



# CRC SPECIAL REPORT

## MICHIGAN CONSTITUTIONAL ISSUES



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### ARTICLE VI – JUDICIAL BRANCH

#### In Brief

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

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

State government powers are expansive and shared among three branches of government: legislative, executive, and judicial. Judicial power resides with the courts. In Michigan, the judicial system is composed of a Supreme Court, a statewide court of appeals, county or multi-county circuit and probate courts, and county or municipal district courts. The 1963 Constitution created “one court of justice,” meaning that all courts are organized under the Supreme Court and operate under rules and procedures created by the Supreme Court. It is likely that a constitutional convention, should one be convened, would focus on the operations of the judicial system within that framework, including: court organization, the role of the county clerk in circuit courts, the selection of justices and judges, court rulemaking, the funding of trial courts, and continuance of the Judicial Tenure Commission.

#### Introduction

Within the context of the separation of powers doctrine that characterizes Michigan’s state government, judicial power consists in general of the authority exercised by courts to interpret the law. The exercise of that authority generally is limited to specific cases and controversies brought before the courts for resolution by public and private parties and may involve significant questions of public policy or merely pedestrian questions that are of importance only to the parties of the case.

Courts derive their powers from the Constitution and laws by which they are established. Article VI, Section 1 declares the judicial power of the state

... is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish by a two-thirds vote of the members elected to and serving in each house.

Article VI has been amended three times by means of legislative proposals. In 1968, the people adopted two separate constitutional amendments to 1) establish the Judicial Tenure Commission and 2) define the manner of filling judicial vacancies. In 1996, the Constitution was amended to establish qualifications for judicial offices.



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## Constitutional Convention Issues

The 1850 and 1908 Michigan Constitutions granted the Supreme Court general superintending control over lower courts. However, by the time of the 1961 Constitutional Convention, circuit courts, and to a lesser extent probate courts, had evolved into quasi-independent entities whose judges considered themselves accountable only to the local voters by whom they were elected. A majority of the delegates to the 1961 Constitutional Convention concluded that a more centralized judicial structure – “one court of justice” – would be more efficient and economical.

### Court Organization

In general, the overall organization of the court system would likely be one of the first issues a constitutional convention might consider, should one be convened.

The current organization places the Supreme Court atop all other courts. It acts as the court of last resort and the body responsible for overseeing all court divisions below it.

The court of appeals is the intermediate appellate court between the trial courts and the Supreme Court. This court is relatively new in Michigan, having been established by the 1963 Constitution. It hears civil and criminal cases

appealed to it from trial courts. Article I, Section 20 provides that everyone convicted of a criminal offense, other than by a guilty plea, has the right to an appeal. Decisions of the court of appeals are final unless reviewed by the Supreme Court.

Article VI, Section 11 creates circuit courts as the trial court of general jurisdiction, with jurisdiction over all actions except those given by law to another court. It has original jurisdiction over criminal cases, including felonies and certain serious misdemeanors, and civil cases where the amount in controversy is \$25,000 or more and cases where a party seeks an equitable remedy. Finally, the court has jurisdiction over family cases, appeals from other courts, and administrative agencies. Circuit courts have superintending control over courts within the judicial circuit, subject to final superintending control of the Supreme Court.

Article VI, Section 15 creates probate courts with jurisdiction over admission of wills, administration of estates and trusts, guardianships, conservatorships, and treatment of the mentally ill and developmentally disabled.

Finally, district courts were created under authority of Article VI, Section 1, which provides for

“courts of limited jurisdiction that the legislature may establish.” They have jurisdiction over all civil claims up to \$25,000 including small claims, landlord-tenant disputes, land contract disputes, and civil infractions. District court judges also may conduct marriages in a civil ceremony.

Within Michigan’s trial courts, the legislature has created specialty courts, such as mental health courts; drug/sobriety courts; child support specialty courts; and youth/teen or family courts.

The State Court Administrative Office is the administrative agency of the Michigan Supreme Court. The Office assists the Supreme Court to aid in the administration of the courts. It helps to track and manage caseloads, mediates disputes between courts and their funding units, provides technical assistance in the administration of the courts, and provides education to support operation of the courts.

