Council Comments:

Citizens Research Council of Michigan
1526 DAVID STOTT BUILDING -- DETROIT 48226
405 BAUCH BUILDING -- LANSING 48933

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STATE BALLOT ISSUES, AUGUST 6, 1968

The voters of the state will vote in the August 6, 1968, primary election on three proposed amendments to the state constitution:

Proposition 1 establishes a judicial tenure commission;
Proposition 2 establishes a state officers compensation commission; and,
Proposition 3 authorizes the governor to fill judicial vacancies by appointment.

These are the first amendments to the 1963 constitution which have been submitted to the voters. Another proposed amendment and several other state propositions will appear on the ballot at the November general election.

STATE PROPOSITION NO. 1: JUDICIAL TENURE COMMISSION

This proposed constitutional amendment establishes a judicial tenure commission to investigate complaints about the conduct of judges. The commission is not authorized to take disciplinary action itself. Instead, recommendations are submitted to the supreme court which may decide to censure, suspend with or without salary, retire or remove a judge for any of the following causes: conviction of a felony; physical or mental disability which prevents the performance of judicial duties; misconduct in office; persistent failure to perform his duties; habitual intemperance; and conduct that is clearly prejudicial to the administration of justice.

The supreme court is given rule-making authority to implement this section of the constitution and is also directed to provide for the confidentiality and privilege of the proceedings.

The judicial tenure commission would be composed of nine members, of whom a majority of five would be Judges. Four of the member-judges would be elected by the judges of the respective courts-court of appeals, circuit courts, probate courts, and courts of limited jurisdiction. Members of the state bar would elect one judge and two lawyers; and the governor would appoint two non-lawyer citizen-members.

Present Method for Removal

At present, Michigan judges may be removed from office by two processes: (1) by impeachment which may be used in the case of any civil officer, and (2) by removal by direct legislative action pursuant to the adoption of a concurrent resolution approved by two-thirds of the members in each house. The latter procedure was first incorporated in the constitution of 1963 because it

was felt that the impeachment process was too narrow in restricting the causes for removal to corrupt conduct in office or for crimes or misdemeanors." The proposed amendment establishing a tenure commission would provide a third process for removing judges from office.

Tenure Commissions in Other States

The proposal to establish a judicial tenure commission is a relatively new approach in the United States to the problem of ensuring that a judge does not continue in office for a prolonged term if he is unfit to perform his judicial duties. California became the first state to establish a judicial tenure commission in 1960. Since then, eight more states have established such bodies. These states are: Colorado, Florida, Maryland, Nebraska, New Mexico, Ohio, Pennsylvania, and Texas.

Because the California operation is similar to what is being proposed in Michigan, the California experience is of interest. The California commission on judicial qualifications operates with a staff of two–an executive secretary and an office secretary–and expends about $36,000 per year. In 1966, seventy-five complaints were registered against judges of which thirty-three required some investigation or inquiry. Investigations may include obtaining medical reports concerning the physical or mental incapacity of a judge. The California commission maintains the confidentiality of its investigations and thus has been able to secure remedial action without the full publicity of a formal hearing before the supreme court. There have been an average of five or six resignations or retirements per year while commission investigations were underway.

Conclusions

The power to remove a judge from office is rarely exercised by legislatures. Removal by legislative action is cumbersome and is employed only in extreme cases of gross misbehavior.

Proponents of the judicial tenure commission approach cite several advantages as compared to the present methods of removing judges (impeachment and direct legislative action). First, the amendment authorizes not only the removal of judges, but also other disciplinary action where removal is not warranted. Second, the supreme court, which is head of the judicial branch of government, is strengthened by being given the power to remove or otherwise discipline judges, Third, the judiciary will have a voice in monitoring its own members since representatives of the judges of the various courts will be serving on the commission. Fourth, the tenure commission can function to prevent abuses from arising by making continuing investigations and by the power of persuasion. Finally, the confidentiality of investigations will serve as a protection to judges against malicious and unfounded charges.

STATE PROPOSITION NO. 2: STATE OFFICERS COMPENSATION COMMISSION

This proposed constitutional amendment would create a state officers compensation commission with the power to set the salaries of legislators and of the governor, lieutenant governor and justices of the supreme court. The state officers compensation commission would be made up of seven members appointed by the governor. Under the proposed system, salaries set by the compensation commission would be final unless rejected by a two-thirds vote in each house of the legislature.

Prior to 1948, the salaries of legislators, the governor and the lieutenant governor were fixed in the

constitution, while the salaries of the justices were fixed by statute. In 1948, the constitution was amended to authorize the legislature to determine, by statute, the compensation of its own members, the governor and the lieutenant governor, but provided that no change in compensation of these officials can become-effective during the current term of office.

