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Steven M. Ellis
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I. Introduction

The power to act unilaterally by executive order is perhaps the broadest administrative tool that Michigan's governors possesses under the Michigan Constitution of 1963. Functioning as legal, policy and political tools, executive orders have been increasingly used by Michigan governors over the past four decades to exercise control over the executive branch and to enhance political power. However, despite the broad implications of Michigan's governors' ability to act by executive order, Michigan's citizens' public awareness, much less understanding, of this power is extremely limited.

The lack of public knowledge of Michigan's governors' ability to act by executive order is compounded by the fact that the scope and the boundaries of this power are often defined in a limited fashion, if at all. Although limited illustrations of the power exist in case law and in commentaries examining the powers of other state governors, no authoritative reference detailing the executive order powers of Michigan's governors has been advanced until now. Therefore, in order to contribute to the public understanding of the system by which it is governed and the individuals who operate within that system, this article will detail the historical development of gubernatorial executive order powers in Michigan, and serve as a reference regarding the scope of the governor's ability to act by executive order.

Part II of this article presents background information on of executive orders, including the executive power of governors, the historical origin of gubernatorial executive orders; the general types of executive orders; and the typical form of executive orders. Part III examines the historical development of gubernatorial executive orders in Michigan, focusing on the weakness of the governor under the 1908 Constitution, the 1961 Constitutional Convention, and the implementation of the 1963 Constitution. Finally, Part IV sets forth the current scope of the

Governor's executive order powers, including rules of construction and interpretation, constitutional bases of power traditionally cited in executive orders, and constitutional bases of power not traditionally cited in executive orders; and concludes by examining the governor's inherent authority to act by executive order as the chief executive.

II. Background

A. Gubernatorial Executive Power

Three classes of governors exist in the United States: state, territorial, and military. A state governor is the chief executive officer of one of the states, a territorial governor is the chief executive officer of a territory, and a military governor is the chief executive officer of a state, who is appointed by the President during a time of war when the civil authority of the state cannot be maintained.¹

Generally, the people of a state vest the supreme executive power of the state in a governor via the state's constitution. The people of the State of Michigan have vested the executive power of Michigan's state government in the governor under Article 5, section 1 of the Michigan Constitution of 1963 which provides, "[t]he executive power is vested in the governor." Thus, the Governor is the chief executive of the State of Michigan.

As the highest executive authority in the state, the office of governor is "one of high dignity in which the people have a paramount interest."² The governor of a state represents all of the people in the performance of his or her duties, and those acts that are authorized become binding on all citizens of that state.³ However, the actual exercise of gubernatorial power is highly prescribed. The office of governor is a constitutional office with powers delegated by the people, and as a result, a governor does not exist under common law or possess common law

powers.⁴ Since the governor is a mere executive officer, her general authority is narrowly limited by the constitution of the state.⁵ Accordingly:

The governor has no prerogative powers, but possesses only those powers and duties as are vested in [her] by constitutional grant or by statutory grant. The extent and exercise of the governor's powers under statute will depend on the particular provisions thereof, and [her] duties under statutory provisions are circumscribed by the terms of the legislation; but in acting or failing to act in [her] official capacity the governor is always subject to constitutional limitations... Generally, the duties of the governor may be limited to those imposed on [her] by the constitution, but it has also been held that the legislature may require the governor to perform duties other than those specified in the constitution.⁶

Nevertheless, a constitutional grant of supreme executive power implies the power necessary to secure the efficient and fair execution of the law, so long as that power is exercised within constitutional and statutory limitations.⁷

A governor bears the same relation to a state as the President does to the federal government, and a governor is normally entitled to the same immunities, privileges and exemptions in the discharge of gubernatorial duties.⁸ Thus, in practical terms, a governor receives her power only through legislative enactment or by constitutional provision, and the governor cannot alter, expand, or diminish that power. Correspondingly, the legislature of a state may not interfere with a state governor's exercise of gubernatorial powers that are granted by a state's constitution.

B. Historical Origin of Gubernatorial Executive Orders

Although the presidential power to issue executive orders was first utilized by George Washington,⁹ state governors typically did not begin to use gubernatorial executive orders until after the presidential terms of Andrew Jackson.¹⁰ Gubernatorial executive orders generally arose as an indirect result of the Jacksonian era fractionalization of state executive branches and the proliferation of elective state administrative offices.¹¹ Although initially afforded a weak status vis-à-vis state legislatures in the early years of the republic, state governors were gradually able

to use the growth of the independence and prestige of their offices to increase their power through developments such as direct popular election of the governor, extended terms in office, the reintroduction of the gubernatorial veto (albeit in qualified form) and the decline of public confidence in the effectiveness of the legislature as the chief mechanism of state government.¹²

However, even as the powers of state governors increased, governors found these increases mitigated by the rise in the number of independent or semi-independent state agencies corresponding with the increasing number of functions in which the state engaged.¹³ Governors often found themselves left with little, if any, real control over independent and semi-independent agencies, as oversight of these agencies often reposed only in the state legislature.¹⁴ Initially, state functions were limited, so the rise of so many autonomous agencies presented little problem.¹⁵ But as state services, state employees, and, most importantly, state expenditures began to increase exponentially in the twentieth century, governors' relative lack of control over so many areas of state government began to present increasing problems.¹⁶ Ultimately, many governors started to advocate a strengthening of their power in order to exercise general control over all or most state administrative functions.¹⁷

Initially, states sought to achieve such a result through consolidation of the numerous independent and semi-independent agencies.¹⁸ Other attempted solutions included the substitution of appointed agency heads for independently elected individuals and fiscal reforms granting governors powers in the areas of budget preparation and execution.¹⁹ However, no one solution proved to be a panacea to the problems of effectively administering state government.²⁰ Thus, states began to increasingly see the gubernatorial power to issue executive orders as an effective manner in which to solve the problems of controlling and administering state government.²¹

C. Types of Gubernatorial Executive Orders

In granting governors the power to issue executive orders, states have recognized that two of the most potent managerial tools to effectively administer state government include the power to direct, and the power to remove.²² Although removal powers generally depend on some constitutional or statutory authority, the power to direct is often poorly defined, if specified at all in state constitutions.²³ Some states provide for a gubernatorial ordinance power or a general power of executive order by constitution or statute, but clear parameters are often omitted, making the scope of such power subject to controversy.

Nevertheless in jurisdictions recognizing such powers, whether by common law, constitution or statute, executive orders are generally classified in one of three categories: (1) ceremonial and political proclamations, (2) gubernatorial ordinances, and (3) orders for administrative direction and control.²⁴ However, although the bulk of executive orders fall within these three categories, they are neither exhaustive, nor mutually exclusive: some executive orders resist being classified into neat analytical divisions.²⁵

1. Ceremonial and Political Proclamations

Ceremonial and political proclamations are generally proclamations establishing special days or weeks.²⁶ Governors often issue these proclamations for the purpose of recognizing contributions to society by organizations or individuals, memorializing individuals or events, commemorating important dates, and raising awareness of societal problems.²⁷ Although gubernatorial proclamations are usually issued under the great seal of the state and over the governor's signature, and published or proclaimed to the public at large, they may convey legal effect or only ceremonial significance.²⁸

2. Gubernatorial Ordinances

Gubernatorial ordinances are regulations or ordinances which “affect the public at large, generally have the force of law, and serve to implement or supplement the constitution and laws of the state.”²⁹ Such regulations or ordinances are usually issued pursuant to statutory authority granted by the legislature or pursuant to specific or general constitutional authority.³⁰

Additionally, some governors have attempted to issue gubernatorial regulations or ordinances in order to effectuate the constitution itself, although such attempts may run the risk of being deemed unconstitutional under a separation of powers analysis as a usurpation of the policy-making prerogative of the legislature.³¹ Gubernatorial ordinances generally possess the same characteristics and are grounded in the same legal bases as orders for administrative direction and control.³² Thus, courts usually examine the applicability of gubernatorial ordinances in light of the precedents controlling orders for administrative direction and control.³³

3. Orders for Administrative Direction and Control

Orders for administrative direction and control consolidate administrative power in the governor and operate as instruments of executive authority.³⁴ The form and style of such orders varies from state to state and from governor to governor, based on factors such as the subject matter within the order; the objects to which the order is directed; the goal or desired result of the order; the express or implied consequences for noncompliance with the order; and the legal bases upon which the order is issued.³⁵ Orders for administrative direction and control may generally fall anywhere on a spectrum between discretionary orders that merely request a course of action or result, and mandatory orders that dictate the specific course of action and result desired.³⁶

Furthermore, in addition to making use of the governor’s power to direct, mandatory orders may also effectuate the governor’s removal power as a consequence of noncompliance.³⁷

Thus, of the five previously mentioned factors which determine the ultimate form of an order for administrative direction and control, the most important factor may be the legal base or bases upon which the order is issued, for those bases usually determine what other factors may also be implicated.³⁸

D. Form of Gubernatorial Executive Orders

Gubernatorial executive orders generally resemble other types of law and are relatively uniform in structure from one to another.³⁹ Most executive orders are usually composed of four distinct parts. The first part usually contains paragraphs starting with “whereas,” followed by a statement of the legal bases upon which the governor is issuing the order. This part will usually contain a clause stating the location of the constitutional and statutory authority for the order (if applicable), as well as a statement illustrating the particular relevance of that authority to the immediate situation.⁴⁰ Sometimes this part is also used to make broad political statements or pronouncements on issues unrelated to the order or outside of the governor’s ability to directly affect by executive order.⁴¹

The second part of an executive order generally contains clauses also beginning with the word “whereas,” but these clauses detail the specific context of the order. An order will generally contain of number of these clauses stating the nature of the situation, why or how the situation arose, and why the governor needs to issue an executive order in relation to the situation.⁴²

The third part of an executive order often contains a statement of direction by the governor. This statement is the substance of the order,⁴³ and it details the specific actions the governor requires to be taken and the timetable by which they are to be completed. “The length

of this section depends upon the nature and complexity of the order itself and may range from a single paragraph to a number of pages.”⁴⁴

Finally, the fourth part of an executive order is usually composed of formalities relating to the filing of the order itself, such as the date of issue, the signature of the issuing governor, the seal of the state where the order was issued, and the signature of the secretary of state who affixed the seal and files the order.

