorities.

Many times, a committee’s formal oversight function does not go much further than an initial public hearing. Individual committee members and staff can continue individual discussions and investigations, often in the context of developing compromises for legislation. But the public is generally left out of those discussions.

#### **Oversight Committees.**

The state’s legislative history with oversight committees is relatively brief. And committee activity is not formally prescribed by rule, but instead contingent on the respective committee chairs and House and Senate leadership. For example, Rep. Steve Johnson, the current House Oversight Committee chair, said in an interview that current House Speaker Jason Wentworth is “very adamant” on pushing legislative oversight aggressively. Due to term limits, though, Speaker Wentworth will leave the House at the end of this term. Will the next speaker also push for aggressive oversight committee action?

Because the oversight committees are structured the same way as the policy committees, with the majority party having most of the committee seats, the chance that partisanship could influence how the oversight committee functions remains a reality. Mr. Johnson acknowledged in his interview that partisan makeup can influence how oversight is conducted.

Consider the recent controversies between the Republican-controlled legislature and Democratic Governor Whitmer regarding the state’s actions to control the Covid-19 pandemic in Michigan.

A review of how Michigan departments and agencies handled government operations during the pandemic crisis (including its effect on state fiscal matters) is clearly needed. Such a review of how the executive and legislative branches responded, the laws affecting those responses as well as specific policy decisions and how they were reached, will be critical for both current and future state leaders. There will be other crisis to come, so learning from the current crisis to prepare for the future is essential.

Initially, when the pandemic hit and an emergency was declared, there was a general sense of bipartisan cooperation on how the state would react to the crisis. However, that cooperative tone quickly degraded, stirred in part by antagonistic comments by President Donald Trump, the dissemination of false information about the severity of the disease and government intentions in controlling it, and an overall partisan split on how to respond. That led to court cases and legislative petitions to better proscribe the governor's authority. Whether such action was needed is not so much the question, as to why it occurred in such an overtly partisan basis affecting all officials.

While no state can entirely eliminate partisan interests, even in its oversight efforts, the public needs assurance that the driving oversight goal is to improve state government performance and service to the public. The controversies of how the pandemic was handled have largely become partisan campaign issues, leading to greater overall mistrust.

Some states go to great lengths to ensure actual bipartisanship which in turn provides heightened credibility to their oversight findings. As Michigan considers future oversight systems it must remember the public's trust should be paramount and any oversight actions should be undertaken in a collaborative bipartisan manner.

**The Effect of Term Limits on Oversight.** Term limits in Michigan are blamed by many observers, in-

cluding former legislators of both parties, for hurting the legislative oversight process. In large part, term limits have contributed to a general lack of knowledge on legislative and governmental functions and the inability of lawmakers to develop subject expertise on various issues.

States that have what are considered fairly strong legislative oversight systems, such as South Carolina, Idaho, Texas, and Wisconsin, do not have term limits on their legislative members.

The Citizens Research Council published a report on term limits in May of 2018.<sup>5</sup> Several findings of that report are relevant to the discussion of legislative oversight. For example, the strict nature of Michigan's term limit law reduces the window individual members, as well as leaders, have to develop oversight protocols,

rules, and routines in the absence of an established, formal review system.

Michigan is among the states with the shortest limits: three two-year terms (six years) maximum in its lower chamber, the Michigan House of Representatives, and two four-year terms (eight years) in Michigan's upper chamber, the state Senate. Michigan is among a minority of the states with term limits that impose a lifetime limit on service. The majority of the term-limited states (9 of 15) merely restrict consecutive years of service.

Additionally, term limits appear to have weakened the power of the legislative branch relative to the executive branch. Civil servants – professionals who often have years of experience – form the backbone of the executive branch. Although the legislature is supposed to exercise oversight over the executive branch (i.e., monitor the work of civil servants in state agencies and commissions), most term-limited legislators face a steep learning curve when trying to exercise this responsibility.

Term limits have strengthened the roles of chamber leadership – such as the Speaker of the House and

While no state can entirely eliminate partisan interests, even in its oversight efforts, the public needs assurance that the driving oversight goal is to improve state government performance and service to the public.



Senate Majority Leader – relative to the rank-and-file chamber membership. Officials in these positions can control what bills move through the legislative process and the willingness to engage in activities such as oversight.

Legislators who served before the implementation of term limits (adopted in 1992) said lawmakers who served either as chairs or long-time members of policy committees developed particular expertise on the subjects covered by the committees they were assigned to. This allowed them to cut through the issues and get straight to pertinent questions and then on to an appropriate legislative response.

Those members also wanted other legislators, whether on their committees or not, to have the same access to information and knowledge about governmental functions. Former Michigan House Speaker Paul Hillegonds singled out former House Taxation Committee Chair Rep. George Montgomery for arranging evening sessions with experts on state revenues and taxes, open to all legislators and staff, to gain a greater understanding of the state's complicated revenue system.

Term limits have sapped that legislative knowledge base; without which conducting oversight is difficult. Several suggested that additional training for legisla-

tors would prove important. Examples of educational opportunities available to newly elected lawmakers include a short course offered by the Institute for Public Policy and Social Research (IPPSR) at Michigan State University along with IPPSR sponsored forums on salient policy issues.