Starting with an examination of court operations under the “one court of justice” principle, a constitutional convention might consider the extent lower courts have been organized and operated efficiently under direction from the state Supreme Court and the State Court Administrative Office. Providing a chain of command

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under the Supreme Court has created leadership in the organization and administration of lower courts and consistent management of the caseloads assigned to judges within each circuit or district. Occasions have arisen at all lower court levels where lower court judges have disagreed with administrative decisions made in Lansing that have affected the operations of that court. Similarly, at a time when local governments are seeking efficiencies through intergovernmental collaboration for the joint provision of services, the need for approval from court administrators of actions to consolidate court operations between two jurisdictions can be viewed as an impediment.

Such an examination could also consider the types and responsibilities of the lower courts. Michigan is one of 40 states with an intermediate appellate court. The court of appeals has lessened the caseload for the state Supreme Court, thus allowing that court to concentrate its efforts on issues of highest criminal and civil significance. Also, the states without intermediate appellate courts tend to be smaller in population, lessening the value of their comparison to Michigan.

Not all states have multiple general trial courts similar to Michigan's circuit, probate, and district courts.<sup>1</sup> Generally, management of the number of judges per circuit or district has allowed for a fairly equal application of justice throughout the state, but in

<sup>1</sup> *Book of the States*, 2008, Council of State Governments, Table 5.2.

some parts of the state, the division of the courts into different types has required probate judges to share time in the circuit courts to help manage uneven caseloads. Authorization for a unified trial court would create efficiencies by allowing trial court judges to hear any case regardless of whether it currently would be sorted into district, circuit, or probate courts. Efforts to move toward a unified trial court in Michigan would be complicated under the present constitution by the varying jurisdictions of judges. Counties are often the control unit for district courts, but several of Michigan's more populated cities bear that responsibility. Circuit and probate courts are often, but not always coterminous.

### Clerk of Circuit Courts

Section 14 provides that, "The clerk of each county organized for judicial purposes or other officer performing the duties of such office as provided in a county charter shall be clerk of the circuit court for such county..." A constitutional convention might find this an antiquated arrangement reflecting a period when neither the county clerk's role related to the county's operations nor clerk of the courts consumed the workload of clerk's office staff.

Today this arrangement leaves the staff members assigned to the courts beholden to two masters: the county clerks and the circuit court judges attempting to manage a caseload. Judges at times find themselves at the mercy of those clerks for court proceedings, for the court cannot convene without the clerk to record filings, arguments, and testimony. The

arrangement has also complicated administration of the circuit courts by requiring judges to work with the county clerks' offices as they attempt to achieve efficiencies. While the clerks are surely equally interested in achieving efficiencies, they are independently elected and may have separate ideas about how efficiencies can best be achieved. At no other court level do judges have to work with independently elected officials to manage administration of the courts.

### Selection of Justices and Judges

The method of selection of Michigan Supreme Court justices, court of appeals judges, and circuit, probate and district court judges is a question that has persistently cropped up throughout Michigan's history and undoubtedly would be reopened at a constitutional convention.

Michigan's history with judicial selection is mixed. The 1835 Constitution called for the governor to appoint supreme court justices. The 1850 and 1908 Constitutions authorized the election of supreme court justices. The 1963 Constitution maintained the election of judges, but called for candidates for supreme court justices to be nominated by political parties.

Section 2 provides that "The supreme court shall consist of seven justices elected at non-partisan elections as provided by law... Nominations for justices of the supreme court shall be in the manner prescribed by law." Current state law provides that nominations for the office of supreme

court justice shall be made at the state party conventions held in the fall, one candidate for each vacancy to be filled at the next general election. In addition, Section 2 allows that any incumbent justice may become a candidate for reelection by filing an affidavit of candidacy.

Section 8 provides that court of appeals judges “shall be nominated and elected at non-partisan elections from districts drawn on county lines and as nearly as possible of equal population, as provided by law....”

Also, circuit court judges (Section 12) and probate court judges (Section 16) “...shall be nominated and elected at non-partisan elections in the circuit in which they reside...”