III. Historical Development of Gubernatorial Executive Orders in Michigan

A. The Weak Executive under the 1908 Constitution

Like many other states, the State of Michigan historically has found itself forced to deal with the problems inherent in a weak chief executive. The Michigan Constitution of 1908 reflects the Jacksonian era fractionalization of the executive branch. Conservative Republicans had dominated the 1907 constitutional convention, resisting wholesale change, and the 1908 constitution ultimately represented little more than a reorganization and slight expansion of the Michigan Constitution of 1850.⁴⁵

By the late 1950's, the state faced unresolved fiscal problems, controversy over legislative apportionment, and weakness in the executive branch with regard to the legislature.⁴⁶ In 1961 the executive branch contained approximately 130 different state administrative agencies, boards, commissions and departments.⁴⁷ These problems led rapidly to a growing sense that the only solution to the problems in state government was a complete overhaul of the entire governmental structure.⁴⁸

However, although the Michigan Constitution of 1908 contained provisions making it relatively easy to amend, wholesale revision of the constitution was somewhat difficult.⁴⁹ Under

the 1908 Constitution, the question of a new constitutional convention was put before the voters only once every 16 years.⁵⁰ Otherwise, a new constitutional convention could only be called if ratified by a majority of the total votes cast in an election.⁵¹ Nevertheless, although this requirement proved to be an overwhelming obstacle to wholesale revision,⁵² it was ultimately surmounted by a constitutional amendment in 1960,⁵³ and in April of 1961 a majority of voters approved a referendum calling a constitutional convention.⁵⁴ Thereafter, Michigan voters chose 144 delegates in September 1961 to draft a new constitution.⁵⁵

B. The Constitutional Convention of 1961

The delegates to the constitutional convention assembled on October 3, 1961 in Lansing and set to work immediately.⁵⁶ One of the main focuses of the convention was the re-organization and the strengthening of the executive branch. In the words of one delegate:

[I]n the last 20 or 25 or 30 years, the number of state boards, agencies, departments, authorities, commissions and so on has increased and increased without any relation to any kind of logical structure.. [T]here is absolutely no thyme or reason to the structure of the state government... [R]eorganization is a must if the governor is to have a structure of government such that he can maintain contact with the heads of his principal departments in such a way as to not only know what is going on but to be able to give some supervision and direction to the functioning of state government.⁵⁷

Completing their work on August 1, 1962, the delegates ultimately agreed to provide for a stronger governor in the interest of administrative efficiency.⁵⁸ The most emblematic change from the constitution of 1908 was the elimination of the adjective “chief” when describing the executive power vested in the governor.⁵⁹ The adjective had been interpreted as a limitation on the governor’s power, and as such was discarded so the language would properly reflect the “major responsibility the governor bears for the executive branch.”⁶⁰

The delegates also extended the governor’s term of office to four years in order to lessen the concern of the immediate political consequences of gubernatorial action, and set

gubernatorial elections in years in which no presidential election was to take place in order to reduce the likelihood that national political issues would intrude into the election of the state's chief executive.⁶¹ Additionally, the delegates agreed to provide for the consolidation of almost all state agencies into a maximum of 20 departments, most headed by single executives appointed by the governor with the advice and consent of the senate.⁶²

Finally, the delegates agreed to grant the governor specifically enumerated powers that had not appeared in the 1908 constitution, such as the power to re-organize the executive branch according to his discretion; the power to establish temporary commissions existing independently of the 20 departments specified in section 2; the power to initiate court proceedings to enforce compliance with any constitutional or legislative mandate; and the power to reduce expenditures from appropriations under certain circumstances.⁶³

Thus, although certain constraints were placed on the use of some powers, the governor was granted wide authority to administrate the state as he saw fit. On April 1, 1963, a majority of Michigan voters agreed and ratified the Michigan Constitution of 1963.⁶⁴

C. Implementation of the 1963 Constitution

1. 1964 to 1991: Governors Romney, Milliken and Blanchard

After its successful ratification in April, 1963, the Michigan Constitution of 1963 entered into effect on January 1, 1964.⁶⁵ The first governor to serve under the new constitution was George Romney.⁶⁶ Governor Romney served from 1963 to 1969 and began issuing executive orders in 1964. However, Governor Romney issued these first executive orders solely pursuant to his emergency powers. In these orders Governor Romney began the practice in Michigan of issuing a proclamation declaring a state of emergency or disaster, and then issuing a separate executive order on the basis of that proclamation.⁶⁷

In 1965, Governor Romney began issuing more executive orders on a further variety of subjects. In addition to executive orders pursuant to his emergency powers,⁶⁸ Romney issued executive orders pursuant to his power to create temporary commissions,⁶⁹ his power to suspend or remove state officers,⁷⁰ his power to re-organize the executive branch,⁷¹ and his supervisory powers as the chief executive officer.⁷² These orders set forth what was to become the typical structure of executive orders in Michigan: “whereas” clauses setting forth the governor’s authority to issue the order, followed by a statement of the action intended by the governor, as well as the intended results.

Governor Romney also began issuing other types of executive orders in the form of documents titled “executive directives,” establishing the precedent in Michigan whereby gubernatorial executive orders issued in Michigan under the 1963 Constitution are formally designated as “Executive Orders,” “Executive Directives,” or “Proclamations.” Although Michigan’s gubernatorial Executive Orders, Directives and Proclamations are all executive orders in the broad sense of the term, for the sake of clarity, this article will hereinafter refer to executive orders in their broad sense as “executive orders,” while any examples of “Executive Orders,” “Executive Directives,” or “Proclamations” will refer specifically to the documents officially titled as such when issued by Michigan governors. Furthermore, “Executive Re-organization Orders” will refer to any Executive Orders that re-organize the executive branch, even though such Orders are officially designated “Executive Orders.”

Executive Directives, while generally regarded as executive orders in the broad sense, differ from Michigan gubernatorial Executive Orders in that Executive Directives are often illustrations of the governor’s administrative authority and are aimed almost exclusively at subordinates in the executive branch. Executive Directives are usually official, written

communications of the internal governing policies of the Governor to members of her cabinet and senior staff. The purpose of Executive Directives is to state clearly and concisely the governor's expectation of the policies, practices and procedures various departments, agencies and senior staff of the governor will uniformly follow during the governor's tenure. Although Executive Directives may stand alone, in some instances they may also act as a companion to Executive Orders, giving clarification to particular departments as to their responsibility in carrying out an Executive Order.⁷³

Additionally, Michigan governors may also generally use an Executive Directive to accomplish a purpose that could be achieved just as well through an Executive Order.⁷⁴ Although not usually the case, one reason for doing so may be to protect the Executive Directive from any possible interference by the legislature. As will be examined later, Article 5, section 2 of the 1963 Constitution authorizes the governor to re-organize the executive branch. Similarly, Article 5, section 8 authorizes the governor to supervise the executive branch. One major difference between these two provisions is that section 2 grants the legislature a veto over gubernatorial actions taken pursuant to that section, while section 8 does not.

If an Executive Order is issued with regards to the executive branch, members of the legislature might interpret that Order as having been issued pursuant to Article 5, section 2, and accordingly, those legislators might attempt to exercise their constitutional veto power under section 2 to block the measure. Conversely, an Executive Directive that accomplishes the same result will more likely be interpreted as having been issued pursuant to Article 5, section 8, thus denying the legislature the opportunity to interfere with the governor's action.⁷⁵

When William G. Milliken succeeded Romney as governor, he continued to issue Executive Orders, Executive Directives and Proclamations in the same manner Governor

Romney had begun.⁷⁶ However, as his term of office drew on, Governor Milliken began to make further use of the gubernatorial power to re-organize the executive branch. Although tentative at first,⁷⁷ Governor Milliken's Executive Re-organization Orders began gradually to evolve in both the complexity and the number of subjects they embraced.⁷⁸ Additionally, as the state slumped through two back-to-back recessions in the 1970's,⁷⁹ Governor Milliken became the first Michigan governor to utilize his constitutional power to reduce appropriations, issuing his first Executive Order reducing appropriations in 1970,⁸⁰ and continuing to periodically issue similar Executive Orders reducing appropriations over the next twelve years.

Governor James J. Blanchard,⁸¹ Governor Milliken's successor, also continued to issue Executive Orders, Directives and Proclamations in the same style Governor Romney had established. Governor Blanchard took office in 1983 facing a \$1.7 billion budget deficit and a nationwide recession.⁸² Not surprisingly, Governor Blanchard appears to have issued a number of his initial Executive Orders in reaction to the state of the economy, as most of them deal with job creation and budget reduction. However, overall, Governor Blanchard's orders broke little ground from those of his predecessors. Thus, when Governor Blanchard left office on January 1, 1991,⁸³ the boundaries of the legal status, form and substance of Michigan's gubernatorial executive orders seemed fairly well settled.

2. 1991 to 2004: Governors Engler and Granholm

Nonetheless, after Governor John M. Engler⁸⁴ assumed office, any individuals who believed that Michigan's first three governors under the 1963 Constitution had reached the limit of their gubernatorial executive order powers realized their mistake. Although, Governor Engler stayed within the framework established by Governor Romney in many respects, Governor Engler vastly increased the use of Executive Re-organization Orders, both in terms of the

number issued, as well as the scope of the objects embraced. For example, during his first year in office, Governor Engler issued 26 Executive Re-organization Orders.⁸⁵ In contrast, Governor Milliken had issued only eight Executive Re-organization Orders in 1973, the calendar year that had previously seen the issuance of the most Executive Re-organization Orders.⁸⁶ Through the use of Executive Re-organization Orders, and subsequent court decisions upholding this use, Governor Engler was able to establish in the governor a self-executing quasi-legislative authority over the executive branch, giving him the power to create, abolish or transfer entities, powers and functions as he saw fit.⁸⁷

Thus, when Jennifer M. Granholm⁸⁸ assumed the office of Governor, she inherited the precedent with respect to most powers set by Governor Romney, as well as the expansive re-organization authority secured to the office by Governor Engler. During her first year in office, Governor Granholm issued “executive orders,” under her supervisory powers relating to two ethics measures;⁸⁹ created eight temporary commissions or agencies;⁹⁰ acted four times under her emergency powers;⁹¹ re-organized the executive branch twice;⁹² and ordered two expenditure reductions.⁹³ Additionally, she also issued 25 executive directives establishing guidelines and procedures for members of the executive branch to follow.⁹⁴

IV. Scope of Gubernatorial Executive Order Powers under the 1963 Constitution

A. Rules of Construction and Interpretation

Michigan’s governors possess only those powers granted to them by the state constitution.⁹⁵ Consequently, gubernatorial executive orders in Michigan must be issued pursuant to at least one provision of the Michigan Constitution of 1963, whether or not the specific provision is explicitly stated in the order itself or implied therein. As the validity and

effect of an executive order stems from constitutional provisions, the meaning ascribed to those provisions is of critical importance. Accordingly, the Supreme Court has developed a number of guidelines for interpreting the 1963 Constitution.

The primary rule of constitutional construction in Michigan is the rule of the “common understanding” of the purpose and intent of the people who adopted the provision at issue.⁹⁶ The intent to be determined is that of the people who adopted the constitutional provision at issue. Intent should be determined by reference to the state of the law or custom previously existing, and by contemporaneous construction, rather than by reference to the changed views of the present day.⁹⁷ Thus, a court should place itself in the position of the framers to ascertain what was meant at the time the provision was adopted.⁹⁸ To that end, both the "Address to the People" and the convention debates may be consulted.⁹⁹

However, debates which took place in constitutional convention committees must be placed in perspective; they are individual expressions of concepts as the speakers perceive them and, although they are sometimes illuminating, affording a sense of direction, they are not decisive as to intent of the general convention or of the people in adopting the measures; committee debates will be looked to only in the absence of guidance in constitutional language as well as in the "Address to the People" or when court finds in the debates a recurring thread of explanation binding together the whole of a constitutional concept.¹⁰⁰

Notably, in examining the constitutional debates, the Supreme Court has held that where “provided by law” is used in a constitutional provision, the drafters intended that the legislature should do the entire job of implementing that provision.¹⁰¹ Conversely, the term “prescribed by law” indicates that the section itself provides the overall plan for its own implementation, and the legislature is delegated only the power to specify certain details.¹⁰² Additionally, in construing

statutory language, the Supreme Court must independently determine the meaning of all constitutional terms, even if they have been defined by the statute.¹⁰³

Furthermore, the Supreme Court has also set forth three general rules to use in interpreting the meaning of gubernatorial executive orders issued under the 1963 Constitution.¹⁰⁴ First, the executive intends the meaning that is clearly expressed and an unambiguous executive order does not need interpretation.¹⁰⁵ Second, the corollary of the first rule is that every word, sentence and section of the order should be given effect, if possible.¹⁰⁶ Finally, if the meaning of an executive order is in doubt, the interpretation given by the agency administering it is persuasive as to the meaning of the order unless it is plainly erroneous or inconsistent with the order.¹⁰⁷

B. Constitutional Bases of Power Traditionally Cited in Executive Orders

Thus, today, a consistent pattern has developed with respect to the powers implicated by gubernatorial executive orders. As seen earlier, the Executive Orders, Executive Directives, and Proclamations that Governors Romney, Milliken, Blanchard, Engler and Granholm issued during their terms all generally fall within one of six broad categories of powers authorized by constitutional and statutory authority. Therefore, the following section will further illustrate these powers in order to better understand their basis and the scope.

