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EXECUTIVE REORGANIZATION OF STATE GOVERNMENT

The Issue in Brief

Section 2 of Article 5 of the state Constitution authorizes the governor to “make changes in the organization of the executive branch or in the assignment of functions among its units which he considers necessary for efficient administration.” The state Constitution authorizes the creation of no more than 20 principle departments; Public Act 380 of 1965, the executive organization act of 1965, established 19 principle departments. In order to effect a reorganization, the governor must issue an executive order outlining the specific organizational changes, then the Legislature has 60 calendar days to disapprove each executive order. Disapproval must be by both chambers. If this does not occur, the executive order becomes effective on a date designated by the governor.

Delegates to the 1961 Constitutional Convention wanted to strengthen the governor to meet the evolving needs of state government. One of the techniques adopted was to include authorization for executive reorganization subject to legislative veto by both houses of the Legislature. Opponents were concerned with the concentration of power, including political control, in the governor at the expense of the Legislature. For the first 26 years the executive reorganization authority existed, it did not prove to be a substantial factor in the administrative or political management of state government. There were few major reorganizations effected.

The current Governor is using the executive reorganization authority to a greater extent than his predecessors. The Governor’s use of this power may reflect all three reasons envisioned by the delegates to the constitutional convention: efficiency, management control, and political control. Any conclusion as to whether this use is good or bad public policy depends on one’s support for a strong executive, as well as one’s position on the specific changes that have been implemented. Those who believe in a strong executive will applaud the current Governor’s initiatives, while those who do not believe in a strong executive may find fault with the Governor’s use of the executive reorganization authority. This **Council Comments** reviews the history of the gubernatorial reorganization provision, analyzes the impact of past executive reorganizations, and reviews the active use of this constitutional authority by the current Governor.

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Background

The concept of executive reorganization had been implemented at the federal level prior to the time it was advocated in Michigan. In November 1951, the staff report to the Joint Legislative Committee on Reorganization of State Government, on the General Management of Michigan State Government, Report Number 30, recommended the governor be authorized to submit executive reorganization proposals to the Legislature which would become effective unless disapproved by either house of the Legislature. This recommendation was one of numerous recommendations included in the “little Hoover Commission” study of Michigan state government that was staffed by the Citizens Research Council. The reorganization proposal essentially reversed the traditional roles of the executive and legislative branches. In this instance, the governor “enacts” legislation organizing the executive branch subject to a legislative veto. There was, of course, no prohibition contemplated preventing the Legislature from enacting reorganization plans.

This executive reorganization proposal was enacted by Public Act 125 of 1958. Act 125 authorized the governor to submit reorganization plans within the first 30 days of any regular legislative session. Any reorganization plan became effective 90 days after legislative adjournment unless disapproved within 60 legislative days by either house of the Legislature. The subsequent constitutional authority requires disapproval by both houses. There was one reorganization effected under Act 125. In 1962, the independent Office of Civil Defense was transferred to the Michigan State Police. There were five other reorganizations that were enacted by statute after being submitted in an executive order. Legislative enactment occurred to avoid use of the executive-initiated reorganization because some legislators were concerned about the constitutionality of the provision, believing it violated the separation of powers doctrine. This statutory authority was repealed by Public Act 237 of 1968, because it was not necessary after the constitutional executive reorganization provision was adopted.

Constitutional Convention. At the 1961 Constitutional Convention, Delegate Martin, chairman of the committee on executive branch, explained the reason for giving authority to the governor for administrative reorganization. It was believed that, “the governor is in the best position to have knowledge of the structural problems and needs that exist in the executive branch.” 1 Official Record, Constitutional Convention 1961, at 1768. The committee recommended that a legislative veto of any reorganization proposal would require the affirmative vote of both houses. Two minority reports were submitted: one allowed disapproval by a majority in either house, and the second required a two-thirds majority of each house to disapprove a reorganization order. Neither minority report was adopted by the Constitutional Convention.

An argument for disapproval by either house rather than requiring disapproval by both houses was: “Whoever has the power by an executive order to organize and to rearrange the departments of his government to suit his will has a tremendous political power....” 2 Official Record, Constitutional Convention 1961, at 1844.