The question of the method of selection of judicial officers in all courts is one of great importance. At issue are several fundamental safeguards: (1) an independent judiciary; (2) accountability to the residents of the state; and (3) the desire to entrust judicial questions to highly qualified judicial personnel. It is, of course, known that either an elective system or an appointive system can produce some excellent judges and also some mediocre or poor judges. A constitutional convention would be left to decide which system is more likely to produce consistently the high quality, impartial judges that are essential to the proper functioning of our judicial system, and who should be charged with evaluating the quality of the judges.

The importance of preserving the

concept of an independent judiciary elected by and responsible to the people is the main argument of those that favor judicial elections. Historically, Michigan has shown a strong preference for an elective judiciary and the practice of filling vacancies by appointment is inconsistent with this tradition.

Those favoring an appointment process to fill judicial vacancies argue that it improves the quality of judges because a more selective screening process can be developed and employed. 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 office.

The problem with judicial elections is that, other than in a few high profile cases, few people are sufficiently exposed to the judges to evaluate their demeanor, judicial reasoning, or decisions handed down. Those closest to the judicial system are the victims of crime or civil action, those accused of committing crimes or defendants in civil actions, and the lawyers that represent those parties. Others are left to research judges’ histories or select candidates on a slate of nominees based on name recognition. Unlike other political offices, where candidates can promise action on particular issues or identify a political bent, judges are specifically prohibited from predetermining how they would rule on specific matters.

A commonly observed phenomenon in judicial races is “ballot roll-off,” where voters cast votes for high profile offices but fail to vote

for offices further down the ballot. Ballot roll-off is commonly attributed to voter fatigue and voter confusion. Voter fatigue – when voters tire of the voting process – occurs most frequently for offices for which there is little recognition of the office responsibilities and little ability to judge the qualifications of the candidates. Voter confusion occurs when voters lack full understanding of the voting technology, ballot instructions, or ballot design. In the 2008 general election, more than 5 million voters participated in the presidential election, but less than 3.8 million voters participated in election of Michigan’s Supreme Court Justice. Almost 25 percent of the voters chose not to exercise the franchise for the state’s highest judicial office.<sup>2</sup> The ballot roll-off for court of appeals judges was far greater.

At the time Michigan’s Constitution was adopted in 1963 and for many years thereafter, judicial elections were staid, civil affairs that drew little controversy or attention. In recent years, judicial elections have grown increasingly political, controversial, and uncivil. The campaigns of judicial candidates, and especially interest groups, have spent far more money campaigning than ever before and efforts to get candidates elected have grown as negative as other offices for which politics have historically played greater roles.

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<sup>2</sup> Michigan Department of State, Elections Division, [http://miboecfr.nictusa.com/election/candlist/O8GEN/O8GEN\\_CL.HTM](http://miboecfr.nictusa.com/election/candlist/O8GEN/O8GEN_CL.HTM), accessed June 3, 2010.

Options to address the role of money in judicial campaigns and to allow voters to make better-informed decisions include: public financing of judicial campaigns, changing the length of judicial terms so that judges won't have to run for seats on the bench as often, taking greater strides to make judicial elections truly non-partisan, strengthening disclosure laws so that citizens know who is contributing to judicial campaigns and how much, establishing standards of conduct for campaigns, doing more to distribute information about the candidates, and establishing judicial evaluation committees.<sup>3</sup> Specific to Michigan, changes to the Constitution to remove courts from the process of redistricting house and senate districts would lessen the political stakes associated with the election of judicial candidates. (See CRC Report No. 360-06, *Article IV – Legislative Branch*.) With less at stake for the political parties, it is possible that judicial campaigns could return to civility and improve lost confidence in the courts.

At least some of the judges are popularly elected in 38 states. The *Book of the States*<sup>4</sup> reports the method of selection of judges for 1) unexpired terms, 2) full terms and 3) the retention of supreme court justices and judges of the intermediate appellate courts.

<sup>3</sup> Honorable Dennis Archer, "Perspectives on Michigan Judicial Elections," keynote address at Perspectives on Michigan Judicial Elections symposium, Wayne State University Law School, January 12, 2004.

<sup>4</sup> *The Book of the States*, 2008. Council of State Governments.