1. Temporary or Special Commissions Power

The most ubiquitous traditional category of executive power used to authorize gubernatorial executive orders is the power to appoint temporary or special commissions. The most obvious example of this power is set forth in Article 5, section 4 of the 1963 Constitution. This section provides that, “[t]emporary commissions or agencies for special purposes with a life

of no more than two years may be established by law and need not be allocated within a principal department.”¹⁰⁸

The language referring to “a principal department,” refers to Article 5, section 2, which states, in part:

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.¹⁰⁹

Section 2 requires that the approximately 130 various state administrative agencies, boards, commissions, and departments existing when the 1963 Constitution entered into effect be grouped together according to their major purposes in no more than twenty principle departments, not including the offices of the governor and lieutenant governor, and the governing bodies of state colleges and universities. Accordingly, under section 4, the governor may establish temporary commissions or agencies that exist independently of any other state departments organized pursuant to section 2, and these temporary commissions may only exist for two years from their date of creation. Although this section has never been specifically interpreted by the courts, any interpretation would likely correspond to the plain meaning of the constitutional provision.

However, the governor’s power to form temporary or special commissions is not limited to those set forth in section 4. Sections 1, and 8 of Article 5, have also served in conjunction as a basis for the governor to appoint temporary or special commissions.¹¹⁰ Section 1, a carryover from the 1908 Constitution,¹¹¹ provides that: “[t]he executive power is vested in the governor.”¹¹² Section 8, which is also carried over from the 1908 Constitution,¹¹³ provides that:

Each principal department shall be under the supervision of the governor unless otherwise provided by this constitution. The governor shall take care that the laws be faithfully executed. He shall transact all necessary business with the officers of government and may require information in writing from all executive and administrative state officers, elective and appointive, upon any subject relating to the duties of their respective offices.¹¹⁴

These sections, respectively, vest the governor with executive and supervisory power over the executive branch. Although limited by section 2 (any temporary or special commissions created pursuant to sections 1 and 8 must fall within the departments mandated by section 2, as opposed to section 4 which allows for temporary or special commissions independent of those departments), sections 1 and 8 appear to grant the governor an inherent ability to appoint temporary or special commissions anywhere within the executive branch, be they in the executive office itself, or in any other department mandated under the Executive Organization Act of 1965.¹¹⁵

Correspondingly, the governor's constitutional ability to create special commissions under sections 1 and 8 has been recognized by the state legislature. For example, in 1931 the state legislature enacted the Special Commissions act.¹¹⁶ Under this act, the governor may create special commissions of unlimited duration at any time, for any purpose she deems necessary or advisable, consisting of as many members she deems appropriate.¹¹⁷ However, any special commissions created under this act must fall within the executive office of the governor.¹¹⁸

Additionally, the legislature has also recognized the governor's authority to create temporary or special commissions within the other departments mandated by Article 5, section 2. In 1978, the legislature enacted the Base Conversion Authority act,¹¹⁹ which allows the governor, upon notification by the federal government that a federal military installation in Michigan is to be closed, and upon resolution by the local township authority with jurisdiction over the area of the military installation requesting the establishment of a base conversion

authority, to issue an Executive Order to create a base conversion authority within the Department of Labor and Economic Growth.¹²⁰

Finally, the governor's inherent authority to create special or temporary commissions has also been recognized by the United States Congress. A number of federal statutes delegate the authority to state governors to implement those federal statutes by gubernatorial executive order, and Michigan governors have done so.¹²¹ Although the propriety of such delegations may be questioned under the concept of federalism, no gubernatorial Executive Orders issued in Michigan pursuant to these statutes have yet been challenged in the courts.

2. Emergency Powers

A second frequently used traditional category of power is the governor's emergency powers. Although emergencies on their own do not create power or authority in a governor, they may afford occasions for the exercise of powers already existing.¹²² Executive orders issued pursuant to the emergency powers usually involve two steps. Under the first step, the governor invokes the emergency powers by declaring some type of disaster or emergency under her Article 5, section 1, executive authority. The legislature has delegated the governor the ability to declare a state of emergency or disaster under section 1 in three different ways: the Emergency Management Act,¹²³ the Emergency Powers of the Governor act,¹²⁴ and the Declaration of State of Energy Emergency Act.¹²⁵

The Emergency Management Act is a broad grant of authority that delegates responsibility to the governor to cope with dangers to the state or its people in a time of emergency. The act allows the governor to proclaim a state of emergency or disaster through Executive Orders, Directives or Proclamations carrying the force of law.¹²⁶ Such declarations

continue to exist for 28 days, at which point they automatically terminate unless both houses of the legislature, by resolution, approve of a request by the governor for an extension.¹²⁷

Additionally any Executive Order, Directive, or Proclamation declaring a state of emergency or disaster must state the nature of the threat, the areas threatened, the conditions causing the threat, and the conditions that would allow the state of emergency or disaster to terminate.¹²⁸ Such an order must be filed with the Secretary of State and the State Police and disseminated promptly in order to bring it to the public's attention.¹²⁹ Furthermore, any order declaring a state of emergency or disaster under the Emergency Management Act also authorizes the governor to deploy any supplies stockpiled pursuant to the act; accept assistance from the federal government; or enter into reciprocal aid agreements with other states, the federal government, or a neighboring state or province of another country.¹³⁰ Two examples of such agreements are the Interstate Emergency Management Assistance Compact; Equipment,¹³¹ and the Interstate Emergency Management Assistance Compact; Personnel.¹³²

The Emergency Management Act also empowers the governor to suspend regulatory statutes, orders or rules (excluding those related to the criminal process or criminal procedures) when compliance would hinder or delay necessary action; utilize all available state and federal resources as reasonably necessary; transfer department functions; commandeer private property; direct and compel evacuations; prescribe modes of ingress or egress for evacuations; limit or suspend the sale of alcohol, tobacco, firearms, explosives, and combustibles; provide for temporary emergency housing; and direct all other actions necessary or appropriate.¹³³ Furthermore, the act states that anyone who willfully disobeys an order related to the aforementioned powers is guilty of a misdemeanor.¹³⁴

Finally, the Emergency Management Act also authorizes the governor to declare a heightened state of alert in order to prevent terrorist acts or apprehend terrorists.¹³⁵ Under this section of the act, the governor is afforded the same powers as in the event of a state of emergency or disaster, except that she may not limit the sale of alcohol.¹³⁶ Furthermore, a heightened state of alert lasts 60 days, rather than 28, but may also be extended pursuant to the approval of both houses of the legislature.¹³⁷

The second legislatively delegated gubernatorial authority to declare a state of emergency or disaster under Article 5, section 1 is the Emergency Powers of the Governor act. This act grants the governor broad powers strikingly similar to those granted under the Emergency Management Act.¹³⁸ Moreover, the Emergency Powers of the Governor act explicitly states its intent to give the governor broad power to act, as well as the requirement that the act be broadly construed.¹³⁹

The third statute that authorizes the governor to invoke her emergency powers is the Declaration of State of Energy Emergency Act. Under this act, the governor can declare, by Executive Order, or Proclamation, a state of energy emergency.¹⁴⁰ An energy emergency is a condition of danger to the health, safety, or welfare of the citizens of the state due to an impending or present energy shortage.¹⁴¹ A state of energy emergency continues for 90 days, or until the governor finds the emergency has passed – whichever is shorter – and the legislature may approve an extension for a specific number of days, or terminate the state of energy emergency by a concurrent resolution adopted by a record roll call vote by a majority of the members elected to and serving in each house of the legislature.¹⁴²

Once the governor declares a state of energy emergency, she may order specific restrictions on the use and sale of energy resources, including restrictions on the interior

temperature of public, commercial, industrial, and school buildings; restrictions on the hours of the day in which those buildings may be open; restrictions on the lighting levels in those buildings; restrictions on the conditions for sale of energy resources to consumers; restrictions on the display of decorative lighting; restrictions on the use of privately owned vehicles and the reduction of speed limits; restrictions on public transportation (including ordering facilities closed); and restrictions on pupil transportation by public schools.¹⁴³ The governor may also direct energy suppliers to provide an energy resource to any person or facility that provides an essential service for health, safety or welfare of state residents, and may suspend, by Executive Order with specificity, a directly related regulatory statute (excluding those related to the criminal process or criminal procedures) when compliance would hinder or delay any necessary action.¹⁴⁴

If a state of energy emergency is declared, the governor may implement any of the provisions of the act by executive order, directive or proclamation,¹⁴⁵ and individuals who knowingly violate such orders, directives or proclamations are subject to a misdemeanor.¹⁴⁶ Additionally, a declaration of a state of energy emergency does not limit, modify, or abridge the governor's powers to declare state of emergency under the Emergency Management Act, or interfere with any of the governor's other constitutional or statutory powers.¹⁴⁷

Therefore, once the governor declares a state of emergency or disaster, she may then take the second step involved in issuing an Executive Order pursuant to her emergency powers: sending in elements of the state militia pursuant to her powers as commander in chief under Article 5, section 12, which provides that, “[t]he governor shall be commander-in-chief of the armed forces and may call them out to execute the laws, suppress insurrections and repel invasion.” This provision reflects similar language from the 1908 Constitution,¹⁴⁸ and it is

implemented by the Michigan Military Act,¹⁴⁹ which states that the governor is commander in chief of the militia, and may order any members of the organized or unorganized militia¹⁵⁰ to active state service in case of riot, tumult, breach of the peace, resistance of process, or for service in aid of civil authority, whether state or federal, or in time of public danger, disaster, crisis, catastrophe or other public emergency within the state.¹⁵¹

Additionally, under the Michigan Military Act, the governor may enter into an agreement with the governors of one or more other states authorizing the joint use of state military forces in time of invasion, rebellion, public disaster, or catastrophe, or to assist with drug enforcement,¹⁵² and may order Michigan military forces into another state in pursuit of insurrectionists, saboteurs, enemies or enemy forces, in the event of war, or other declared emergency, until other state or federal forces can take up the pursuit.¹⁵³

The governor may also order the organization, disbanding, arrangement, transfer, conversion, alteration, consolidation, or attachment of units of the state military establishment;¹⁵⁴ declare martial law, when forces are deployed, in order to promote the maintenance of law and order;¹⁵⁵ promote officers and warrant officers of the organized militia;¹⁵⁶ prescribe the awarding of medals and public recognition for distinguished service, longevity, acts of valor or meritorious achievement to members of the organized militia, or to other individuals who have rendered appropriate service to the military establishment;¹⁵⁷ and appoint a board of 3 national guard officers, to inquire into and make recommendations for the payment of compensation, claims, medical attention, hospital treatment, funeral expenses, and other expenses for a member of the state military establishment injured, disabled, or killed during the performance of active state service or special duty.¹⁵⁸

However, while the Governor is commander-in-chief of the militia, the governor's ability to remove or otherwise discipline officers of the militia is unclear. In *McDonald v Schnipke*, the Supreme Court held that the governor may not remove or otherwise discipline officers of the militia.¹⁵⁹ However, *McDonald* was decided based upon Michigan law prior to the enactment of the Executive Organization Act of 1965,¹⁶⁰ which provides that the Adjutant General serves at the pleasure of the Governor. As a result, the Governor likely has authority to remove the Adjutant General, despite the holding in *McDonald*.