The debate at the Constitutional Convention reflected a more fundamental reason for adopting a comprehensive executive reorganization provision. This justification related to creating a strong chief executive, and was a theme that surfaced frequently during other Convention deliberations. Proponents of the proposed amendment, that would have authorized disapproval by either house,

argued that requiring disapproval by both houses would strengthen the governor at the expense of the Legislature, which they opposed. Those delegates favoring a strong executive opposed the amendment on the opposite grounds; that is, the executive reorganization power would be weakened if either house could veto an executive reorganization proposal.

There was a fundamental disagreement between the advocates supporting the committee recommendation and those delegates arguing for disapproval by a majority in either house of the Legislature. The advocates for a strong executive usually made their arguments in terms of economy and administrative efficiency, and strengthening the governor's management control of state government. The opponents of a strong executive often couched their arguments in terms of providing a balance of power between the governor and Legislature.

Ultimately, the amendment for disapproval by either house was defeated 54 yeas to 71 nays. The committee proposal was approved 79 to 44 on April 24, 1962, and contained the requirement that both houses must disapprove an executive reorganization order in order to prevent it from becoming effective.

Executive Orders 1965-1990

Public Act 380 of 1965, the Executive Organization Act. In order to implement Section 2 of Article 5 of the state Constitution, Act 380 was enacted. The act established a classification system that identified three types of transfers to consolidate the then existing 125 agencies or so into 19 departments. A type I transfer agency retained all its substantive powers, but staff activities such as budgeting and procurement are provided by the head of the principal department. Under a type II transfer, all powers, duties, and functions are transferred to the principal department, and the transferred agency exercises only those duties delegated to it by the department head. A type III transfer provided for the transfer of the agency to the principal department and the abolishment of the agency. In addition, a fourth classification was established for any agency not enumerated within Act 380, but established by law within a department. Such agency continues to exist within the principal department and exercises all its statutory powers. The head of each principal department, with the approval of the governor, was authorized to establish the internal organization of the department.

Seven of the principal departments established by Act 380, as amended, were constitutional: the departments of Attorney General, Civil Rights, Civil Service, Education, State, Treasury, and Transportation. The balance of the 19 principal departments were the departments of Agriculture, Commerce, Corrections, Labor, Licensing and Regulation, Management and Budget, Mental Health, Military Affairs, Natural Resources, Public Health, Social Services, and State Police.

The Michigan Supreme Court in **McDonald v Schnipke**, (380 Mich 14; 1968), concluded that Act 380 was the enabling act for Section 2 of Article 5 of the Constitution and that Act 380 authorized the abolishment of an existing department, board, or commission through a type III transfer. In **Soap and Detergent Association v the Natural Resources Commission**, (415 Mich 728; 1982), the Michigan Supreme Court ruled that the Constitutional Convention recognized that the executive reorganization power is legislative in nature but may be exercised by the governor. The court also concluded that executive reorganization does not violate the separation of powers doctrine.

The first executive orders issued were in 1965 and implemented Act 380. The executive organization act required the governor to establish the effective date for the transfer either of any organizational entity or the powers, duties, and functions of any organizational entity. In 1965, there were 19 executive orders implementing Act 380. **Table 1** presents information concerning executive reorganization orders issued for calendar years 1965 through 1990, exclusive of the 19 procedural orders issued to implement Act 380.

Table 1

Summary of Executive Reorganization Orders Issued 1965-1990

<u>Calendar Year</u>	<u>Substantive Change</u>	<u>Procedural Change</u>	<u>Total</u>
1965-70	3	1	4
1971-75	13	3	16
1976-80	4*	1	5
1981-85	5	1	6
1986-90	<u>9</u>	<u>1</u>	<u>10</u>
Total	34	7	41

* Includes one disapproval by the Legislature in 1977

Source: Legislative Service Bureau, library.

Seven of the 41 executive orders issued were procedural in nature; they clarified earlier orders, changed the effective date of an earlier order, or rescinded an earlier order. The one executive order rejected by the Legislature occurred in 1977, and would have transferred the public service commission's highway enforcement function to the Department of State Police. In 1982, this activity was transferred by executive order 1982-1.