Supreme court justices are elected for full terms in 22 of the 50 states; and judges of intermediate appeals courts are elected for full terms in 19 of the 39 states that have such courts. Eight of those states select supreme court justices for full terms in partisan elections; another 14 states select supreme court justices for full terms in non-partisan elections. Michigan and Ohio are the only two states that call on partisan political parties to nominate candidates for supreme court justice to be elected in non-partisan elections. Supreme court justices either must stand for a retention vote or run for reelection in 38 of 49 states (in Massachusetts, Supreme Court and Appeals Court judges serve until death, resignation, retirement, or removal); and intermediate appeals court judges must go through an elections process in 32 of the 38 states (excepting the 11 states without such courts and Massachusetts for the reason cited above). (See **Figure 1** on p. 6)

### Filling Judicial Vacancies

Until 1964, the long-standing practice was to fill judicial vacancies by gubernatorial appointment. As adopted, the 1963 Constitution required that all judges must be elected to office, thereby removing all appointive powers that existed in the 1908 Constitution. 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.

The requirement that vacancies be filled by elections was short lived. A 1968 amendment to Section 23 authorized the governor to fill judicial vacancies in any court of record or in the district court by appointment. The governor's appointment power does not extend to newly created judgeships; these posts must be filled by election. Furthermore, Section 23 allows a person appointed to the judgeship to be eligible to run for election to the vacated post with the designation as an incumbent on the ballot. Prior to that amendment, only elected judges benefited from designation.

If a constitutional convention proposes changes to the method of selecting judges, it is likely that a convention also would address the method of selecting justices to complete unexpired terms. Alternatives a convention might consider could include: extending the election or appointment of judges to lifetime terms with vacancies filled by elections, requiring the gubernatorial appointment to come from a list of candidates offered by a judicial nominating committee, or requiring gubernatorial appointments to be filled with consent of the senate or the other statewide elected officials (e.g., the secretary of state and attorney general).

**Figure 1** (on p. 6) shows that appointment processes are used to fill unexpired judicial terms in all states where unexpired terms are possible for supreme court justices or judges in the intermediate appeals (again excepting Massachusetts for the reason cited above).

**Figure 1**  
**Summary of Selection and Retention of Appellate Court Judges by State**

<u>Number of States</u>	<u>Method of Selection/Retention</u>
<b>Supreme Court</b>	
<b>Method of Selection for Unexpired Term</b>	
21	Gubernatorial appointment from judicial nominating commission
13	Gubernatorial appointment
8	Gubernatorial appointment from judicial nominating commission with consent of legislature
3	Gubernatorial appointment with consent of legislature
2	Court selection
1	Gubernatorial appointment with approval of elected executive council
1	Legislative appointment
<b>Method of Selection for Full Term</b>	
14	Non-partisan election
8	Partisan election
14	Gubernatorial appointment from judicial nominating commission
7	Gubernatorial appointment from judicial nominating commission with consent of legislature
2	Gubernatorial appointment with consent of legislature
2	Legislative appointment
1	Gubernatorial appointment
1	Gubernatorial appointment with approval of elected executive council
1	Gubernatorial appointment from judicial nominating commission with approval of elected executive council
<b>Method of Retention</b>	
19	Retention election
14	Non-partisan election
5	Partisan election
3	Gubernatorial appointment from judicial nominating commission with consent of legislature
3	Legislative appointment
2	Gubernatorial appointment with consent of legislature
1	Judicial Nominating Commission appointment
<b>Intermediate Court of Appeals</b>	
<b>Method of Selection for Unexpired Term</b>	
17	Gubernatorial appointment from judicial nominating commission
12	Gubernatorial appointment
4	Gubernatorial appointment from judicial nominating commission with consent of legislature
2	Court of last resort appointment
2	Gubernatorial appointment with consent of legislature
1	Legislative appointment
<b>Method of Selection for Full Term</b>	
12	Gubernatorial appointment from judicial nominating commission
11	Non-partisan election
7	Partisan election
4	Gubernatorial appointment from judicial nominating commission with consent of legislature
2	Legislative appointment
1	Gubernatorial Appointment
1	Gubernatorial appointment with consent of legislature
1	Gubernatorial appointment from judicial nominating commission with approval of elected executive council
<b>Method of Retention</b>	
17	Retention election
11	Non-partisan election
4	Partisan election
2	Gubernatorial appointment from judicial nominating commission with consent of legislature
2	Legislative appointment
1	Judicial Nominating Commission appointment
1	Gubernatorial appointment with consent of legislature

Source: Book of the States, 2008, Council of State Governments, Table 5.6, pp. 286-88.