Dissatisfaction with the current practice of setting salaries by legislative act appears to be based primarily on the fact that considerable controversy usually occurs every time legislative salaries are increased. The procedure itself has not imposed stringent limits on legislative salaries, a problem which existed prior to 1948 when a fixed amount was set by the constitution. On the contrary, since 1949 legislative salaries plus expense allowances have risen from $2,900 to the present $15,000 annually. Over the same period, the salary of the governor increased from $22,000 to $40,000, the lieutenant governor from $5,900 to $22,000, and the justices of the supreme court from $12,000 to $35,000.

Experience in Other States

Historically, most state legislatures were restrained from fixing their own salaries by constitutional provisions setting forth the specific amount or imposing a ceiling on the amount. Because this approach tended to freeze legislative salaries for prolonged periods of time, a majority of states (30) now allow salaries to be set by legislative act.

Interest in establishing a commission to determine legislative compensation appears to come primarily from states where restrictive constitutional limits still operate: Idaho, where a commission was created by statute in 1967 to set expense allowances of legislators, and Oklahoma, where the voters will consider this August a constitutional amendment similar to the one in Michigan.

A State Officers Compensation Commission—Pro and Con

Pro. The main advantage of empowering a compensation commission to make salary determinations would be to relieve the legislators from taking direct responsibility for action on a matter in which they have a personal stake. It might also be argued that a precedent exists in Michigan for allowing salaries to be set by an independent agency. The state civil service commission, a constitutionally established independent body, is empowered to fix rates of compensation of state employees in the classified service.

Con. It may be argued that the legislature is the proper body to set policy on compensation of elected state officials because the function of the legislature is to make decisions on matters of broad public interest. Another argument is that the legislature, by making these decisions directly, would be conducting its business in such a way that the public can oversee the action and express its opinion. The transfer of power to a separate commission tends to obscure the lines of responsibility and to remove the action from public view.

STATE PROPOSITION NO. 3: FILLING OF JUDICIAL VACANCIES

This proposed constitutional amendment would authorize the governor to fill judicial vacancies in any court of record or in the district court by appointment. A vacancy is defined to exist because of death, removal, or resignation of the judge or by vacating the office, which includes moving out of the district from which he was elected. The governor would not be able to appoint persons to newly created

judgeships; these posts would be filled by election.

The proposed amendment would allow a person appointed to the judgeship to be eligible to run for election to the vacated post. In addition, the amendment specifically provides that an appointed judge shall be designated as an incumbent on the ballot. At present, only elected judges have such designation. The proposal also empowers the supreme court to "authorize persons who have been elected and served as judges to perform judicial duties for limited periods or specific assignments."

Until 1964, the long-standing practice was to fill judicial vacancies by gubernatorial appointment. The constitution of 1963 requires that all judges must be elected to office, thereby removing all appointive powers. It did, however, permit the supreme court to assign retired judges to perform judicial duties for the limited period of time from the occurrence of the vacancy until the successor was elected and qualified.

Interest in going back to the former system and restoring to the governor the power to fill judicial vacancies has arisen partly from a concern that there may not be enough retired judges available for assignment to vacancies, particularly in view of the fact that many new judgeships have been created. However, records at the Office of Court Administrator indicate that there is no problem of vacancies at the present time. Only one judicial vacancy is currently unassigned.

At one time, there were fewer retired judges but the requirement of mandatory retirement at 70 has increased the pool. As of March 13, 1968, there were 16 retired judges, two of whom have been assigned to fill vacancies. With one or two exceptions, most of the others would probably be able to perform judicial duties.

Filling Judicial Vacancies by Appointment–Pro and Con

Thus, the main question which this proposed amendment raises is whether it is better to fill judicial vacancies by election or by appointment. The question was vigorously debated by Con-Con delegates and the point of view rests largely on one's philosophy. The following gives the major arguments pro and con.

Pro. Those favoring gubernatorial appointment to fill judicial vacancies argue that it improves the quality of judges because a more selective screening process is provided. Furthermore, a short term appointment followed by an election gives the electorate the advantage of being able to vote for or against a judge on the basis of his record in officer The problem of confusion arising from similarity of names on the ballot is avoided by the designation of the incumbent.

Con. The importance of preserving the concept of an independent judiciary elected by and responsible to the people is the main argument against filling vacancies by appointment. Historically, Michigan has shown a strong preference for an elective judiciary and the practice of filling vacancies by appointment is inconsistent with this tradition. It is also argued that the designation of an appointed judge as an incumbent gives him an unfair advantage over other candidates seeking the office.