As was pointed out above, the principal reason for the adoption of the constitutional reorganization power, as included in the record of the Constitutional Convention, was to promote economy and efficiency in the organization of executive agencies. It was believed that executive reorganizations were necessary to meet the changing conditions of the state. It was further believed that the governor was better able than other public officials to recognize these changing needs and make the necessary accommodations. The contrary argument was that executive reorganization would place too much political power in the hands of the governor, and upset the balance of power between the executive and legislative branches. At least during the 26-year period included in **Table 1**, neither of these propositions has been supported by actual practice. Most of the substantive executive orders have transferred small organizational units from one principal department to another principal department. The reorganizations have been as minor as the 1975 transfer of the nursing home rate-setting function from the Department of Public Health to the Department of Social Services. There have been few major reorganizations.

Major Reorganizations, 1965-1990. Using a definition that includes the transfer of major functions or activities between departments, there were seven significant executive reorganizations between 1965 and 1990. These reorganizations included:

- **1965-30** The bureau of the budget was created in the Executive Office through the transfer of the divisions of budget, building and management services from the Department of Administration.
- **1970-13** The management science group was transferred to the Executive Office from the Department of Administration.
- **1972-3** Established seven centralized data processing centers to serve the 19 principal departments.
- **1973-1** The Department of Aeronautics and the Port Authority were transferred to the Department of State Highways from the Department of Commerce.
- **1973-2** Consolidated environmental programs in the Department of Natural Resources.
- **1980-1a** Made a number of organizational changes in several departments; the major ones were the transfer of the state housing authority from the Department of Social Services to the Department of Commerce, and the insurance bureau from the Department of Commerce to the Department of Licensing and Regulation.
- **1982-1** Transferred the public service commission's highway enforcement responsibilities from the public service commission to the Department of State Police.

Interestingly, the executive orders creating a central budget and management capability in the Executive Office were reversed through the promulgation of executive orders in 1971 and 1973. This was done because there was a political concern that the Executive Office was becoming too large.

There was one sweeping reorganization proposal that was never implemented. In 1973, the Governor issued executive order 1973-11, that created a Department of Human Services by combining the three principal departments of Social Services, Mental Health, Public Health and organizational units from other principal departments. However, the reorganization never took effect operationally even though the 1974-75 Executive Budget devoted 217 pages to the Department of Human Services. Legally, the department existed; operationally, it did not. Although the executive order was in place, the Governor decided enabling legislation was desirable because the creation of a Department of Human Services was such a radical change. Legislation creating a Department of Human Services was adopted by the House on December 6, 1973. Senate progress was slower. The bill was not reported out of committee until November 16, 1974, and no action was taken by the full Senate. The legislation died on the Senate calendar when the Legislature adjourned sine die on December 31, 1974. Thus, the Department of Human Services never became operational even though legally in existence, and in 1981, the Governor rescinded 1973-11.

Two of the more significant reorganizations that occurred during the period were accomplished through amendments to Act 380. The Department of Management and Budget was created and the Department of Administration was abolished through the adoption of Public Act 127 of 1973. The Department of State Highways became the Department of State Highways and Transportation and then the Department of Transportation as the result of Public Act 70 of 1975 and Public Act 483 of 1978. In addition, through the adoption of Public Act 484 of 1978, the governor was authorized to appoint the Department of Transportation director, subject to a constitutional change that was approved by the electorate at the 1978 general election.

Although the constitutional executive reorganization power may have great potential for a governor who wished to use it to restructure executive branch organization, there was little use of this authority during the first 26 years it was in existence. It was not used, to any great extent, by governors to shape principal departments to meet changing needs. Conversely, it was not used to enhance the governors' political power at the expense of the legislature, nor to enhance their management control of the executive branch.

January 1991 thru May 1992

The current Governor has made extensive use of the executive reorganization power since taking office on January 1, 1991. During the first 17 months of his term, the Governor issued 30 executive reorganization orders including 26 in 1991, which is 18 more than were issued in 1973, the calendar year that had been the leading year for executive reorganization order promulgations. Only four of the 30 orders were procedural in nature.