Sen. Ed McBroom, chair of the Senate Oversight Committee, and Rep. Johnson in the House both acknowledged term limits provided challenges to the oversight process.

In terms of legislative training, Sen. McBroom thought training might be better focused on assisting legislators in knowing how they can help constituents navigate processes rather than teaching them about governmental processes and procedures.

Both expressed that sunset legislation could be critical to the oversight process with some conditions. For example, Rep. Johnson said a sunset on legislation such as Right to Work could prove disastrous to Michigan's economic development efforts.

And Sen. McBroom favored sunsets on all regulations, forcing departments to review whether the regulation still meets its stated purpose, needs revision, or should be terminated.



*Michigan State Capitol*

### Sunset Provisions

Sunset legislation is a policy action that creates a structure for legislators to assert oversight on executive branch agencies as well as the overall effectiveness of enacted legislation.

The principle of sunset legislation states a specific time an agency or program will be eliminated, if not renewed by an affirmative action on the part of legislators and the executive. While not always referred to as sunset, the general concept and practice have been in place for hundreds of years.

A special joint committee of Michigan's Legislature summarized the idea in a preliminary report issued in 1977:

By placing a termination date on the statutes which created it. Before that date arrived, the legislature would conduct an evaluation to determine whether the entity is functioning effectively and efficiently. If it is, its life would be extended for another short, specific period. If it is doing poorly, the legislature would modify it, or let the 'sun set' on it; let it terminate.

United States.

One of the earliest references to time specific termination comes from an English judicial ruling in the 17th Century. According to scholars, the court ruling held if a law ended because it timed out then the previous statute in place before the sunsetted law now would take effect once more, unless it had been specifically repealed.

Sunset provisions of a sort were included in the U.S. Constitution. For example, Article 1, Section 8, Clause 12 puts a specific time limit on the U.S. Army, stating Congress has the power "To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years". The Constitution makes the U.S. Navy perpetual, but funding for a standing army is limited to a two-year period. The provision makes sense given the Constitution was written not long after the revolution and Americans having to deal personally with the British Army. In practice, the Army has been perpetual as the U.S. government has simply re-upped funding on a continuous basis.

### Sunset History

The sunset concept is centuries old, but it gained increased attention several decades back. In the 1970s and 1980s sunset legislation was seen by its supporters as one of the most effective methods to improve government accountability, effectiveness, and efficiency. Since that time, however, enthusiasm for new sunset legislation overall has cooled. Nevada was the most recent state to adopt a sunset bill in 2011, and this was after several states had dropped their sunset measures.

Generally, sunset legislation has existed in governments that use a representative assembly. Types of sunset legislation – or time specific termination legislation – have been used in the United Kingdom, the Netherlands, and Germany along with the

**The principle of sunset legislation states a specific time an agency or program will be eliminated, if not renewed by an affirmative action on the part of legislators and the executive.**

Several of the infamous Alien and Sedition Acts enacted under the presidency of John Adams expired March 3, 1801, one day before he left office.

In the 1930s, William O. Douglas, former head of the Securities and Exchange Commission and later the longest serving U.S. Supreme Court justice, urged President Franklin D. Roosevelt to support a proposal to terminate all regulatory agencies after 10 years.

The modern enthusiasm for what was now called sunset legislation caught fire in the 1970s. Supporters were driven by the Watergate scandal, but also by a growing populist dislike for what was viewed as too much government. Not coincidentally, the movement to incorporate sunsets grew at the same time as a separate movement spread throughout the states to limit the growth of state and local tax



revenues and as political calls to rein in government grew more popular.

Unlike the push to adopt tax limitations and cuts, sunset legislation seemed something all parties and leaders could embrace. President Jimmy Carter supported sunset legislation, as did conservative Republican Barry Goldwater and liberal Democrat George McGovern. Some 100 members of the U.S. House of Representatives expressed support for sunset legislation. It was endorsed by the Washington Post, Common Cause, and the U.S. Chamber of Commerce.

Lawmakers were particularly attracted to the concept as a way of putting the legislative branch on a more equal footing with the executive branch. The growth of executive power at the time had been a growing concern with some political and governmental observers. It was also seen as way to deal with incremental budgeting and block the practice of creating new but permanent agencies.

In fact, in the 1970s President Carter called not only for federal sunset legislation but zero-based budgeting (ZBB) as well. He had used ZBB in Georgia when he was governor and required its use as president.

Zero-based budgeting can act as a general government oversight tool since decisions have to be made on the effectiveness of a program or agency

in order for it to continue to get funding. But, as will be discussed below, its effectiveness depends on established guidelines. The novel budgeting practice did not achieve much of its intended effect during the Carter administration because what ZBB actually meant often varied in the eye of the officials assessing its use.

Just as sunset was a popular item in the federal government in the 1970s, it was equally popular in state governments at the same time.

From 1976 to the early 1980s, more than 20 states adopted overall sunset laws affecting state agencies, with Colorado leading the way, passing its law in 1976. It was not universally popular, though. New York, Wisconsin, and Maryland considered and did not enact proposals. In Iowa, the governor vetoed a sunset bill.

From 1976 to the early 1980s, more than 20 states adopted overall sunset laws affecting state agencies.