## Recusal of Justices

A constitutional convention also may wish to address an issue that has created controversy within the court recently. Judicial ethics require judges to recuse themselves from cases when there exists a possible conflict of interest or prejudice. In trial courts, such actions would cause cases to transfer to another trial court judge. In the court of appeals, a recusal would cause assignment of that case to another appeals court judge. In the case of the Supreme Court, the recusal of a single judge would leave only six justices and the potential of an inability to establish a majority to decide the case.

In response to these circumstances, a constitutional convention might wish to consider options for cases when a justice is unavailable to hear a case. One alternative would emulate the practice in Ohio. Section 4.02 of the Ohio Constitution provides in relevant part,

If any member of the court shall be unable, by reason of illness, disability or disqualification, to hear, consider and decide a cause or causes, the chief justice or the acting chief justice may direct any judge of any court of appeals to sit with the judges of the supreme court in the place and stead of the absent judge.

## Court Rulemaking

Section 5 empowers the Supreme Court to “establish, modify, amend and simplify the practice and procedure in all courts of this state....” Similar provisions were

contained in the 1850 and 1908 state Constitutions. While the provision appears to be straightforward, it poses two issues that a constitutional convention might want to visit. First, there is as a practical matter no bright line to distinguish questions of practice and procedure on the one hand from questions of substantive law on the other. (For example, what evidence may be admissible at trial and under what circumstances may be viewed as a matter of practice and procedure, but also may have a direct impact upon the substance of legal recourse.) Second, the Michigan Supreme Court has taken the position since 1959 that when there is a conflict concerning practice and procedure between one of its rules and a statute, the former prevails.

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

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

1961 Constitutional Convention, the matter may be worthy of reconsideration.

## State Funding of Trial Courts

While streamlining the court system to create “one court of justice,” neither the constitutional convention nor the legislation drafted to implement the constitutional provisions addressed the need for a unified system of court finance. As discussed above, all of the trial courts are organized under the direction of the state Supreme Court and are subject to rules and must follow operating procedures established by the state Supreme Court. However, the court organization created under the 1963 Constitution relies upon the local governments to serve as the funding units for the trial courts. The county governments, alone or in tandem, are the funding units responsible for funding the circuit and probate courts. Counties and several of the larger cities serve as the “district control unit(s)” responsible for funding district courts.

As funding units, the counties and municipalities must perform careful balancing acts with the trial courts to provide needed funding without intruding into the affairs of the courts. Every year the chief judge in each court must submit a proposed budget to the county(s) or municipality responsible for court funding. Generally the courts and funding governments are able to work together to agree on budgets that the governmental bodies can afford and that will meet the needs

of the courts. However, the separation of powers provisions in the constitution prevents the counties and cities from having any real controlling powers over the management or operations of the courts when conflicts arise.

Any conflicts are taken to arbitration before the State Court Administrative Office or are brought to suit before courts of higher jurisdiction. One of the most significant cases to be decided on court funding, *Wayne Circuit Judges v Wayne County*, 386 Mich 1 (1971), found that the judiciary possesses an inherent power to determine and compel payment of those sums of money which are reasonable and necessary to carry out its mandated responsibilities.

Over time, there has been some recognition by the state legislature that the state should bear the responsibility for funding the "one court of justice." The first movement in this direction was necessitated by the financial difficulties of the City of Detroit and Wayne County in the early 1980s. In 1981, the state assumed funding responsibility for the 3rd Circuit Court in Wayne County, Detroit's Recorder's Court, and Detroit's 36th District Court. Pursuant to Public Act 438 of 1980, this state action was to be the first phase of a state reorganization that would ultimately result in full state funding for the trial courts. Act 438 laid out a six-year timetable for the state to fund trial court operational expenses on a statewide basis.