At least seven of the transfers were major reorganizations:

- **1991-2** The bureau of state lottery was transferred from the Department of Management and Budget to the Department of Treasury.
- **1991-7** The two state veterans' facility institutions were transferred from the Department of Public Health to the Department of Military Affairs.
- **1991-9** The functions of the Department of Licensing and Regulation were transferred to the Department of Commerce and the Department of Licensing and Regulation was abolished; thus reducing the number of principal departments to 18.
- **1991-12** The Corrections Commission was abolished and its duties were transferred to the director, who is to be appointed by the governor.
- **1991-18** The tax tribunal was transferred from the Department of Treasury to the Department of Commerce.
- **1991-30** The employment security commission was made an advisory body, and its statutory authority was transferred to the director of employment security. The governor will appoint the director of employment security and the chair of the commission.

- **1991-31** The Department of Natural Resources was restructured to strengthen the position of director at the expense of the natural resources commission, and 15 boards and commissions were abolished. The governor will appoint the commission chair.

Prior to issuing the executive order abolishing the Corrections Commission, the current Governor asked for an attorney general's opinion relating to the governor's authority to abolish boards and commissions. The Attorney General ruled that the governor has authority to abolish or eliminate boards and commissions (OAG, 1991-92, No. 6675).

As noted in the constitutional deliberations, there are, at least, the following three reasons for any governor to utilize the constitutional executive reorganization authority:

1. To provide for a more efficient state government;
2. To gain management control of state government; and
3. To enhance the governor's political control of state government.

All of the executive reorganization orders are, to some extent, based on improving efficiency in state government. In the case of the bureau of state lottery transfer to the Department of Treasury, the principal reason given for the transfer was that the lottery is a revenue producing activity and one of the main activities of the Department of Treasury is collecting taxes and other revenues. It was concluded that the lottery activity should be part of the state agency that has the revenue collection knowledge in state government. The transfer of the Department of Licensing and Regulation to the Department of Commerce primarily was premised on administrative efficiency.

The transfer of the tax tribunal to the Department of Commerce from the Department of Treasury was justified on the basis of administrative efficiency, but this reason was given a different twist than had been used in other transfers. It was pointed out that there might be the appearance of conflicting interests, because the tax tribunal hears tax appeals from taxpayers and the principal role of the Department of Treasury is to collect revenue for the state. Thus, the tax appeal responsibility would be more appropriately lodged in another state department. Hearing property tax appeals, independent of any potential influence, presumably would result in a more efficient system than would occur in an environment where potential influence exists.

A number of the gubernatorial executive orders appear to be directed toward gaining more management control of state government. In terms of the number of state employees, the Department of Corrections has been the fastest growing state agency of the last decade. Corrections has become a sensitive public policy issue, as the state has attempted to enhance public safety by building more prisons to incarcerate dangerous felons. By abolishing the Corrections Commission, the body that appointed the director of the Department of Corrections, and reserving the appointing authority for himself, the current Governor increased his management control of an important state department, but accepted more political accountability for the corrections function.

Another example of the Governor's effort to enhance his management control of state government was the reduction of the authority of the employment security commission by transferring its powers to the director of employment security. The executive organization act of 1965 provides the employment security commission "shall be an autonomous entity in the department of labor," which was not one of the three basic types of transfers enumerated in Act 380. The 1991

executive order was challenged in court by one member of the employment security commission and three members of its advisory council on the basis that the commission was created as an autonomous entity and was not subject to reorganization by executive order. On April 1, 1992, the Circuit Court for the County of Wayne found that the executive order violated the state Constitution and enjoined the enforcement of the order. Currently, the case is pending in the Michigan Court of Appeals.

The most controversial executive order relates to the reorganization of the Department of Natural Resources. To opponents of the reorganization this is an attempt by the Governor to gain control of environmental enforcement and state resources management. Most of the concern relates to the abolishment of the several boards and commissions that some persons believe will restrict citizen input in both the environmental, and game, fish and recreation management areas. A consolidated lawsuit by four groups was filed in the Circuit Court for the County of Ingham. On January 30, 1992, the Court ruled that executive order 1991-31 violates the state Constitution. As of this writing, the decision is on appeal to the Michigan Court of Appeals.

The third reason stated by the constitutional convention for the exercise of the executive reorganization powers, increasing the governors political control of state government, often is indistinguishable from increasing management control. The governor has significant policy making power and is responsible to the electorate for policy as well as for management of the executive branch. Thus, the reorganization orders abolishing boards and commissions or making them advisory and providing for direct gubernatorial appointment of department heads or commission chairpersons increase the governor's authority and responsibility.