Sunset legislation was also sharply criticized at the time. It was ridiculous, some critics contended, to think federal agencies such as the FBI, the U.S. Postal Service, the Centers for Disease Control, and others might be ended.

Some critics also said a fully working sunset system would actually make the work of congressional members and legislators more difficult because while they are dealing with current issues, they would also have to spend time continuously reviewing and assessing long-standing agency programs.

Additionally, sunset provisions drive up the cost of governing according to critics, as more staff is needed to conduct most of the research and review.

Also, if legislation was passed and agencies created without a set of goals and objectives, how then would legislators review the programs and make decisions?

Sunset critics also pointed out that the likelihood of agencies and programs being terminated was small. For one, if an agency had not been properly reviewed, for lack of time if nothing else, lawmakers would probably simply extend the agency. Plus,



*Inside the Michigan Capitol*

industries and special interests reliant on those agencies, along with their lobbyists, would mount efforts encouraging public support, making it unlikely an agency would be mothballed.

### Sunset Legislation Currently Among the States

While most states have enacted an overall sunset system, there is no one consistent model for the sunset provisions. The states vary in how extensive the oversight process is outlined in their government structures.

At its height of popularity, sunset legislation was seen by supporters not only as a way of helping ensure efficient and cost-effective government, but as a way of establishing and ensuring the legislative and executive branches were more co-equal. It is no coincidence that much of the push for sunset legislation occurred following the Watergate scandal, the resignation of former President Richard Nixon, and worries about growing executive authority both at the federal and state level.

While five states have repealed their sunset legislation, it is still used as an active part of many states' legislative oversight systems. Among the states that have repealed sunset laws, some have replaced that system with other elements of strong oversight systems.

As of 2018, according to the Council for State Governments, 25 states had well defined sunset legislation.<sup>6</sup> These legislative models specifically define an entity that will conduct preliminary evaluations of state agencies and programs. In most of those states, there is also either a specific or general life expectancy to each agency under review. In several of the other states the legislature determines the life expectancy of the agency.

Michigan is among 10 states<sup>a</sup> that have not enacted a specific sunset law but use sunset provisions on an ad-hoc basis, inserting them into various sections of

law for specific programs.

The 25 states which have set up formal sunset structures range from some of the largest – California, Texas, Illinois, Ohio – to the smallest – Alaska, Delaware, Vermont, and Wyoming.

Responsibility for who conducts preliminary reviews varies widely. While sunset is considered a legislative review system, in some states the preliminary review is conducted by a state department. For example, in Colorado preliminary reviews are handled by the Department of Regulatory Affairs. In Alabama, those are conducted by the Department of Examiners of Public Accounts. Illinois uses the Governor's Office of Management and Budget.

In Delaware, the preliminary evaluations are conducted by the actual agencies under review, using criteria that is stated in the statute. Legislative committee staff conduct a separate review.

In most states the actual initial review is conducted by the legislature. In some cases, for example Vermont and Arizona, legislative staff handle the initial review. In Hawaii, it is the legislative auditor. In Georgia, it is the Department of Audits.

Most states with this type of specific sunset legislation involve the actual lawmakers in the preliminary evaluation process. In Connecticut, Louisiana, and Oklahoma the process involves the standing committees with subject matter jurisdiction of both the House and Senate.

Several states have a specific committee, subcommittee, or legislative commission to conduct the review. In Nevada it is a subcommittee, while California employs a joint sunset review committee. In Texas, the Sunset Advisory Commission and its staff conducts the preliminary review.

The CSG also noted that in most of those 25 states there are other types of legislative reviews beyond just the initial evaluation. Except in Maine, these subsequent reviews are all conducted by legislative committees. Depending on the state the subsequent reviews may be handled by a joint committee, an appropriations committee, a standing committee with subject matter, or a government operations

<sup>a</sup> Idaho, Minnesota, Montana, Nebraska, Nevada, New Jersey, New York, Virginia, and Wisconsin.

committee.

In Maine, subsequent reviews are conducted by the Office of Program Evaluation and Government Accountability but only when issues are handed to it by the state's Government Oversight Committee. Legislative staff members in that committee conduct the actual evaluations and then their reports are turned back over to the Government Oversight Committee which proceeds from there.

Among the Midwest states, Ohio may have had the most active sunset operation, at least for a five-year period. From 2005 to 2010, according to CSG, Ohio conducted a total of 274 preliminary and final reviews. From those, during that time period, the state eliminated 79 laws or boards. Another 195 were renewed.

In 2011, Florida repealed its law for comprehensive sunset review of agencies. However, the state does have what it calls an Open Government Sunset Review of public records and meetings.

Sunset legislation has also been repealed in some states that had overall laws. Oregon repealed its law early on, in 1993. Overall legislative oversight is discretionary in that state.

And South Carolina, which is considered to have one of the better legislative oversight systems, repealed its general sunset law in 1998.

In terms of sunset's success in controlling or reducing government's costs, particularly state government costs, there has not been much specific research on the subject. One exception was a 2009 dissertation by Jonathan Waller of Auburn University who concluded there were little statistically different results in per capita expenditures between sunset states and non-sunset states. His research, however, showed that sunset laws do cut expenditures, but those reductions come more from the oversight practice rather than closing agencies.

