Michigan House of Representatives

Joint Meeting of the Appropriations Committee and the Tax Policy Committee

Outline of Comments by
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Introductory Remarks

- Second appearance on government restructuring
- January 2008: Adopting a "Lean Government" Model for Michigan; Revisiting the Executive Organization Act of 1965 (outline included in this document)
- 2009: Strengthening the Legislative Branch
- Urge you to act

Strengthening the Legislative Process

Summary: Michigan's Legislative Branch

- Co-equal branch of sovereign government
- One of the "political branches"
- Only branch authorized to create government policies as laws.
- Statutes represent the unilateral power of the sovereign to impose its will.
- Our system of separation of powers requires each branch to effectively carry out it powers.

Legislative Power and Effectiveness Continues to Decline

- People have imposed a "mandatory inexperience" structure of the legislative branch
- But did not expect or want a weak or ineffective legislature
- Legislators are no less intelligent or committed than in the past – but they are much less effective
- But effective lawmaking is not sausage making and as an institution you increasingly fail to measure up the standards the People desperately need to address the challenges of this state
- You have not made the necessary changes in the institutional structures of the Legislature to adopt to a mandatory inexperience, term limited system.
- With the advent of term limits, many new legislators have little knowledge of the scope of their powers
- One aspect of term limits is an erosion of legislative powers through the lack on an institutional memory or the failure to create legislative institutions that are able to effectively assist the elected representatives in the exercise of their power.

Michigan's Legislative Powers and Processes Are Eroding

A number of factors have been at play in Michigan over the past several years that have eroded the role and effectiveness of the Legislature – the branch of our tri-partite system that is intended to represent the People in establishing public policy.

The forces that contribute to this process are cumulative and reinforce each other:

- Term limits
- Legislative leadership with limited experience in setting public policy
- Budget reductions that have diminished the professional staffs in the Legislature
- The loss of much institutional memory of the powers and tools of governance
- Reduced participation in national organizations such as the National Council of State Legislators (NCSL)
- Abandonment of any significant legislative oversight process of the implementation of laws or the conduct of executive branch agencies

- Erosion of ethical standards

Consequences of Weakened Legislative Power

From the perspective of the broad public interest, the following negative consequences have developed:

- The frequent inability of legislative committees to conduct serious, in depth hearings on complex issues, replacing them with "work groups"

- A shift of a disproportionate influence to career employees of executive branch agencies in setting public policy

- The lack of long term legislative thinking

- The trend toward making the legislative process a political "chess game" where partisan politics dominates and public policy takes a secondary role. One consequence is that issues that do not have a partisan advantage for one side or the other are not even addressed.

Rebuilding Legislative Power Under a "Mandatory Inexperience" Constitution

There are several steps that might be taken within a term limits regime to strengthen legislative powers and the role of the Legislature in setting public policy:

1. Legislative Policy Research Office in the Legislative Council. The strongest agencies in the legislative branch are the Fiscal Agencies. Similar structures could be established for important policy areas.

2. Legislative Oversight Agency. This is a constitutional role that has almost completely eroded. With few senior legislators truly knowledgable about executive agencies, there is no effective oversight.

3. Confidential Records Protocol and Rules. The Legislature has failed to establish procedures and regulation regarding legislative access to otherwise confidential records. The executive branch properly is concerned about sharing statutorily confidential information with the Legislature. Congress has addressed this issue and the Michigan Legislature should also do so before next Governor takes office.

4. Streamline the Legislative Council. The Legislative Council should adopt procedures to either delegate more duties or find more effective ways to meet, e.g., on-line meetings, in order to conduct important legislative business.

5. Shift Budget Resources from Executive to Legislative Branch. The Executive Branch agencies receive a disproportionate amount of state funds allocated to planning, research and policy development. Given its constitutional law making and oversight function, there should be a shift of resources to the Legislative Branch.

6. Allocate Federal Funds to Legislative Research and Oversight Function. Billions of dollars flow through the state and are constitutionally required to be appropriated by the Legislature. But the Fiscal Agencies do not have sufficient resources to manage all these funds and advise legislators. Away should be found to allocate more of these funds to the Legislative Branch.

7. Abandoning Power Through Statutes Instead of Legislative Rules for Internal Matters. Out of ignorance, the Legislature has at time passed laws which regulate the internal activities of the Legislature. Such actions amount to abandoning constitutional powers and make the Legislature subject to the consent of the Governor to changes in internal legislative matters.

8. Abandoning Power to the Executive Through Broad Rule Making Without Sunsets. 2009 is the 40th anniversary of the passage of the Administrative Procedures Act. This Act allows executive branch agencies to enact rules "with the force and effect of law." Because the legislative oversight function is so limited, the risk of rule making abuse by executive branch agencies is enhanced.

9. Failing to Use Legislative Auditor General Reports and Misunderstanding Auditor General Powers. Legislators still try to give the Legislative Auditor General new statutory powers. These attempts merely reflect the fact that the Auditor General is a constitutional officer whose duties are only those set forth in the Constitution.

10. Failure to Define Role of Attorney General In Legislative Affairs. This is an issue that flares up every 10 years or so. The Attorney General asserts that he or she is the legal counsel for the Legislature which generally works. But the Attorney General has limited resources to be an effective resource for the Legislature in lawmaking. You should either use the AG more or strengthen the legal resources available to the Legislature.