While the state met its funding obligations for the Detroit and Wayne County courts, sufficient funds were never provided to fund court operations in the other 82 counties.

Public Act 189 of 1993 created new sources of funding for court operations by restructuring and increasing certain court fees. Funds from those fees were earmarked to a newly created State Court Fund, which allocated funding to trial court funding units pursuant to a formula based on the state's paying a percentage of trial court costs. Some court funding units benefited from this allocation, others did not. Again, the state was not able to provide sufficient resources to fully fund court operations statewide.

**Table 1  
Michigan's Trial Court System  
Costs and Sources of Funding**

	<u>FY2008</u>		<u>FY1993</u>	
	<u>Amount</u>	<u>Percent</u>	<u>Amount</u>	<u>Percent</u>
<b>Costs by Court Level</b>				
Circuit Court	\$ 888.3	61.1%	\$ 135.6	24.3%
Friend of the Court	\$ 162.6	11.2%	\$ 80.4	14.4%
Probate Court	\$ 63.5	4.4%	\$ 176.0	31.5%
District Court	<u>\$ 339.7</u>	23.4%	<u>\$ 185.8</u>	33.3%
	\$1,454.1		\$ 577.9	
<b>Sources of Funding</b>				
State Funding	\$ 333.8	23.0%	\$ 109.1	18.9%
Federal Funding	\$ 106.1	7.3%	\$ 64.1	11.1%
Revenue Collections	\$ 252.0	17.3%	\$ 178.0	30.8%
Calculated Local Contribution*	\$ 762.2	52.4%	\$ 226.7	39.2%

\* Local court contribution includes in part a shift in funding to the court from other federal, state and county funded juvenile programs.

Source: PowerPoint presentation *Court Structure and Resources*, by Dawn Monk, Deputy State Court Administrator and Rebecca Mack, State Court Administrative Office Financial Analyst, February 9, 2010 [percentages CRC calculation].



The legislature again attempted to restructure the court system and provide equitable state funding of trial courts in 1996. Detroit's Recorder's Court was folded into Wayne County's 3rd Circuit Court. The 3rd Circuit Court and the 36th District Court no longer received special funding. New funds were established to provide operational funding to trial courts statewide.

Even with state funding that has grown substantially, locally-raised revenues are needed to fund trial court operations. Data from the State Court Administrative Office shows that the cost of Michigan's trial court system increased from \$577.9 million in 1993 to \$1,454.1 million in 2008, a 161 percent growth over 15 years. **Table 1** (on p. 8) shows the sources of the revenues used to finance the trial court system.

A constitutional convention may wish to examine whether the "one court of justice" policy should be extended to funding of the court system. A state funded court system would give the Supreme Court and court administrator's office greater latitude to achieve efficiencies by consolidating courts and enable creation of a unified trial court system in parts of the state where it could operate best. It would allow for better management of caseloads across the state, resulting in an equal application of justice regardless of location. It would make all court staffs employees of the state and would standardize compensation in terms of payrolls, pensions, and benefits.

## Judicial Tenure Commission

When the 1963 Constitution was adopted, judges could be removed from the bench in only two ways: by impeachment, which can be used in the case of any civil officers; and by direct legislative action pursuant to the adoption of a concurrent resolution approved by two-thirds of the members in each house. The latter provision was added by the drafters of the 1963 Constitution because impeachment was seen as a tool that could be used only in narrow circumstances for removal, i.e., instances of corrupt conduct in office and for crimes or misdemeanors.

The first successful amendment to the 1963 Constitution, and second proposed amendment, was a legislatively-initiated proposal in 1968 to create a Judicial Tenure Commission (JTC). The JTC serves as an investigatory body, investigating complaints about the conduct of judges and submitting recommendations based on investigations of those complaints to the Supreme Court for disciplinary action. Section 30 authorizes the Supreme Court 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 judicial duties; habitual intemperance; and conduct that is clearly prejudicial to the administration of justice. Unlike the provisions that existed prior to the 1968 amendment that recognized only wrong-

ful conduct that would warrant removal from the bench, Section 30 recognizes that different levels of discipline are warranted for different degrees of misconduct and that sometimes it is necessary to remove a judge for health or other reasons that should not denote misconduct.