**Sunset laws do cut expenditures, but those reductions come more from the oversight practice rather than closing agencies.**

## Michigan's History with Sunset

Michigan does not have an overall sunset review process outlined in law. Yet, even without a formal process, the legislature still uses sunset provisions as a device in specific pieces of legislation.

Often the sunset provisions Michigan lawmakers do enact are politically based, as a way of winning approval of potentially controversial legislative issues with the idea a specific ending date makes the issue more politically palatable. The device has been used often in environmental and licensing bills, for instance.

Before Michigan lawmakers considered creating a generic sunset law, sunset provisions were being added to specific legislation. For example, the Felony Firearm Statute, Public Act (PA) 6 of 1976 – which created a two-year felony charge for committing another felony crime with a firearm – initially included a sunset provision (since repealed).

Even then, a number of legislators considered use of such provisions reluctantly, as a necessary provision to win enough votes to pass a measure.

**Studying the Sunset Concept.** The increasing national enthusiasm for an overall sunset measure drew in the Michigan legislature and public, with growing interest in a sunset bill. In July 1976, Senate Concurrent Resolution 471 was adopted by both houses of the legislature to create a special bicameral, bipartisan joint committee to consider creating an overall sunset program. This was one of the earliest steps in Michigan's most recent effort to embrace a formal, direct legislative sunset tool.

Beginning in September 1976, the new special committee held 11 public hearings on the proposal. A preliminary report on the special committee's findings was issued in December 1977.

The report made it clear Michigan was driven to consider the matter because of the overall national

enthusiasm. “The simplicity of the concept has made sunset legislation enormously appealing to state legislatures. By the end of 1977, all 50 state legislatures will have studied the concept and/or will have had sunset bills introduced. At this writing, twenty-three states had passed some form of sunset legislation.”

In fact, the report added, “the Michigan Legislature was impressed enough by the idea and by news of the passage of a sunset law in Colorado that the only real question on the matter was the course the legislature would take.” Could the state pass a bill immediately, using Colorado’s act as the likely model, and “work out implementation problems later.” Or would the state, “investigate the issues behind the concept, with the goal of developing the desired legislation – if any – to fit the particular needs of the state of Michigan.” The special committee made it clear it had chosen the second option.

The committee members, as the report made clear, realized the concept of sunset could be potentially vast. Deciding the details of how to implement, manage and assess the system could also be a vast undertaking. As the report said, “It can cover every segment of state government, or be highly selective in its targets. It can be applied to its fullest extent immediately or phased in gradually over a long period. It can be legislature-centered or executive centered. It can be implemented through existing effectiveness review units, or through new units created for the purpose. The list goes on, but the point is that sunset is a general concept, and the range of its specific options is very wide.”

Committee members also recognized that while the concept was popular it might not be needed at all. One issue that came up was that almost no state of Michigan’s size and governmental complexity at the time had adopted a general sunset measure. There were also worries that with a full-time legislature a sunset process may result in unnecessary duplication of ongoing legislative processes.

Primarily, the committee worried about what might happen if a bad bill was adopted. Alabama had ad-

opted a sunset bill that had an essentially overbearing aspect, reviewing everything in state government but with little overall time to conduct the reviews. The national head of Common Cause at the time warned that Alabama might kill sunset by “loving it to death.”

The report itself said the committee’s study and review was necessary. “The concept’s strongest advocates continually have urged caution upon legislatures considering sunset legislation. They recently have renewed their pleas for careful consideration in the aftermath of the passage of some comprehensive state sunset laws which are so complicated and demanding that they seem to invite failure,” the report said.

Despite those concerns, the special committee was convinced a “properly considered and implemented” act would, “fill the Legislature’s need for fuller oversight of government activities.” And the committee wanted to be sure a sunset system enacted provided for the

executive branch to participate as well.

The report included a proposed bill. That proposal outlined a set of findings which held, “agencies sometimes have been established without due regard for, or analysis of, the extent of existing state government agencies, and the effect that a new agency might have upon overall service to the public,” as well as a general trend to create new agencies instead of reviewing how existing agencies are conducting their business. Because there was no regular review of an agency’s effectiveness “the intent of legislation” is sometimes not accomplished.

The proposed bill created a joint committee consisting of five members each from both the House and Senate. The House Speaker and Senate Majority Leader could both be committee members. The committee chair and vice-chair would be from the opposite houses.

Under the bill, every state department would report to the committee every January 1 the names and legislative missions of all agencies under its structure. The joint committee would have authority to review

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any bill introduced to create a new agency and consider whether it created duplication of what other agencies were doing, possible alternative avenues for providing the expected services to the public, and when the agency should be terminated.

The proposed bill also set up a process for agency review and proposed termination, if necessary, by having members of the joint committee work with members of the standing House and Senate policy committees on agency reviews and publishing lists in the legislative journals of a schedule of potential agency terminations.

Once the report was released, the joint committee held another series of public hearings through early 1978, but no bill moved through the legislative process that year, an election year for both legislative houses.

**The Sunset Bill.** The sunset bill that eventually went to Governor Milliken, Senate Bill (SB) 75, was introduced in early 1979 by Sen. Gary Corbin. The measure had bipartisan support from 23 co-sponsors, including Senate Majority Leader Democrat William Faust and Minority Leader Republican Robert VanderLaan. Among the co-sponsors was Republican John Engler serving his first term in the Senate.