3. Budgetary Powers

The third category of gubernatorial power traditionally relied upon to issue executive orders is the governor's power to reduce appropriations. This power, one of a number of broad budgetary powers granted to the governor under the 1963 Constitution,¹⁶¹ arises from Article 5, section 20, which states:

No appropriation shall be a mandate to spend. The governor, with the approval of the appropriating committees of the house and senate, shall reduce expenditures authorized by appropriations whenever it appears that actual revenues for a fiscal period will fall below the revenue estimates on which appropriations for that period were based. Reductions in expenditures shall be made in accordance with procedures prescribed by law.

This provision is new to the 1963 Constitution. It grants the governor power to control state expenditures in the interest of a balanced budget. The Michigan Constitution of 1963 requires a balanced state budget under Article 5, section 18, which provides: “[p]roposed expenditures from any fund shall not exceed the estimated revenue thereof;” and Article 6, section 31, which provides:

Any bill requiring an appropriation to carry out its purpose shall be considered an appropriation bill. One of the general appropriation bills as passed by the legislature shall contain an itemized statement of estimated revenue by major source in each operating fund for the ensuing fiscal period, the total of which shall

not be less than the total of all appropriations made from each fund in the general appropriation bills as passed.

Under Article 5, section 20, the governor, with the approval of the appropriations committees of each house of the legislature, must cut expenditures when economic indicators predict that actual revenues will fall short of estimated revenues. However, the governor cannot reduce expenditures of the legislature or the judiciary, or from funds created by the constitution and dedicated to a specific purpose.

This power has been implemented by the legislature through the Management and Budget Act,¹⁶² which authorizes the Governor to determine which appropriations to reduce to remedy the shortfall, and issue an Executive Order, subject to approval by the House and Senate appropriations committees, implementing the reduction.¹⁶³ The governor must give the committees five days advance notice before submitting an expenditure reduction, and the committees must vote to approve or reject the governor's recommendations in a resolution within ten days of receiving the order.¹⁶⁴ The order is not effective if rejected by either committee.¹⁶⁵ In that event, the governor must wait 30 days, but may then begin the process again.¹⁶⁶ If approved by both committees, the order becomes effective when filed with the Secretary of State (along with the both resolutions approving the order).¹⁶⁷ In interpreting this section, the Supreme Court has held that the governor has discretion to reduce expenditures of some agencies to a greater extent than expenditures of others and no requirement of proportionality exists with respect to the reductions.¹⁶⁸

4. Supervisory Powers

A fourth traditional category of gubernatorial power that Michigan governors have utilized to issue executive orders arises from the governor's general supervisory powers over the executive branch. The Michigan Constitution of 1963 vests responsibility for the supervision of

the executive branch of state government in the governor, and the governor may make reasonable delegations of executive or administrative duties.¹⁶⁹ The governor's supervisory powers arise mainly from Article 5, section 8 of the 1963 Constitution, which provides:

Each principal department shall be under the supervision of the governor unless otherwise provided by this constitution. The governor shall take care that the laws be faithfully executed. He shall transact all necessary business with the officers of government and may require information in writing from all executive and administrative state officers, elective and appointive, upon any subject relating to the duties of their respective offices.

With the exception of the first sentence placing each principal department under the supervision of the governor, this language is identical to language in the 1908 Constitution.¹⁷⁰ "Since 1835, the governor has been charged with the responsibility of taking care that the laws are faithfully executed. Each Michigan constitution has allowed the governor to request information in writing from state officers in the executive branch."¹⁷¹

Section 8 has been subject to only limited judicial interpretation. But the Court of Appeals has interpreted the provision broadly, stating that it allows the governor to require that department heads comply with executive orders, and that the governor's use of the word "request" rather than the word "order" is irrelevant for the purpose of determining the binding effect of a gubernatorial executive order on an administrative department head.¹⁷² However, the Supreme Court has imposed a narrow restriction on this power, ruling that section 8 prevents the governor from employing outside counsel at the expense of the state to advise him on drafting proposed legislation because the phrase allowing the governor to require information in writing from executive branch state officers simultaneously compels the governor to seek legal advice from the attorney general.¹⁷³ Even so, despite that narrow limitation, section 8 arguably grants the governor broad authority over the administration of the executive branch, and serves as the

basis by which the governor may issue Executive Orders, Directives or Proclamations having binding effect on members of the executive branch.

Another constitutional provision that arguably provides a basis for the governor's supervisory powers is Article 5, section 1. However, the text of this section, which vests the executive authority in the governor, is largely undefined, and offers even less guidance than section 8. Finally, the governor's authority under Article 5, section 10, which provides, in part, that, "[t]he governor shall have power and it shall be his duty to inquire into the condition and administration of any public office and the acts of any public officer, elective or appointive," may also possibly serve as a basis by which the governor may exercise supervisory authority over the executive branch.

5. Removal Powers

A rarely used traditional category of gubernatorial power that has been used to issue executive orders is the governor's removal powers. These powers fall within one of three categories: the power to remove state officers, the power to remove local officers, and the power to remove judges. With respect to state officers, Article V, section 10 states that:

The governor shall have power and it shall be his duty to inquire into the condition and administration of any public office and the acts of any public officer, elective or appointive. He may remove or suspend from office for gross neglect of duty or for corrupt conduct in office, or for any other misfeasance or malfeasance therein, any elective or appointive state officer, except legislative or judicial, and shall report the reasons for such removal or suspension to the legislature.

The Constitution of 1850 was the first Michigan Constitution to contain authority granting the governor power to remove state officials.¹⁷⁴ However, this authority, also contained in the 1908 constitution, allowed for the governor to remove state officials only when the legislature was not in session.¹⁷⁵ Under the 1963 Constitution that limitation is eliminated,

although the current provision still does not extend to officers of the legislative or judicial branches.

“Removal” is defined as deprivation of office by the act of a competent superior officer acting within his or her scope of authority.¹⁷⁶ The governor has the power to remove state officers only for cause, and must give notice and an opportunity for a hearing.¹⁷⁷ Furthermore, misfeasance is defined as “a default in not doing a lawful thing in a proper manner, or omitting to do it as it should be done,”¹⁷⁸ and malfeasance is the failure to perform the duties of a public office.¹⁷⁹ The Supreme Court described the details of the removal power in *Attorney General ex rel Rich v Jochim*, stating:

[The Governor] is given inquisitional power, that [she] may ascertain their condition, for the public welfare. No other means is provided for acquiring the necessary information. If [she] discovers irregularities of particular character, it is [her] duty to remove the officer, and supply his place by appointment, reporting [her] action to the Legislature at the next session. *Dullam v Willson* is authority for the proposition that the incumbent is entitled to notice of the charge, and an opportunity to be heard in his defense. This necessarily implies that the governor’s action is, in a sense, judicial. But it does not follow that the investigation must be made by some other person or officer, who must make complaint to the Governor; that the complainant must procure counsel; or that the Governor is necessarily interested, and thereby disqualified from hearing and determining, because [she] performs the other duties which are specifically imposed upon [her] by this section of the Constitution. . . . There is nothing in the record to show any interest upon the part of the Governor, further than to ascertain the condition of the office, and to act upon the information obtained as the Constitution requires. It is the duty of the Governor to investigate, using all lawful means to go to the bottom of any real or supposed irregularity. To that end, [she] may use clerks and expert accountants, if necessary, and it is fair to presume that the State would recognize.¹⁸⁰

The governor’s power to remove state officials under section 10 is self-executing and not subject to implementation by the Legislature.¹⁸¹ Even though the legislature has enacted statutory provisions relating to the removal of the Attorney General and the Secretary of State,¹⁸²

members of the governing bodies of state universities,¹⁸³ and appointees filling vacant offices during a legislative recess,¹⁸⁴ all constitutional officers are removable by the Governor.¹⁸⁵

In contrast¹⁸⁶ to the governor's ability to remove state officials, the governor's ability to remove local officials under Article VII, section 33 is not self-executing. This section provides that, "[a]ny elected officer of a political subdivision may be removed from office in the manner and for the causes provided by law."¹⁸⁷ Thus, the governor's power to remove officers of a political subdivision is implemented by the Michigan Election Law,¹⁸⁸ which includes provisions for removal of most local offices.¹⁸⁹ However, the governor does not have power to remove county executives, members of community college boards, and school district board members, as the legislature has not granted the governor such power.

The Governor's power to remove local officials is generally not subject to judicial review,¹⁹⁰ unless an exercise of the removal power is arbitrary.¹⁹¹ Once again however, the Governor must afford the accused public officer notice and a reasonable opportunity to present a defense,¹⁹² and an accused public officer is entitled to fair and just treatment in the course of the removal proceedings.¹⁹³ Nevertheless, despite these protections for the accused, the Governor is the sole tribunal in removal proceedings, and the accused has no right of appeal or review. If the Governor acts within the law, the Governor's decision is final.¹⁹⁴

Finally, the governor may remove judges from office under Article 6, section 25, but only upon the concurrence of the legislature. This section provides that:

For reasonable cause, which is not sufficient ground for impeachment, the governor shall remove any judge on a concurrent resolution of two-thirds of the members elected to and serving in each house of the legislature. The cause for removal shall be stated at length in the resolution.¹⁹⁵

Once again, this authority reflects language from the 1908 Constitution.¹⁹⁶ The governor's power to remove is implemented by the Michigan Election Law¹⁹⁷ which contains

sections providing for the removal of Justices of the Supreme Court,¹⁹⁸ Judges of the Court of Appeals,¹⁹⁹ Circuit Court Judges,²⁰⁰ Probate Court Judges,²⁰¹ and District Court Judges.²⁰²

6. Re-organization Powers

a) Explicit Re-organization Power

The final generally recognized category of power that a governor may use to issue an executive order deals with the governor's power to re-organize the executive branch. The 1963 Constitution explicitly grants the governor the power to effect re-organizations of the executive branch in Article 5, section 2, which states:

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.

In addition to granting the governor the power to re-organize the executive branch, Article 5, section 2 requires that:

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.