The first issue a constitutional convention might chose to address is the seemingly contradictory provision related to removal of judges. The 1968 amendment added Section 30 to create the JTC and stipulated the conditions under which judges may be censured, suspended, retired, or removed, but it did nothing to amend or delete the last sentence of Section 4, which says, "The supreme court shall not have the power to remove a judge."

Second, a constitutional convention could be expected to examine the need for the JTC and constitutional provisions for the JTC's operational process. It may wish to alter the openness of the process and the reasons for which action may be initiated. It may wish to consider membership on the commission to include more members not closely tied to the judicial system or legal profession.

According to the Judicial Tenure Commission website, the JTC concluded 581 cases in 2009. In 442 (76.1 percent) of those cases, an investigation to evaluate the complaint did not produce a sufficient showing of misconduct. Another 25 cases (4.3 percent) were settled with admonitory, cautionary, and explanatory letters, meaning that the judge was warned about his or her con-

duct but the complaint and JTC actions were not made public. Others were dismissed because of the lack of jurisdiction, lack of merit, or for other reasons. Only 1 cases (0.2 percent) rose to the level of public censure, which meant that the matter rose to the level of receiving attention by the Supreme Court.<sup>5</sup>

According to the Council of State Governments, states generally fall into two camps on adjudicating complaints against judges. The laws of 18 states and the District of Columbia empower the same body charged with investigating complaints against judges to also adjudicate the charges that may be warranted after investigation of the complaints. Those decisions are then subject to appeal to another body, usually the states' supreme courts. In 24 states, including Michigan, the investigating body must prepare

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<sup>5</sup> Judicial Tenure Commission website, <http://jtc.courts.mi.gov/statsbudget.htm>, accessed June 8, 2010.

and file charges with the states' supreme courts for adjudication. Seventeen states do not provide any mechanism to ensure the process works.<sup>6</sup>

Section 30 currently provides, "The supreme court shall make rules implementing this section and providing for the confidentiality and privilege of proceedings." The 1968 constitutional amendment that established the JTC purposefully created a system of confidentiality of investigations to serve as a protection to judges against malicious and unfounded charges. Although the public desires judges to be fair and impartial, their public standing and requirements to stand for election inherently make them political beings. As such, they are subject to acrimony both by discontented citizens and by political opponents wishing to unseat them from their positions on the bench. Creating a level of confi-

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<sup>6</sup> *The Book of the States*, 2008, Council of State Governments, pp. 294-6.

dentiality serves to keep the investigations of allegations of misconduct from becoming fodder for political posturing.

The Council of State Governments also reported on the point at which reprimands of members of the judiciary are made public. Only Washington conducts a completely open process, with all records and proceedings open from the beginning of fact finding hearings by the Commission on Judicial Conduct. Thirty-two states, including Michigan, make the process known to the public only when the investigating body decides that it has sufficient evidence to warrant filing charges with the adjudicating body. Another 11 states announce findings to the public when a decision has been adjudicated. The final states make the findings public only after the appeals process has been exhausted.<sup>7</sup>

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<sup>7</sup> *The Book of the States*, 2008. Council of State Governments, pp. 294-5.

## Conclusion

Unlike other articles in the 1963 Constitution, Article VI does not include provisions that have been ruled unconstitutional or inoperable. The judicial system is operating adequately and can continue into the future with the current constitutional provisions without pause. However, some of the issues critics identify in Article VI may rise to higher levels of importance in coming

years. The increasingly political and tainted campaigns for Supreme Court justices may diminish the perception of an independent, impartial judiciary capable of dispensing justice to all. Continuance of this trend may create a rallying call to reform the methods of selecting judges. The cost of operating Michigan's trial court system has increased at a pace that imposes tremendous

burden on the local governments – counties and cities – charged with funding responsibility. A unified state funding system to parallel the "one court of justice" established by the 1963 Constitution would alleviate the mandated costs that those governments must bear and enable the court system to achieve efficiencies in operations that are otherwise unobtainable.