The introduced bill was simpler than the special committee's proposed bill. It dropped the explanation of why the legislature was creating the bill. It boosted the members of the joint committee to 12, including the chairs of both the House and Senate Appropriations Committees. It said the committee would obtain information on all agencies, instead of requiring the departments to provide the materials. It required the joint committee to agree on a review method before applying one to an agency review. It set criteria on how to judge an agency, including the agency's budget, workload, structure, decision making process, and objectives.

Agencies were required to cooperate with the committee during reviews and promptly answer all questions put to them by the committee. Further, it required that all agency employees be allowed to be questioned by the committee.

Once a review was completed, a report had to be issued with the committee determining if the agency should be continued, modified, or terminated. The committee must hold a public hearing on its report – if no hearing was held within 45 days the report would be considered disapproved. If a report was approved, copies had to be provided to the legislature, the governor, and the agency. Following the issuance of the final report, the bill said the committee would recommend legislation to enact proposed changes or termination.

**A sunset bill does not create anything that the legislature could not already do.**

The Senate Administration and Rules Committee sent a substitute bill to the full Senate, which added a series of definitions and restored a requirement that departments report on the agencies under

their control (requiring the information by February 1). It also gave more direction on how legislation was to proceed. For example, the bill stipulated that it must be detailed where personnel were being transferred and how property and unexpended funds were to be distributed. The Senate passed SB 75 in May that year.

Democratic Majority Floor Leader Joe Forbes and freshman Republican Paul Hillegonds shepherded the bill through the House. In an interview, Rep. Hillegonds said he was passionate for sunset legislation after working in Washington, D.C., and seeing it used in the appropriations process. Rep. Forbes was also enthusiastic for the concept, especially a mandated review process. Without actual legislative oversight, Rep. Forbes felt agencies would just come up for automatic renewal.

The House was also where much of the effort to win a compromise with Gov. Milliken took place. The governor worried the bill encroached too much into executive authority.

The final version of the bill was little changed from the Senate substitute and was sent to Gov. Milliken in December 1979. That month the Detroit Free Press also supported the sunset concept on its editorial page but proposed that termination dates be set as a way of working against special interests. A critic responded that specified termination dates

only meant political fights and eventually automatic renewal.

**Milliken's Veto.** In January 1980, Governor Milliken vetoed the bill. In his veto letter, Gov. Milliken said he was convinced the legislative study committee made a "sincere attempt" to create a clearly structured method to carry out legislative review. However, he said there was nothing the bill created that the legislature could not already do.

While he also raised concerns about the bill's possible effect on Michigan's bond obligations and constitutionally designated agencies, Mr. Milliken said he felt required actual terminations on specific dates should "be tested as part of any evaluation process." And since the bill was not to take effect until 1981 anyway, he said there was time to develop a proposal in 1980 that included an actual termination schedule.

The legislature declined the invitation in 1980, however. In the 1981-82 session, another bill creating a general sunset plan was introduced but died in committee. That was the last time such a bill was introduced.

**The Kelley Opinion.** Lawmakers did not abandon sunset, though. Starting in 1980, legislators began adding termination dates to a wide variety of programs in their enabling legislation. Among those provisions were sunsets eliminating the state's Youth Conservation Corps requirements that employers participate in training programs, and a definition of an unemployment credit week. The legislature added termination dates to many bills.

Included was a termination on changes enacted to Michigan's workers compensation system during a controversial year-ending session in 1981. The significant changes to the workers compensation system generated furious demonstrations, including demonstrators trying to blockade a House member in his office so he could not vote on the package.

A specific definition on a worker's disability qualifying him/her for worker's compensation adopted during that time frame became the focus of a new controversy in 1984 and 1985. The controversy was heightened by the presence of Democratic Governor James Blanchard, the Democratically controlled House and

the now Republican controlled Senate (following the recall of two Democratic senators).

A new sunset date on the definition had been set for June 30, 1985, but that date passed with no decision on a new definition. Urgent but unsuccessful discussions on a compromise definition were held between Gov. Blanchard and legislative leaders that weekend, and the following Monday, July 1, the House passed a new definition, but the Senate held off.

The following day, Attorney General Frank Kelley issued a letter opinion to Mr. Blanchard saying the initial June 30 termination of the definition was unconstitutional.

To be constitutional, the Attorney General said, sunset legislation must meet the state's title-object provisions which "is to place the legislature and the public on notice of the object of the law, thereby assuring that only matters germane to the object noted in the title will become law."

Expiration of the definition was not listed in the title of the law, so the expiration was invalid according to Mr. Kelley.

The ruling's effect was electric. Legislators worried it would affect hundreds of laws. The administration said they would follow the ruling but called on lawmakers to still come up with a new definition. Now Senate Majority Leader Mr. Engler called the ruling "one man's opinion" and expected it would be challenged in court.

However, the ruling still stands. And Mr. Kelley issued three more opinions over the next year dealing with a number of specific sunset provisions. Some were judged constitutional, others not using the same title-object provisions.