Section 12 of the Schedule and Temporary provisions to the 1963 Constitution gave the legislature two years after the effective date of the new constitution to make the initial allocation of agencies.²⁰³ However, if the Legislature failed to complete the reassignments in two years, the Governor was given the authority to make the initial reorganization within one year thereafter.²⁰⁴

But the legislature successfully completed its task, reorganizing state administrative agencies into nineteen principal departments in the Executive Organization Act of 1965.²⁰⁵

The Executive Organization Act of 1965 implements the constitutional provisions and sets out an organizational plan for the executive branch of government. The Act also establishes a classification system that identifies three types of transfers to consolidate all state agencies into 19 departments. A type I transfer agency retains all its substantive powers, but staff activities such as budgeting and procurement are provided by the head of the principal department.²⁰⁶ 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.²⁰⁷ A type III transfer provides for the transfer of the agency to the principal department and the abolishment of the agency.²⁰⁸ Additionally, a fourth type of classification continues to exist within the principal department and exercises all of its statutory powers.²⁰⁹ Finally, the head of each principal department, with the approval of the governor, is authorized to establish the internal organization of the department.²¹⁰

The Executive Organization Act of 1965 also sets for the procedures required in issuing an executive re-organization order. Whenever the governor makes changes in the organization of the executive branch or in the assignment of functions among its units which require the force of law, such changes must be set forth in executive orders and copies of the orders must be submitted to the legislature as provided in section 2 of article 5 of the state constitution.²¹¹ An executive re-organization order must be filed with the department of state in the same manner as required by law for the filing of public acts of the state,²¹² and copies of each such executive order must be filed with and retained on record by the legislative council and a copy transmitted to each member of the legislature.²¹³

The Legislature then has no more than 60 calendar days during a regular session (or a full regular session if less than 60 days) to disapprove the order.²¹⁴ Unless disapproved by a concurrent resolution of a majority of the members serving in both the House of Representatives and the State Senate, an executive re-organization order becomes effective at the date designated by the governor.²¹⁵ Executive re-organization orders not overturned by the Legislature have the force and effect of law,²¹⁶ and they must be dated, given an identification number, and published in the same manner as required by law for the publication of the public acts of the state.²¹⁷ Although an executive reorganization order may be modified or repealed by the legislature at any time by law,²¹⁸ it bears note that no executive reorganization order has been disapproved by the Michigan Legislature in nearly 40 years.

However, although the Executive Organization Act of 1965 was enacted to implement the governor's constitutional re-organization power and to allow the governor to reshape the executive branch of state government,²¹⁹ the act does not limit the Governor's broad reorganization authority under Article 5, section 2.²²⁰ Re-organization orders may "effect something as limited as a transfer of functions among executive branch entities or as broad as alterations in the very structure of the executive branch."²²¹ The only constitutional limitations placed on the Governor in effecting a re-organization are that a re-organization may not result in the establishment of more than 20 principal departments, and that the reorganization is subject to disapproval by the legislature.

Additionally, while the Governor may assign or reassign functions within the executive branch by executive order, executive orders may not alter statutory functions. Thus, for example, while Governor Engler was not constitutionally able diminish or abolish authority legislatively-delegated to the State Board of Education, he was able to transfer that authority to

the Superintendent of Public Instruction by Executive Order.²²² Similarly, former Governor Milliken could constitutionally transfer to the Natural Resources Commission rule-promulgation authority formerly delegated by the legislature to the Water Resources Commission.²²³

b) Inherent Authority Supporting Re-organizations

In addition to section 2, the inherent power granted to the governor by Article 5, sections 1 (vesting executive authority in the governor) and 8 (granting the governor supervisory authority over the executive branch), may also serve as constitutional bases for Executive Re-organization Orders.²²⁴ Section 2 is new to the 1963 Constitution, but its basis lies in a similar 1958 act that granted the governor re-organization power over the executive branch.²²⁵ Public Act 125 authorized the governor to submit reorganization plans within the first 30 days of any regular legislative session.²²⁶ Any reorganization plan became effective 90 days after the legislative adjournment unless disapproved within 60 legislative days by either house of the legislature.²²⁷

Public Act 125 of 1958²²⁸ was enacted while the 1908 Constitution was in effect. Under the separation of powers doctrine, the legislature may delegate some of its functions, but only to lawful public agencies or other branches of the government: not to private individuals or corporations.²²⁹ Thus, the legislature was able to delegate its re-organization authority to the governor under the Act because of the inherent executive authority vested in the governor by the 1908 Constitution.²³⁰ Thus, although the legislature ultimately repealed Public Act 125 of 1958,²³¹ the inherent executive authority in Article 5, section 1 is often cited in Executive Re-organization Orders as a constitutional basis supporting the governor's authority to issue an Executive Order.²³²

Additionally, Article 5 section 8, which vests supervisory power over the executive branch in the governor, has also been cited as a constitutional basis for issuing Executive Re-organization Orders.²³³ The delegates to the Constitutional Convention of 1961 added an explicit grant of supervisory power over the executive branch in recognition of the governor's responsibility to make sure the departments of the executive branch performed their duties as provided by law.²³⁴ Therefore, as the natural corollary of the responsibility to supervise the executive branch is the right to take action to ensure that the executive branch continues to function, section 8 also supports the assertion that the governor is inherently authorized to issue executive orders.

Unfortunately, however, previous Michigan governors have cited sections 1 and 8 as support for the governor's authority to issue Executive Re-organization Orders in a seemingly arbitrary manner.²³⁵ Thus, while these two sections may be utilized to support the re-organization authority in section 2, no concrete rules have arisen to explain when or why their inclusion might be necessary in a given situation.

C. Constitutional Bases of Power Traditionally Not Cited in Executive Orders

The Michigan Constitution of 1963 also grants powers to the governor that could theoretically serve as the basis by which the governor could issue an executive order. However, although Michigan governors have exercised some of these powers to order some kind of action, no governor has explicitly used these powers to support an Executive Orders, Directive or Proclamation. Nonetheless, each one could presumably serve, at least in conjunction with the aforementioned powers, if not on its own, as a basis by which the governor may issue an executive order.

1. Special Sessions of the Legislature

No Michigan governor has used the constitutional power to convene special sessions of the legislature in an executive order. Article 5, section 15 of the 1963 Constitution provides that, “[t]he governor may convene the legislature on extraordinary occasions.” This language is the same as language contained in the 1908 constitution.²³⁶ The Governor has the power under section 15 to “communicate by message to the legislature at the beginning of each session [including extra sessions] and may at other times present to the legislature information as to the affairs of the state and recommend measures he [or she] considers necessary or desirable.”²³⁷

However, the Governor may not call a joint convention of the House of Representatives and the State Senate.²³⁸ “When the legislature is convened on extraordinary occasions in special session, no bill shall be passed on any subjects other than those expressly stated in the governor’s proclamation or submitted by special message.”²³⁹ Although the governor may control the subject-matter of legislation to be enacted at special session, the governor may not restrict boundaries within the natural range of that subject, dictate legislative methods, or limit the class of those affected.²⁴⁰ Accordingly, the governor may not restrict the Legislature to consideration of a particular bill, since, within the subject submitted by the Governor, the Legislature has freedom of action. During an extra session, the Legislature may consider proposed constitutional amendments, regardless of the scope of the Governor’s proclamation or special message.²⁴¹

Additionally, in the event of an emergency, the Governor may convene the Legislature, whether in regular or extra session, outside of Lansing. Article 5, section 16 of the 1963 Constitution provides that, “[t]he governor may convene the legislature at some other place when the seat of government becomes dangerous from any cause.” This section is also substantially similar to language found in the 1908 Constitution which states, “[the governor] may convene

the legislature at some other place when the seat of government becomes dangerous from disease or a common enemy.”²⁴² The change in this language reflects the concern among the framers about the dangers inherent in life in the atomic age, and the observation that disease or enemies do not represent the only threats that could justify removal of the legislature from the capitol.²⁴³

2. Writs of Election

Similarly, no governor has cited the authority to issue writs of election in an executive order. Article 5, section 13 of the 1963 Constitution provides that: “[t]he governor shall issue writs of election to fill vacancies in the senate or house of representatives. Any such election shall be held in a manner prescribed by law.”²⁴⁴ With the exception of the addition of the second sentence regarding the manner of holding elections, this provision is identical to its analogue in the 1908 Constitution.²⁴⁵

In calling a special election, the governor must comply with the Michigan Election Law, which specifies the procedures by which such elections are to be called.²⁴⁶ Under the Election Law, the governor has the discretion to call a special election²⁴⁷ or direct that the vacancy be filled by voters at the next general election.²⁴⁸ Therefore, although the governor has no discretion as to whether to fill a vacancy, the governor does have discretion as to when that vacancy shall be filled, whether at a special election occurring prior to the next general election, or at a special election happening concurrent to the next general election.

The Governor must call a special election to fill vacancies in the State Senate,²⁴⁹ the State House of Representatives,²⁵⁰ the Michigan delegation of the United States House of Representatives,²⁵¹ and in limited circumstances, township offices.²⁵² When calling a special election for a partisan office, a primary election and nominating process is required. Section 631 of the Election Law provides:

Whenever a special election shall be called to fill a vacancy in any office, the candidates for which are regularly nominated in accordance with the provisions of this act relating to primary nominations, a special primary for all political parties shall be held in the county, district or city in which the vacancy occurs on such day as may be fixed by the official or legislative body calling the special election, but not less than 20 days prior to the date of such special election, and the authorities calling any such special primary shall, in the call therefor, fix the time within which candidates may file nominating petitions.²⁵³

3. Clemency Powers

Finally, Michigan governors have traditionally not cited their clemency powers when issuing executive orders. The governor has exclusive authority to grant reprieves, commutations, and pardons for criminal offenses. Article 5, section 4 of the 1963 Constitution provides:

The governor shall have power to grant reprieves, commutations and pardons after convictions for all offenses, except cases of impeachment, upon such conditions and limitations as he may direct, subject to procedures and regulations prescribed by law. He shall inform the legislature annually of each reprieve, commutation and pardon granted, stating the reasons therefor.

The clemency powers are exclusive in the governor, and the Michigan Supreme Court, interpreting an identical analogue in the 1908 Constitution,²⁵⁴ has held that any law restricting the Governor's power of pardon and commutation of sentence is unconstitutional and void.²⁵⁵ As a result, once a court imposes a sentence, and the defendant has commenced serving that sentence, a court may only alter the conviction or sentence for legally cognizable reasons. Action in excess of that authority infringes on the governor's exclusive clemency powers.²⁵⁶

However, the Governor's power to pardon is not absolute. Punishment for contempt of court, for example, is an offense within the exclusive control of the judiciary, and the governor's pardoning power is not applicable. Furthermore, when exercising her clemency powers, the governor is subject to procedures and regulations set forth in law. In particular, the Corrections Code of 1953,²⁵⁷ establishes the State Parole Board within the Department of Corrections,²⁵⁸ and

articulates the specific procedures for pardons, reprieves, and commutations, including application, investigation, public hearing, and recommendation to the Governor.²⁵⁹

C. Inherent Authority to issue Executive Orders

In the event that no provision under the Michigan Constitution of 1963 provides specific authority for the governor to act in a situation, the executive and supervisory authority contained in sections 1 and 8 of Article 5 might also grant the governor a broad, inherent power to take action by executive order. Most state constitutions contain provisions vesting supervisory and executive powers in the governor, especially provisions providing that the governor is to faithfully execute the law.²⁶⁰ Generally, most courts are split in opinion as to whether or not these types of executive and supervisory provisions grant power in and of themselves.²⁶¹ On one side are those who have found that these provisions do not represent a constitutional grant of executive order powers: the ‘weak governor’ argument.²⁶² On the other side are those who feel that these provisions do vest a governor with authority to act: the ‘strong governor’ argument.²⁶³

Proponents of the “weak governor” argument often cite cases holding that the general constitutional language does not vest governors with rights because it does not confer specific power, that a broad grant is limited by later specific grants of executive power, and that such general constitutional language is only declaratory and not binding.²⁶⁴ In contrast, proponents of the “strong governor” argument maintain that a grant of executive power is "something more than a verbal adornment of the office, and implies such power as will secure an efficient execution of the laws" and that the phrase "the executive power shall vest in the governor" would be meaningless if the governor's powers were, in fact, limited to those which are specifically enumerated.²⁶⁵ The relative abstraction or lack of specific detail in a constitutional provision implies a desire on the part of the drafters to impart managerial flexibility.