11. Failure to Assert Primacy of Legislature In Negotiations With Sovereign Indian Tribes (TOMAC case). In 2013, the Inidian gaming compacts will expire. Since they were adopted, the Michigan Supreme Court has clarified the roles of the Executive and Legislative Branches in dealing with sovereign Indian tribes. The Legislature should establish structures like those used in other states to formalize its role and process for dealing with Indian tribes.

12. Failure to Assert coequal authority for government reorganization. This is the matter I discussed with the Appropriations Committee in 2008.

The Legislative Council is a Constitutional body:

The Legislative Council is a constitutional body that can be the vehicle for a stronger Legislative Branch:

> CONSTITUTION OF MICHIGAN OF 1963
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> **Art. IV, § 15 Legislative council.**
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> There shall be a bi-partisan legislative council consisting of legislators appointed in the manner prescribed by law. The legislature shall appropriate funds for the council's operations and provide for its **staff which shall maintain bill drafting, research and other services for the members of the legislature**. The council shall periodically examine and recommend to the legislature revision of the various laws of the state.

Do Something About the Life Time Ban In Term Limits

You have a duty to be honest with the People if they have adopted a Constitutional provision that does not work intended.

You should address term limits and put a change before the People in August 2010.

But the change should not take place until the reapportioned Legislature is up for election in 2012.

Do not wait for the perfect time to eliminate term limits generally; that is not going to happen.

But you can address the so-called "life time ban" by just adding one word to the Constitution – CONSECUTIVE.

> **Art. IV § 54 Limitations on terms of office of state legislators.**
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> No person shall be elected to the office of state representative more than three CONSECUTIVE times. No person shall be elected to the office of state senate more than two CONSECUTIVE times. Any person appointed or elected to fill a vacancy in the house of representatives or the state senate for a period greater than one half of a term of such office, shall be considered to have been elected to serve one time in that office for purposes of this section. This AMENDMENT TO THE limitation on the number of times a person shall be elected to office shall apply to terms of office beginning on or after January 1, ~~1993~~ 2013.

2008 Presentation to Appropriations Committee

Adopting a "Lean Government" Model for Michigan; Revisiting the Executive Organization Act of 1965

A Very Brief History of the Organization of the Executive Branch

- 1950s; growing dysfunction in government; payless pay days; 120+ state executive departments; weak governor; split executive (see chart)

- 1962 Constitutional Convention; modernize and strengthen executive branch; bi-partisan support for executive reforms

- Executive Article gave significant duties to Legislature in structuring the executive branch; executive branch must be organized "by law;" executive branch to be composed of no more than 20 "principal departments"

> **Art. V, § 2 Principal departments.**
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> All executive and administrative offices, agencies and instrumentalities of the executive branch of state government and their respective functions, powers and duties, except for the office of governor and lieutenant governor and the governing bodies of institutions of higher education provided for in this constitution, shall be allocated by law among and within not more than 20 principal departments. They shall be grouped as far as practicable according to major purposes.

- Following the mandate of the People the Legislature and Governor agreed to the Executive Organization Act of 1965 ("EOA") allocating all "executive and administrative offices, agencies and instrumentalities of the executive branch of state government and their respective functions, powers and duties" within 19 principal departments, reserving for future use

- The structure established in the EOA in 1965 was very stable until the 1990s. Section 16 listing the principal departments has only been amended once in the 1960s and twice in the 1970s (1968 PA 353, 1973 PA 127, and 1978 PA 483). Other statutory changes, however, were made in the structure of the executive branch but not reflected in the EOA

- In the 1990s, then-Governor Engler reinvigorated one of the strongest constitutional powers of the governor – the power to make changes in the executive branch structure

"with the force of law," i.e., with the same effect as a statutory change initiated by the Legislature. The Legislature failed to veto any of the executive orders.

> **Art. V, § 2 Principal departments.**
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> Subsequent to the initial allocation, the governor may 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. Where these changes require the force of law, they shall be set forth in executive orders and submitted to the legislature. Thereafter the legislature shall have 60 calendar days of a regular session, or a full regular session if of shorter duration, to disapprove each executive order. Unless disapproved in both houses by a resolution concurred in by a majority of the members elected to and serving in each house, each order shall become effective at a date thereafter to be designated by the governor.

- Legislative leaders challenged the Governor's exercise of his reorganization authority; the Michigan Supreme Court upheld the extensive nature of the Governor's powers
- But, nothing in the litigation limited the Legislature's powers; the Legislature has simply abandoned any attempt to exercise its broad powers conterminous with the Governor
- There is no easily accessible organization chart for State Government; over 40+ years, the present executive organization approaches the problems of the 1950s

Adopting a "Lean Government" Model for Michigan

- The Legislature has an opportunity to take a much more active role in designing an executive branch structure for the first decades of the 21st Century
- The Michigan Constitution anticipates a changing structure of the executive branch to meet the needs of the People and administer the size of government the People were willing to pay for
- The State of Michigan is getting smaller, poorer and older. It cannot support the complex structure largely created in the 1960s
- A "lean government" model may allow better delivery of government services; none of the changes eliminate state-mandated programs and functions; establishing function remains a legislative function

  - Reorganization is but one element of the changes the state government needs to make to live within its means. And mere consolidation, if not followed by improved management and elimination of some programs, could be seen as the proverbial "rearranging the deck chairs on the Titanic"

- Only the House and Senate Appropriations Committees have the responsibility to look at government-wide structural issues

- The Appropriations Committees may want to restructure the executive branch, in part, to permit the subcommittees better carry out their critical duties in a term limited environment

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