**Sunset Today.** As earlier stated, Michigan does use sunset provisions in specific statutory instances. And often they are used to win approval of a proposal. According to former Rep. David Hollister who sponsored mandatory seatbelt use, a sunset provision had to be added to get the bill passed in the first place.

Sometimes, efforts are mounted to end sunset provisions. Attorney General Dana Nessel recently called



for the state to end the sunset on Michigan's .08 blood alcohol content (BAC) level – defining when a person is guilty of impaired driving – saying letting the limit return to its former .10 BAC level, “would be the worst idea I could possibly imagine.” (Governor Whitmer signed an extension of the .08 BAC limit, which still has a sunset, but one that is tied to federal highway construction funds to a requirement that states adopt a .08 BAC limit).

In recent years, a number of sunset provisions have been added to environmental laws and professional licensing laws. For example, Section 3104 of Natural Resources and Environmental Protection Act stipulates that until October 1, 2024, a \$500 fee is needed to file for a permit to alter a flood plain.

The Legislative Service Bureau also issues a report for each biennial legislative session of statutes, provisions or agencies that by law are scheduled

for repeal. The 2020-2023 report outlines 20 such laws currently on the state books calling for repeals.

A number of the repeals, however, are not set by dates but by other conditions just as the new provisions on the state's .08 BAC law require. For example, the state's Fire Safety Standard and Firefighter Protection Act says the law will be repealed when a federal standards preempting act is adopted. Another conditional appeal applies to the state's underground storage tank regulations (in the Natural Resources and Environmental Protection Act). The regulations are to be repealed 12 months after all bonds and notes of the finance authority are paid off.

However, one significant provision, does have a date specific termination time. Groundwater protection fees in the state's Natural Resources and Environmental Protection Act are slated to end on December 31, 2021.

## Examples of Oversight Working in Other States

With or without sunset provisions, both term-limited and non-term-limited states have been able to establish oversight systems that could serve as models to strengthen Michigan's oversight efforts.

Generally, those systems require legislation or at least joint rules setting up a process that survives one legislative session to another. Oversight systems also require additional and specific staff, though questions often remain if staffing is sufficient for the tasks needed.

They also require a commitment to bipartisanship. Not that each party have equal representation, though one state examined did require equal representation on its oversight committee, but at least a recognition that problems can affect all sides, and services and resolutions should also benefit all sides.

**Maine**, like Michigan, is a term limit state. But, unlike Michigan, Maine's auditor general does not

enjoy the same degree of support and deference, pushing more explicit oversight responsibility to the legislature and its structure.

Other states have been able to establish oversight systems that require legislation or at least joint rules setting up a process, additional and specific staff, and a commitment to bipartisanship.

As earlier indicated in Maine's sunset law, initial evaluations of agencies and laws are conducted by a standing joint committee on the subject matter. The subsequent evaluation is assigned to the Maine's Office of Program Evaluation and Government Accountability which defines the scope of the project and conducts the research. It

reaches initial conclusions and proposals which are then returned to the bicameral Government Oversight Committee (GOC).

The GOC consists of 12 members, six from each house, and is equally divided between Democrats and Republicans. The committee is aided by a small staff of nine senior and staff analysts.

The small number of staff, along with the amount of overall funding provided for oversight activities,

has played a role in the somewhat limited number of reports the office has churned out. Since 2006, the office has released some 60 reports (compared to the 77 the Michigan OAG, which has a far larger staff, issued in calendar 2020) and 12 of those were annual reports.

The reports have covered a wide range of topics, including many dealing with the complex issues of mental health and health care. In recent years there also have been a number of reports on corrections issues, though one had to do with health care in prisons. Among those was a report on the sale of real estate to the state prison warden. Tax and economic development issues have also generated a number of reports.

Despite its limitations, the program has gained general acceptance and seems to be popular. A staff member at the program offices said when it first began operations in 2005 there was some hostility towards it but that has changed in the ongoing years.

Once reports are turned over to Maine's GOC the committee holds public comment on the report, votes on whether to endorse it and monitors how agencies respond.

Among the states, **South Carolina** is viewed as having an extraordinary degree of legislative oversight power, which stems not just from the formal oversight committees but also its appropriation process. Yet, its process varies between the House and Senate.

An overall political feistiness also plays a major role in the legislative oversight system. Despite South Carolina being a solidly Republican state, with Republicans in control of the entire government, legislators show far less deference to the governor. That is especially true in the appropriations system. Overrides of vetoes, extremely rare in Michigan (only three in the last nearly 70 years), are more common in South Carolina.

Also unlike Michigan, South Carolina's auditor general does not enjoy the support and authority the OAG has in the Mitten state.

South Carolina does not have term limits, nor does it any longer have a formal sunset law.

Lack of sunset legislation puts a greater emphasis on the legislative oversight committee system. The oversight committees are strengthened by having greater overall authority in state government, even with South Carolina's legislature being a part-time body. Both chambers of the General Assembly have oversight committees.

Even with established legal authority, again like Michigan, the committees take on much of the character of the chair. The House, for example, has tried to ensure a degree of bipartisanship. A Democrat, for example, chairs one subcommittee. And if an issue appears to be too partisan, the chair will create ad hoc committees to review the matter.

Even with the oversight committees, South Carolina law directs all standing committees to be engaged in oversight activities.