Records from the Constitutional Convention of 1961 indicate that the drafters supported an interpretation of the constitution in line with the ‘strong governor’ argument. The drafters stated in their address to the people of Michigan that the provision was exactly the same as the similar provision contained in the 1908 constitution, with the exception that the word “chief” before “executive power” was eliminated due to the possibility that it could be interpreted as a limitation on the exercise of executive power.²⁶⁶ The drafters intended that like the President under the United States Constitution, the ultimate rights and responsibilities for the exercise of executive power (or lack thereof) should lie with the governor.²⁶⁷ Indeed, opponents of the language who were overruled objected that the new language was only appropriate if the drafters intention was to, “make all parts of the executive branch subservient completely to the governor.”²⁶⁸

These statements indicate that the drafters meant for these provisions to be a very real, binding grant of authority to the governor as the executive officer. Although specific constitutional grants of authority to the governor were also included in other provisions, the drafters’ comments indicate that they were not intended to limit the broad grant of executive power. Rather, the comments show that the drafters did indeed intend to grant the governor authority to exercise her executive power to the fullest possible extent.

Adopting the strong governor argument, a Wisconsin commentator recently set forth a model test of judicial enforcement for determining the validity of gubernatorial executive orders issued pursuant to this inherent authority.²⁶⁹ The commentator, Benjamin S. Longlet, proposed a three-prong test whereby an executive order issued pursuant to a governor’s executive or supervisory authority is valid so long as the order is: 1) non-legislative, 2) issued pursuant to some constitutional authority, and 3) consistent with existing law.²⁷⁰

In determining whether a function is non-legislative, Longlet stated that:

The crucial test for determining whether an ordinance is legislative or administrative, therefore, is whether the ordinance makes new law or merely executes a preexisting law... By analogy, if a gubernatorial executive order were, by its terms, to balance and choose between competing policy objectives or otherwise constitute a ‘high-level overall plan embracing the general goals,’ it would be constitutionally invalid and should not be enforced.²⁷¹

With regard to constitutional authority, Longlet argues that provisions of the Wisconsin Constitution which are substantially similar to the Michigan Constitution of 1963 (an executive power clause,²⁷² a “faithfully execute the law” clause,²⁷³ and a “transact all necessary business” clause²⁷⁴), should be broadly construed to authorize the issuance of executive orders under the “strong governor” theory.²⁷⁵

Finally, Longlet states that the decision as to whether an executive order is consonant with existing statutes revolves around the “faithfully execute the law” clause, and depends on whether the reviewing court adopts a “black letter” or “policy implementation” interpretation of the clause.²⁷⁶ An executive order could contravene specific statutory language without violating the law’s underlying policy objectives, or conversely, violate the purposes of a statute without contravening its black-letter terms.²⁷⁷

Therefore, because this test relies on provisions of the Wisconsin Constitution which are substantially Article 5, sections 1 and 8 of the 1963 Constitution, a Michigan court might elect to adopt this test as an authoritative determinant of the validity of a gubernatorial executive order issued pursuant to those sections.

V. Conclusion

The ability of Michigan’s governors to issue executive orders under the Michigan Constitution of 1963 has been the subject of a continuous, gradual expansion in the 40 years since the 1963 Constitution entered into effect. As the governor is ultimately accountable to the

public for the administration of the executive branch of government, Michigan's governors will likely continue to act unilaterally by executive order in order to achieve the utmost flexibility in managing a 21st century state.

Furthermore, as state governments become more complex, spend more money, and employ increasing numbers of people, gubernatorial executive orders will continue to expand, both in the number and the scope of subjects they embrace. Accordingly, the citizens of Michigan must possess the resources adequate to allow them to develop to a sufficient understanding of the powers granted to their governor, as well as the limitations placed on the exercise of that power, in order to safeguard their rights and ensure good governance.

¹ 38 Am Jur 2d, Governor, § 1 (2002).

² 81A CJS Governor § 130 (2002).

³ 81A CJS Governor § 130 (2002).

⁴ 81A CJS Governor § 130 (2002); 81A CJS States §82 (2002).

⁵ 81A CJS Governor § 130 (2002); 81A CJS States §82 (2002).

⁶ 81A CJS States § 130 (2002).

⁷ 16 CJS, Constitutional Law § 215.

⁸ 38 Am Jur 2d, Governor, § 1 (2002).

⁹ President Washington issued the Neutrality Proclamation in 1793, which declared – without any prior authorization by Congress – that the official policy of the United States was to remain neutral in the brewing war in Europe between Britain and France. Thus, by implication, American states and businesses were to refrain from supporting either side. Moe & Howell, *The Presidential Power of Unilateral Action*, 15 J L Econ & Org 132, 154 (1999).

¹⁰ Note, *Gubernatorial Executive Orders as Devices for Administrative Direction and Control*, 50 Iowa L Rev 78, 79-82 (1964). Andrew Jackson was the seventh President of the United States, and served in that office from 1829 to 1837. Biography of Andrew Jackson, available at <http://www.whitehouse.gov/history/presidents/aj7.html>.

¹¹ Note, *Gubernatorial Executive Orders as Devices for Administrative Direction and Control*, 50 Iowa L Rev 78, 79-82 (1964).

¹² *Id.* at 78-79.

¹³ *Id.* at 79.

¹⁴ *Id.* at 79-80.

¹⁵ *Id.* at 80.

¹⁶ *Id.* at 80-81.

¹⁷ *Id.* at 81.

¹⁸ *Id.* at 79.

¹⁹ *Id.*

²⁰ *Id.* at 81.

²¹ *Id.* at 82.

²² *Id.* at 81.

²³ *Id.* at 81-82.

²⁴ *Id.*

²⁵ *Id.*

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- ²⁶ Longlet, *Gubernatorial Executive Orders in Wisconsin: The Case for Judicial Enforcement*, 2000 Wis L Rev 1323, 1325 (2000).
- ²⁷ Some commentators also consider the acts of the governor in ordering special elections and in summoning the state legislature to fall within this category. Note, *Gubernatorial Executive Orders as Devices for Administrative Direction and Control*, 50 Iowa L Rev 78, 83 (1964).
- ²⁸ *Id.* at 82.
- ²⁹ *Id.* at 83.
- ³⁰ *Id.*
- ³¹ *Id.*
- ³² *Id.* at 83-84.
- ³³ *Id.* at 84.
- ³⁴ Longlet, *Gubernatorial Executive Orders in Wisconsin: The Case for Judicial Enforcement*, 2000 Wis L Rev 1323, 1325 (2000).
- ³⁵ Note, *Gubernatorial Executive Orders as Devices for Administrative Direction and Control*, 50 Iowa L Rev 78, 84 (1964).
- ³⁶ *Id.*
- ³⁷ *Id.* at 84-85.
- ³⁸ *Id.* at 85.
- ³⁹ Herman, *Gubernatorial Executive Orders*, 30 Rutgers L J 987, 992 (1999).
- ⁴⁰ See, e.g., clauses 1 and 2 of Executive Order No 2003-15 (September 30, 2003) (creating the Michigan Clean Water Corps).
- ⁴¹ Herman, *Gubernatorial Executive Orders*, 30 Rutgers L J 987, 992 (1999).
- ⁴² See, e.g., clauses 3-6 of Executive Order No 2003-11 (August 21, 2003) (declaring a state of energy emergency).
- ⁴³ Herman, *Gubernatorial Executive Orders*, 30 Rutgers L J 987, 993 (1999).
- ⁴⁴ *Id.*
- ⁴⁵ Dunbar & May, *Michigan: A History of the Wolverine State* (Grand Rapids: William B Eerdmans Publishing Co, Revised ed, 1980) p 518.
- ⁴⁶ Dunbar & May, *Michigan: A History of the Wolverine State* (Grand Rapids: William B Eerdmans Publishing Co, Revised ed, 1980) p 648.
- ⁴⁷ *Id.* at 653.
- ⁴⁸ *Id.* at 648.
- ⁴⁹ Fino, *The Michigan State Constitution: A Reference Guide* (Westport: Greenwood Press, 1996) p 18.
- ⁵⁰ *Id.*
- ⁵¹ *Id.*
- ⁵² *Id.*
- ⁵³ Michigan voters amended the 1908 constitution in 1960 in what came to be called the “Gateway Amendment.” This amendment eased the process for calling a constitutional convention by requiring that a question on general constitutional revision be placed on the ballot in 1961 and every 16 years thereafter, and by reducing the threshold number of voters required to call a constitutional convention. Fino, *The Michigan State Constitution: A Reference Guide* (Westport: Greenwood Press, 1996) p 20.
- ⁵⁴ *Id.* at 20-21.
- ⁵⁵ *Id.* at 20-21.
- ⁵⁶ Dunbar & May, *Michigan: A History of the Wolverine State* (Grand Rapids: William B Eerdmans Publishing Co, Revised ed, 1980) p 650.
- ⁵⁷ 2 Official Record, Constitutional Convention 1961, p 1836.
- ⁵⁸ Dunbar & May, *Michigan: A History of the Wolverine State* (Grand Rapids: William B Eerdmans Publishing Co, Revised ed, 1980) pp 650, 652.
- ⁵⁹ See, e.g., Const 1908, art 6, § 2; Const 1963, art 5, § 1.
- ⁶⁰ 1 Official Record, Constitutional Convention 1961, p 337.
- ⁶¹ Dunbar & May, *Michigan: A History of the Wolverine State* (Grand Rapids: William B Eerdmans Publishing Co, Revised ed, 1980) p 653.
- ⁶² *Id.*; Const 1963, art 5, § 2.
- ⁶³ Const 1963, art 5, §§ 2, 4, 8, and 20.
- ⁶⁴ Dunbar & May, *Michigan: A History of the Wolverine State* (Grand Rapids: William B Eerdmans Publishing Co, Revised ed, 1980) p 657.

⁶⁵ Const 1963, sched § 16.