The current legislative oversight system was established in 2014, with a specific mission to review and to determine if programs should be revised or terminated. It is designed so all of the state can participate by proposing areas for review.

Even with the oversight committees, South Carolina law directs all standing committees to be engaged in oversight activities.

A top staff member for the House Legislative Oversight Committee said the attitude towards oversight is not that a particular agency is doing something wrong, but "Hi, it's your turn." At times, agencies themselves ask for review. For example, the Department of Public Safety asked the governor to request a review.

The House committee has 20 members, making it one of the largest committees in that chamber. And it very specifically is conducting a political process not a judicial process, the staff member said. With the committee as large as it is, the panel has a staff of five full-time people. And because the legislature is part-time, members get a per diem for traveling to meetings when the legislature is not in session (a benefit of the Covid-19 pandemic is Zoom meetings have cut the committee's expenses considerably).

Another major aspect of the oversight committee is it only conducts reviews and does not consider legislation. However, as of 2019 some 40 bills had been proposed based on the work of the committee.

The House committee overall is quite active, and its website lists not only the reports on agencies it has completed, but those currently under study and those yet to be studied. Its reports are extremely detailed in terms of its process and proposals. A report issued in 2020 on the state's Department of Mental Health, particularly in regard to how the state reviews and deals with deaths of vulnerable adults, was very pointed in its findings and recommendations (there were 28 recommendations overall). The report included an overall history of the mental health system in the state and looked into issues such as staff training and patient care.

Interestingly, the South Carolina Senate oversight committee model is different. When the system was first established in 2014, the Senate committee was under the clerk's office. Now the committee is under the President of the Senate.

While the House committee meets frequently, the Senate committee is "less meeting driven."

The Senate committee holds an initial meeting, then contacts an agency directing it to write a report and submit it to the committee. The committee then meets again to review the report, ask questions of the agency. It is a far more informal process than the South Carolina House.

The Senate committee does not have a schedule of agencies it wants to review, the members decide which should be studied. The Senate committee goes through two to three agencies reviews a session.

It terms of states with sunset as its primary oversight system, probably no other state can outdo **Texas**. Its Sunset Advisory Commission is arguably the best organized and financed of any state. It certainly is one of the best in terms of promoting its mission and results.

**Texas's Sunset Advisory Commission is arguably the best organized and financed of any state.**

Texas, where state government is largely dominated by the legislature even though it is a part-time body and where it is common for the governor to call in lawmakers for special sessions, adopted its sunset law in 1977. While there have been some changes, the basic law stands.

Agencies and programs are subject to elimination, by schedule, if the commission does not recommend their continuation, generally with changes to operations. The legislature has to enact legislation enacting the recommendations, or

separate legislation keeping the agency for it to avoid revocation.

The Sunset Advisory Commission includes both legislators – five each from the Senate and House – and two members of the general public, who are appointed by the state's lieutenant governor. It has a staff of 28 individuals, including analysts and attorneys.

The system in Texas schedules agency reviews well in advance – the Texas Medical Board, the Texas Military Department, and the Guadalupe-Blanco River Board already know they will be among 28 state agencies that will be reviewed in the 2030-31 review cycle – which, if nothing else, gives those agencies notice to be prepared.

Since 1977, the Texas sunset commission has conducted more than 550 reviews and claims the legislature in Austin has approved 80 percent of its recommendations on actions involving various agencies. Those reviews have resulted in 41 agencies being dissolved and another 51 consolidated.

The commission also claims it has saved state residents more than \$1 billion through its actions, a return of \$19 for every \$1 spent on the commission. Virtually the only governmental agency completely exempt from review is the judiciary.

Most agencies do not object strenuously to proposed recommendations. However, the commission can generate controversy. Its proposal that the state's board of plumbing examiners be abolished was

opposed by the unions representing plumbers and the bill that would enact the proposed changes was defeated by the legislature. The board still exists.

As it happens, the Texas Public Utilities Commission will be under sunset review this year, so how utilities and the state responded to the calamitous storm

that raked the state this past winter will be under discussion.

However, the plumbing board situation and the fact the Texas legislation did not enact any major changes to utility regulations despite officials last winter saying they would do so, demonstrate a fact

### Recommendations to Strengthen Legislative Oversight

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sunset critics raised from the beginning. Agencies and lobbyists for industries with an interest in certain agencies can and will try to exert influence on lawmakers to keep an agency alive.

Both Michigan House and Senate current leadership have expressed a renewed commitment to legislative oversight in recent years. These efforts are important to the checks and balances among the branches of government and to the pursuit of an economical, accountable state government.

Many elements of oversight are already in place – a constitutionally empowered Auditor General, the Legislative Council, oversight elements in the appropriations process, actions by standing policy committees, and oversight committees.

Sunset provisions are included in some legislation but broadening the use of sunset legislation may be contemplated as a way of institutionalizing oversight in an era of term limits.

The concept of sunset legislation cannot on its own guarantee improved legislative review. In one sense, Governor Milliken was correct in his veto letter of 1979: many of the things the legislature wanted to do with sunset, it can do already.

However, should Michigan want to move to a more active and comprehensive system of legislative review – one conducted by lawmakers themselves – making sunset legislation a more comprehensive aspect rather than the current political tactic system will be a judgment for lawmakers.

One thing also appears clear: if lawmakers wish to have greater oversight authority, they need to set the framework for such authority in a formal setting,

at a minimum as part of legislative rules, ideally the joint legislative rules, or through statute.

Based on the experiences of other states, the legislature should consider a number of actions to enhance oversight. These concepts can be adopted as part of any legislative oversight plan, with or without a general sunset concept:

- The system should have a clear, institutionalized structure. Whether by statute, joint rules or separate rules of each house, a legislative oversight system must have an established, written, ongoing, institutionalized purpose and structure that outlasts the strictures of term limits. The details of how and what and why a committee or commission acts and decides must have an established, agreed-upon, and written basis behind it.
- To combat some of the ill effects of term limits, if a specific oversight committee – either a bicameral panel or one each in the House and Senate -- is created, its members should serve on the committee for their entire terms of office. If House members of the committee are elected to the Senate, they should be appointed to the Senate committee once there is a vacancy. Doing so will reduce the chance of institutional amnesia.
- To combat the ill effects of term limits, the legislature should adopt a practice to add to bills statements of the problems being addressed or legislative intent. Depending on the sunset dates adopted, the legislators creating agencies or enacting laws today are not likely to be part of the legislative body reviewing their effectiveness. Statements of legislative intent will give future

legislators a basis to better perform legislative oversight.

- If separate oversight committees are created in the House and Senate, they should both have the same overall rules and structures. They don't need to review the same agencies or programs at the same time, but they should each review them following the same process.
- Staff will be needed. Whether the staff is specific to that committee or made a part of the OAG or the fiscal agencies, an oversight committee needs to have staff dedicated to its functions. The size of legislative staff was reduced to address the budget balancing difficulties common in the first decade of this century. It is likely that additional staff will be needed to carry out oversight activities and funding for that staff should be insulated to protect against the whims of budget balancing exercises.
- True bipartisanship must be established. Doing so helps create both credibility as well as overall buy-in of results from both parties. If equal numbers of Democrats and Republicans is unfeasible, then the committee should create a chair and one vice-chair, both from the opposite parties. Oversight hearings held to promote partisan purposes instead of policy improvements weaken perceptions of oversight as a legitimate legislative activity. Similarly, a non-partisan, objective decision-making process should be developed to guide the use of sunset provisions.
- Transparency is vital and must be ensured at every step in the overall oversight scheme. Oversight is a tool to ensure accountability to the people. Actions that occur behind closed doors are contrary to this objective.
- The public should be invited to participate, both by appearing and testifying in hearings, but also by proposing agencies or programs that should

be reviewed.

- If overall sunset legislation is adopted, the legislature should consider fixing deadlines to eliminate a program or agency if it fails to meet requirements ordered of it in a review. However, the legislation should steer clear of eliminating whole departments or attempting to limit the governor's ability to reorganize state government.
- If lawmakers want the oversight process handled by the Auditor General, the Legislative Council, or the fiscal agencies rather than by legislative committees, then they should show the same level of commitment to their efforts. They should commit that reports and reviews generated by any of those agencies will be subject to public review and hearings. The committees should be empowered to direct the Auditor General or Legislative Council or fiscal agencies to conduct certain reviews, get more information if needed, and take the first steps in directing corrective action, if necessary, based on those findings. And this process too must be structured and bipartisan.
- Legislative commitment to act on findings should be assured. This report documented information gathered in pursuit of oversight and accountability that seemingly gains little attention from legislators. Auditor General reports without policy actions and reports filed in compliance with appropriations boilerplate provisions can further the goals of legislative oversight, but not if they are filed only to sit on shelves.
- To meet the constitutional issues former Attorney General Kelley raised, and to assist whatever oversight process is undertaken, lawmakers should also include specific authority to end a program or agency in a bill's title. Legislation should include an opening section to create new programs, agencies or policies, and explain why the action is being enacted.



### Conclusion

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Michigan citizens need the assurance state government is operating as effectively as it can, and a robust system of legislative oversight should and would be critical to providing that confidence.

But the public should also have the assurance any oversight is as free from overt partisanship as possible. The public also has to have confidence Michigan's legislature handles oversight in a professional manner, not at the whim of a committee chair or caucus leader.

Michigan's constitution and laws, as well as the structure of its legislature, provide the basics for a good oversight system. Lawmakers can build off the impressive work done by the Legislative Auditor General's office to create a system of authoritative oversight.

Michigan's lawmakers have to be the ones to determine they do not want to seem to be lax in dealing with what could prove to be an important function and benefit to the state.

### Endnotes

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<sup>2</sup> *Government Workers More Prevalent in Red States*, Governing Magazine, March 14, 2014, <https://www.governing.com/news/headlines/gov-states-with-most-government-workers-are-more-conservative-analysis.html>

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<sup>5</sup> *Evaluating the Effects of Term Limits on the Michigan Legislature*, Citizens Research Council of Michigan, Report 401, May 2018, <https://crcmich.org/publications/evaluating-the-effects-of-term-limits-on-the-michigan-legislature>

<sup>6</sup> *Book of the States* 2019, Council of State Governments, Table 3.27 Summary of Sunset Legislation, <http://knowledgecenter.csg.org/kc/system/files/3.27.2019.pdf>