⁶⁶ Governor Romney served from 1963 to 1969. He captured the Republican Party nomination for governor and defeated incumbent Democratic governor John Swainson in 1962, capitalizing on his service at the constitutional convention, as well as his successful tenure as head of American Motors Corporation. Weeks, *Stewards of the State: The Governors of Michigan* (Ann Arbor: Historical Society of Michigan, 2d ed, 1991) p 120; Dunbar & May, *Michigan: A History of the Wolverine State* (Grand Rapids: William B Eerdmans Publishing Co, Revised ed, 1980) pp 657-59.

⁶⁷ See, e.g., Proclamation (May 28, 1964), and Executive Order No 1964-2 (May 28, 1964).

⁶⁸ See, e.g., Executive Order No 1965-2 (February 25, 1965).

⁶⁹ See, e.g., Executive Order No 1965-4 (May 3, 1965).

⁷⁰ See, e.g., Executive Order No 1965-6 (May 20, 1965) (although this order was later overturned by *McDonald v Schnipke*, 380 Mich 14, 155 NW2d 169 (1968)).

⁷¹ See, e.g., Executive Order No 1965-8 (October 25, 1965).

⁷² See, e.g., Executive Order No 1966-3 (May 13, 1966).

⁷³ See, e.g., Executive Directive No 1965-12 (November 4, 1965) (addressing the Michigan Civil Service Commission in order to clarify Executive Order No 1965-16 (November 4, 1965)).

⁷⁴ See, e.g., Executive Directive No 1993-2 (September 22, 1993) (establishing the Office of Health Care Reform and Policy Development – a special agency – within the Office of the Governor).

⁷⁵ This argument assumes that the governor is not fraudulently using the form of an “executive directive” to shield an order that is, in actuality, issued pursuant to Article 5, section 2. In that situation, the legislature is presumably not precluded from exercising their constitutional authority under section 2 to veto the measure.

⁷⁶ Lieutenant Governor to Romney, Milliken became governor when Romney resigned in 1969 to become U.S. secretary of housing and urban development. Governor Milliken was a third generation state senator from Traverse City and a moderate Republican who became Michigan’s longest-serving governor, serving from 1969 to 1982. Weeks, *Stewards of the State: The Governors of Michigan* (Ann Arbor: Historical Society of Michigan, 2d ed, 1991) p 126.

⁷⁷ See, e.g., Executive Order No 1969-3 (April 18, 1969) (transferring the Office of Highway Safety Planning from the Executive Office of the Governor to the Department of State Police).

⁷⁸ See, e.g., Executive Order No 1973-2 (January 11, 1973) (transferring and consolidating environmental functions within the DNR); Executive Order No 1975-10 (October 13, 1975) (transferring public service commission’s railroad regulation functions to department of state highways and transportation).

⁷⁹ Weeks, *Stewards of the State: The Governors of Michigan* (Ann Arbor: Historical Society of Michigan, 2d ed, 1991) p 130.

⁸⁰ Executive Order No 1970-17 (November 17, 1970).

⁸¹ Governor Milliken decided not to run for re-election in 1981, and James J. Blanchard succeeded him in 1983. A four-term United States Congressman from Oakland County, Governor Blanchard served from 1983 to 1990. Weeks, *Stewards of the State: The Governors of Michigan* (Ann Arbor: Historical Society of Michigan, 2d ed, 1991) pp 131, 132, 134.

⁸² *Id.* at 132.

⁸³ *Id.* at 195, “John M. Engler,” note 1.

⁸⁴ A cattle farmer from Beal City, Michigan, John Engler was elected to the Michigan House of Representatives in 1970 at the age of 22, launching what was to become a 32 year career in public service to the State of Michigan in the legislative and executive branches of government. Governor Engler served from 1991 to 2002. Weeks, *Stewards of the State: The Governors of Michigan* (Ann Arbor: Historical Society of Michigan, 2d ed, 1991) pp 138-39.

⁸⁵ Citizens Research Council of Michigan, *Executive Reorganization of State Government*, Council Comments No 1009, p 6 (July 1992).

⁸⁶ *Id.*

⁸⁷ See *House Speaker v Governor*, 443 Mich 560, 506 NW2d 190 (1993).

⁸⁸ Michigan’s 47th governor, and its first female governor, Jennifer M. Granholm is a former federal prosecutor and state attorney general who entered office on January 1, 2003. Biography of Governor Granholm, *available at* <http://www.michigan.gov/gov/0,1607,7-168--57920--,00.html>.

⁸⁹ Executive Order No 2003-1 (January 2, 2003); Executive Order No 2003-2 (January 2, 2003).

⁹⁰ Executive Order No 2003-4 (February 27, 2003); Executive Order No 2003-5 (February 28, 2003); Executive Order No 2003-7 (June 19, 2003); Executive Order No 2003-8 (July 30, 2003); Executive Order No 2003-9 (July 30,

2003); Executive Order No 2003-15 (September 30, 2003); Executive Order No 2003-19 (October 20, 2003); and Executive Order No 2003-24 (December 10, 2003).

⁹¹ Executive Order No 2003-6 (April 15, 2003); Executive Order No 2003-10 (August 15, 2003); Executive Order No 2003-11 (August 21, 2003); and Executive Order No 2003-12 (August 21, 2003).

⁹² Executive Order No 2003-18 (October 2, 2003); and Executive Order No 2003-20 (October 20, 2003).

⁹³ Executive Order No 2003-3 (February 19, 2003); and Executive Order No 2003-23 (December 10, 2003).

⁹⁴ 2003 Executive Directives, available at http://www.michigan.gov/gov/0,1607,7-168-21975_22515_22533---,00.html.

⁹⁵ *Edward Thompson Co v Maynard*, 269 Mich 97, 113, 256 NW 817 (1934).

⁹⁶ *In re Proposal C*, 384 Mich 390, 405, 185 NW2d 9 (1971).

⁹⁷ *Sitz v Dep't of State Police*, 443 Mich 744, 764, 506 NW2d 209 (1993).

⁹⁸ *People v DeJonge*, 442 Mich 266, 274, 501 NW2d 127 (1993).

⁹⁹ *Advisory Opinion on Constitutionality of 1978 PA 426*, 403 Mich 631, 641, 272 NW2d 495 (1978).

¹⁰⁰ *Regents of University of Michigan v State*, 395 Mich 52, 59-60, 235 NW2d 1 (1975).

¹⁰¹ *Beech Grove Investment Company v Civil Rights Commission*, 380 Mich 405, 418-19, 157 NW2d 213 (1968).

¹⁰² *Id.*

¹⁰³ *Council of Organizations and Others for Educ About Parochiaid, Inc v Governor*, 455 Mich 557, 571, 566 NW2d 208 (1997).

¹⁰⁴ *See Soap & Detergent Ass'n v Natural Resources Comm*, 415 Mich 728, 757, 330 NW2d 346 (1982).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Const 1963, art 5, § 4.

¹⁰⁹ Const 1963, art 5, § 2.

¹¹⁰ *See, e.g.*, Executive Order No 1994-24 (September 8, 1994) (establishing the Governor's Blue Ribbon Commission on Michigan Gaming within the Executive Office).

¹¹¹ Const 1908, art 6, § 2.

¹¹² Const 1963, art 5, § 1.

¹¹³ Const 1908, art 6, § 3.

¹¹⁴ Const 1963, art 5, § 8.

¹¹⁵ 1965 PA 380, MCL 16.101 to 16.608.

¹¹⁶ 1931 PA 195, MCL 10.51 to 10.57.

¹¹⁷ *Id.*

¹¹⁸ MCL 16.111.

¹¹⁹ 1978 PA 151, MCL 3.551 to 3.561.

¹²⁰ *See* MCL 3.552; Executive Order No 2003-18 (October 2, 2003) (transferring powers formerly exercised by Department of Commerce to Department of Labor and Economic Growth.)

¹²¹ *See, e.g.*, Executive Order No 1994-20 (July 13, 1994) (establishing the Michigan Rehabilitation Advisory Council pursuant to 29 USC 101 et seq); Executive Order No 1994-23 (September 6, 1994) (establishing the Michigan Statewide Independent Living Council pursuant to 29 USC 701, et seq).

¹²² 38 Am Jur 2d, Governor, § 4 (2002).

¹²³ 1976 PA 390, MCL 30.401 to 30.421.

¹²⁴ 1945 PA 302, MCL 10.31 to MCL 10.33.

¹²⁵ 1982 PA 191, MCL 10.81 to 10.89.

¹²⁶ MCL 30.403.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ 2001 PA 247, MCL 3.991 to 3.994.

¹³² 2001 PA 248, MCL 3.1001 to 3.1004.

¹³³ MCL 30.405.

¹³⁴ *Id.*

¹³⁵ MCL 30.421.

¹³⁶ *Id.*

¹³⁷ *Id.*
¹³⁸ MCL 10.31; MCL 10.33.
¹³⁹ MCL 10.32.
¹⁴⁰ MCL 10.83.
¹⁴¹ MCL 10.81.
¹⁴² MCL 10.83.
¹⁴³ MCL 10.84.
¹⁴⁴ *Id.*
¹⁴⁵ MCL 10.85.
¹⁴⁶ MCL 10.86.
¹⁴⁷ MCL 10.87.
¹⁴⁸ Const 1908, art 6, §4.
¹⁴⁹ 1967 PA 150, MCL 32.50 to 32.851.
¹⁵⁰ “The organized militia of this state taken collectively shall be known as the state military establishment and constitutes the armed forces of this state. The organized militia consists of the army national guard, the air national guard, and the defense force when actually in existence as provided in this act. The unorganized militia consists of all other able-bodied citizens of this state and all other able-bodied citizens who are residents of this state who have or shall have declared their intention to become citizens of the United States, who shall be age 17 or over and not more than age 60, and shall be subject to state military duty as provided in this act.” MCL 32.509.
¹⁵¹ MCL 32.551; MCL 32.555.
¹⁵² MCL 32.559.
¹⁵³ MCL 32.563.
¹⁵⁴ MCL 32.571.
¹⁵⁵ MCL 32.575.
¹⁵⁶ MCL 32.581.
¹⁵⁷ MCL 32.582.
¹⁵⁸ MCL 32.519.
¹⁵⁹ 380 Mich 14, 155 NW2d 169 (1968).
¹⁶⁰ 1965 PA 380, MCL 16.101 to 16.608.
¹⁶¹ *See, e.g.*, Const 1963, art 5 § 18 (power to submit original budgetary plan to legislature); Const 1963, art 5 § 19 (line item veto of appropriations); Const 1963, art 5 § 20 (power to reduce appropriations). Additionally, MCL 18.393 allows the governor to transfer appropriated funds within an administrative department.
¹⁶² 1984 PA 431, MCL 18.1101 to 18.1594.
¹⁶³ MCL 18.1391.
¹⁶⁴ *Id.*
¹⁶⁵ *Id.*
¹⁶⁶ *Id.*
¹⁶⁷ *Id.*
¹⁶⁸ *Michigan Assoc of Counties v Department of Management and Budget*, 418 Mich 667, 345 NW2d 584 (1984).
¹⁶⁹ *See* 81A CJS States § 130 (2002).
¹⁷⁰ *See* Const 1908, art 6, § 3.
¹⁷¹ Fino, *The Michigan State Constitution: A Reference Guide* (Westport: Greenwood Press, 1996) p 108.
¹⁷² *See Michigan Waste Systems v Department of Natural Resources*, 147 Mich App 729, 738, 383 NW2d 112 (1985).
¹⁷³ *Id.*
¹⁷⁴ *See* Const 1850, art 12, § 8.
¹⁷⁵ Const 1908, art 9, §§ 7, 8.
¹⁷⁶ *Attorney General ex rel O'Hara v Montgomery*, 275 Mich 504, 511, 267 NW 550 (1936).
¹⁷⁷ *Attorney General ex rel Rich v Jochim*, 99 Mich 358, 58 NW 611 (1894).
¹⁷⁸ *Gray v Hakenjos*, 366 Mich 588, 593, 115 NW2d 411, 413 (1962).
¹⁷⁹ *Id.*
¹⁸⁰ *Attorney General ex rel Rich v Jochim*, 99 Mich 358, 374-47, 58 NW 611 (1894).
¹⁸¹ *People ex rel Clardy v Balch*, 268 Mich 196, 201, 255 NW 762, 764 (1934) (interpreting substantially similar predecessor provision, Const 1908, art 9, § 7).
¹⁸² MCL 178.83.

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- ¹⁸³ MCL 168.293.
- ¹⁸⁴ MCL 168.293.
- ¹⁸⁵ See *Attorney General ex rel Rich v Jochim*, 99 Mich 358, 58 NW 611 (1894).
- ¹⁸⁶ OAG, 1977-78, No 5395 (Dec 11, 1978).
- ¹⁸⁷ Const 1963, art 6, § 33.
- ¹⁸⁸ 1954 PA 116, MCL 168.1 to 168.992.
- ¹⁸⁹ See MCL 168.207 (all county officers named in MCL 168.200, including the county clerk, the county treasurer, register of deeds, prosecuting attorney, sheriff, drain commissioner, surveyor and coroner); MCL 168.238 (county auditor); MCL 168.268 (county road commissioner); MCL 168.327 (city officers); MCL 168.369 (township officers); and MCL 168.383 (village officers).
- ¹⁹⁰ See *Burback v Romney*, 380 Mich 209, 217, 156 NW2d 549 (1968).
- ¹⁹¹ *McDonald v Schnipke*, 380 Mich 14, 155 NW2d 169 (1968).
- ¹⁹² *People ex rel Clardy v Balch*, 268 Mich 196, 201, 255 NW 762 (1934).
- ¹⁹³ See, Const 1963, art 1, § 17; *Burback v Romney*, 380 Mich 209, 218-19, 156 NW 549, (1968).
- ¹⁹⁴ *People ex rel Clardy v Balch*, 268 Mich 196, 201-02, 255 NW 762 (1934).
- ¹⁹⁵ Const 1963, art 6, § 25.
- ¹⁹⁶ Const 1908, art 9, § 6.
- ¹⁹⁷ 1954 PA 116, MCL 168.1 to 168.992.
- ¹⁹⁸ MCL 168.403.
- ¹⁹⁹ MCL 168.409k.
- ²⁰⁰ MCL 168.423.
- ²⁰¹ MCL 168.443.
- ²⁰² MCL 168.467l.
- ²⁰³ Const 1963, sched § 12.
- ²⁰⁴ *Id.*
- ²⁰⁵ Fino, *The Michigan State Constitution: A Reference Guide* (Westport: Greenwood Press, 1996) p 104; 1965 PA 380, MCL 16.101 to 16.608.
- ²⁰⁶ Citizens Research Council of Michigan, *Executive Reorganization of State Government*, Council Comments No 1009, p 3 (July 1992); MCL 16.103(a).
- ²⁰⁷ Citizens Research Council of Michigan, *Executive Reorganization of State Government*, Council Comments No 1009, p 3 (July 1992); MCL 16.103(b).
- ²⁰⁸ Citizens Research Council of Michigan, *Executive Reorganization of State Government*, Council Comments No 1009, p 3 (July 1992); MCL 16.103(c).
- ²⁰⁹ Citizens Research Council of Michigan, *Executive Reorganization of State Government*, Council Comments No 1009, p 3 (July 1992); MCL 16.103(d).
- ²¹⁰ Citizens Research Council of Michigan, *Executive Reorganization of State Government*, Council Comments No 1009, p 3 (July 1992).
- ²¹¹ MCL 16.134(2).
- ²¹² MCL 16.134(1).
- ²¹³ MCL 16.134(1).
- ²¹⁴ Const 1963, art 5, § 2.
- ²¹⁵ MCL 16.134(2).
- ²¹⁶ *House Speaker v Governor*, 443 Mich 560, 579, 506 NW2d 190 (1993).
- ²¹⁷ MCL 16.134(3).
- ²¹⁸ MCL 16.134(4).
- ²¹⁹ *Michigan Mutual Ins Co v Director, Dept of Consumer and Industry Services*, 246 Mich App 227, 632 NW2d 500 (2001).
- ²²⁰ *House Speaker v Governor*, 443 Mich 560, 506 NW2d 190 (1993).
- ²²¹ *Id.* at 577.
- ²²² See *Straus v Governor*, 459 Mich 526; 592 NW2d 53 (1999).
- ²²³ See *Soap & Detergent Ass'n v Natural Resources Comm*, 415 Mich 728, 330 NW2d 346 (1982).
- ²²⁴ See, e.g., Executive Order No 1995-13 (May 23, 1995) (invoking only Article 5, section 2); Executive Order No 1999-1 (May 3, 1999) (invoking Article 5, sections 1, 2 and 8); and Executive Order No 2001-7 (October 1, 2001) (invoking Article V, sections 1 and 2).
- ²²⁵ See 1958 PA 125, MCL 16.1 to 16.6, repealed by 1968 PA 237.

²²⁶ MCL 16.1, repealed by 1968 PA 237.

²²⁷ MCL 16.2, repealed by 1968 PA 237.

²²⁸ Only one re-organization was effected under 1958 PA 125. In 1962, the independent Office of Civil Defense was transferred to the Michigan State Police. Although five other reorganizations of the executive branch took place subsequent to this, they were all enacted by statute after being submitted by executive order. Legislative enactment occurred to avoid use of the executive-initiated reorganization because some legislators were concerned about the constitutionality of the 1958 act, believing it violated the separation of powers doctrine. Citizens Research Council of Michigan, *Executive Reorganization of State Government*, Council Comments No 1009, p 2 (July 1992). Nevertheless, delegates at the 1961 Constitutional Convention decided to include a provision in the new constitution allowing the governor to re-organize the executive branch through Executive Order, believing 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, p 1768. Declining to adopt a minority report allowing disapproval of a re-organization order by a majority of either house of the legislature, and another minority report requiring a two-thirds majority of each house to approve the order, the delegates ultimately settled on the current formula, requiring both houses of the legislature to disapprove of a re-organization order by resolution in order to prevent such an order from taking effect. Citizens Research Council of Michigan, *Executive Reorganization of State Government*, Council Comments No 1009, pp 2-3 (July 1992).

²²⁹ See, e.g., *People ex rel Shumway v Bennett*, 29 Mich 451 (1874).

²³⁰ See Const 1908, art 6, §§ 2-3.

²³¹ The legislature repealed 1958 PA 125 by 1968 PA 237, finding the Act no longer necessary after the implementation of Article 5, section 2 of the 1963 Constitution, and the Executive Organization Act of 1965. Citizens Research Council of Michigan, *Executive Reorganization of State Government*, Council Comments No 1009, p 2 (July 1992).

²³² See, e.g., Executive Order No 2001-7 (October 1, 2001) (invoking Article 5, sections 1 and 2).

²³³ See, e.g., Executive Order No 1999-1 (February 3, 1999) (invoking Article 5, sections 1, 2 and 8).

²³⁴ 2 Official Record, Constitutional Convention 1961, p 1894

²³⁵ See, e.g., Executive Order No 1995-13 (May 23, 1995) (invoking only Article 5, section 2); Executive Order No 1999-1 (February 3, 1999) (invoking Article 5, sections 1, 2 and 8); Executive Order No 2001-7 (October 1, 2001) (invoking Article 5, sections 1 and 2).

²³⁶ See, Const 1908, Art 6, § 7.

²³⁷ Const 1963, art 5, § 17.

²³⁸ *Wilson v Atwood*, 270 Mich 317, 258 NW 773 (1935).

²³⁹ Const 1963, art 4, § 28.

²⁴⁰ See *Timmer v Talbot*, 13 F Supp 666 (WD Mich 1935).

²⁴¹ OAG 1947-48, No 638, p 513.

²⁴² Const 1908, art 6, § 8.

²⁴³ See 1 Official Record, Constitutional Convention 1961, pp 377-78.

²⁴⁴ Const 1963, art 5, § 13.

²⁴⁵ See Const 1908, art 6, § 6.

²⁴⁶ 1954 PA 116, MCL 168.1 to 168.992.

²⁴⁷ A “special election” means “any election, other than a regular election called by competent authority for the purpose of choosing officials to fill vacancies in public office.” MCL 168.6.

²⁴⁸ MCL 168.634.

²⁴⁹ MCL 168.178, 168.634.

²⁵⁰ MCL 168.178, 168.634.

²⁵¹ MCL 168.145, 168.632 to 168.633.

²⁵² MCL 168.370 (governor may fill vacancy if it is not filled within 45 days by the township board of supervisors).

²⁵³ MCL 168.631.

²⁵⁴ Const 1908, art 6, § 9.

²⁵⁵ *People v Freleigh*, 334 Mich 306, 54 NW2d 599 (1952).

²⁵⁶ *People v Erwin*, 212 Mich App 55, 536 NW2d 818 (1995).

²⁵⁷ 1953 PA 232, MCL 791.201 to 791.283.

²⁵⁸ MCL 791.231a.

²⁵⁹ See MCL 791.206, 791.243, and 791.244.

²⁶⁰ Note, *Gubernatorial Executive Orders as Devices for Administrative Direction and Control*, 50 Iowa L Rev 78, 85 (1964).

²⁶¹ *Id.* at 86.

²⁶² *Id.* at 86-87.

²⁶³ *Id.* at 88.

²⁶⁴ *Id.* at 87.

²⁶⁵ Longlet, *Gubernatorial Executive Orders in Wisconsin: The Case for Judicial Enforcement*, 2000 Wis L Rev 1323, 1333 (2000).

²⁶⁶ 2 Official Record, Constitutional Convention 1961, p 3378.

²⁶⁷ *Id.* at 337-38.

²⁶⁸ *Id.* at 336.

²⁶⁹ Longlet, *Gubernatorial Executive Orders in Wisconsin: The Case for Judicial Enforcement*, 2000 Wis L Rev 1323 (2000).

²⁷⁰ *Id.* at 1327-28.

²⁷¹ *Id.* at 1331-32 (internal citations omitted).

²⁷² “The executive power shall be vested in a governor.” Wis Const, art 5, § 1.

²⁷³ “[The governor] shall transact all necessary business with the officers of the government, civil and military.” Wis Const, art 5, § 4.

²⁷⁴ “[The governor] shall take care that the laws be faithfully executed.” Wis Const, art 5, § 4.

²⁷⁵ Longlet, *Gubernatorial Executive Orders in Wisconsin: The Case for Judicial Enforcement*, 2000 Wis L Rev 1323, 1332-35 (2000).

²⁷⁶ *Id.* at 1337 (2000).

²⁷⁷ *Id.*