GUBERNATORIAL APPOINTMENT PROCESS

The selection of qualified individuals to serve in state governmental positions excepted or exempted from state civil service is a responsibility shared by the executive and the legislative branches of government. This joint participation in the appointment process is mandated by the Constitution of the State of Michigan of 1963, which accords the governor certain powers to appoint officials subject to the advice and consent of the Michigan Senate.

Historical Developments

To gain a broader perspective of the governor's appointment powers and the use of advice and consent, it is useful to trace the historical development of the executive/legislative relationship regarding appointments. Due to the deep-seated distrust of, and contempt for, British-imposed colonial governors, many early state constitutions greatly limited the power of the office of the governor. **Michigan's first constitution (1835)**, however, did not follow that pattern — it gave the governor substantial power. The governor had the power to appoint the secretary of state, judges of the supreme court, the auditor general, the attorney general, and prosecuting attorneys for each county. These appointments were subject to senate confirmation. The only state officers popularly elected were the governor, lieutenant governor, and state legislators.

In contrast, the **1850 constitution** reflected the influence of "Jacksonian democracy," ultimately producing the so-called "long ballot." Among the principles of Jacksonian democracy was the belief that public officials should be chosen by election rather than by appointment. Hence, the 1850 constitution provided for the election of all principal state officials, including the secretary of state, state treasurer, attorney general, auditor general, superintendent of public instruction, regents of the University of Michigan, state board of education, and supreme court justices. Accordingly, the governor's appointment power was reduced to filling vacancies.

While the adoption of a **new constitution in 1908** did little to either erode or enhance the governor's appointment power, other developments led to a substantial increase in the number of state officials appointed by the governor. Ironically, it was the legislature that played the most significant role in expanding the gubernatorial appointment power. Of the more than 2,000 appointments for which the governor is responsible today, most are to the approximately 250 boards, commissions, and other advisory bodies, which, in most cases, have been established by statutes enacted by the legislature. Some are created on an ad hoc basis, but many are permanent. As rapidly changing social and economic conditions brought about the emergence of new and more complex problems, state government began to expand. Prior to the adoption of the 1963 constitution there were no limitations on the number of state agencies that could be established and no restrictions on the power of the legislature to assign administrative duties to newly created agencies or positions independent of gubernatorial supervision. Even the **1963 constitution** does not preclude the creation of new agencies. However, article V, section 2 of that document does limit the number of principal departments to ". . . not more than 20 . . . ." Moreover, all executive offices, excluding the offices of governor and lieutenant governor and the university governing boards, are to be allocated within those principal departments.

The Plural Executive

Many newly created agencies were responsible to **boards or commissions** comprised of individuals appointed by the governor. Boards and commissions are common to the administrative structure of many businesses as well as to all levels of government. Proponents of the system argue that by creating a degree of independence, a board or commission can be insulated from political manipulation. The use of staggered or overlapping terms for the members of a board encourages continuity of policy while making it difficult for an executive to appoint a majority of board members during any one term. In addition, the application of bipartisan representation on these bodies ensures some degree of minority representation and input.

Critics of the board or commission role in government object to the lack of accountability of appointees and the possibility of stalemates in the decision-making process. Moreover, perhaps due to the fact that boards and commissions in Michigan state government have evolved gradually over the years, there appears to be little consistency in the internal structure of these bodies, the method used to appoint members, or their functions. For example, in some instances the governor designates a chairperson whose duties are prescribed by law, while in others the governor designates a chairperson whose duties are not prescribed by law. In yet other instances, the statute does not provide for a chairperson or leaves the selection of a chairperson to the board.

Types of Appointments

In addition to appointing a personal executive staff, the governor currently appoints 12 executive department heads with the **advice and consent of the senate**. Two department heads, the secretary of state and attorney general, are popularly elected. The remaining 5 chief executive officers are appointed by the respective board or commission that heads the department.

The governor is also authorized to appoint a limited number of other positions, particularly of a policymaking nature, within most of the principal departments. Those positions, along with the positions within the Office of the Governor, are exempted from civil service. Certain regulatory officials, such as the financial institutions commissioner, insurance commissioner, and racing commissioner, are also appointed by the governor with senate confirmation. The members of the boards or commissions that head departments are appointed by the governor with senate confirmation, but the terms for these officials overlap so that a majority of the members cannot be appointed in any one year.

Some of these boards, such as the State Administrative Board, are composed exclusively of state officers serving ex officio (ex officio means "by virtue of office or position"). In some cases the governor serves as an ex officio member of a board or commission. For example, the governor serves as an ex officio member of the State Board of Education and the Michigan Historical Commission. On a number of boards, the heads of executive departments serve as ex officio members.

The governor also appoints the heads of other autonomous agencies such as the lottery commissioner and the director of the Bureau of Workers' Disability Compensation. Most of these appointments require senate confirmation.

Pursuant to Sec. 1104 of the Revised Judicature Act (MCL 600.1104), stenographers for each circuit court of the state ". . . shall be appointed by the governor after having first been recommended by the judge or judges of the court to which he is appointed . . . ." Senate confirmation is not required.

Limitations on Gubernatorial Appointment Power

The common requirement that gubernatorial appointments be confirmed by the senate is the most significant limitation imposed on the appointment power. In addition, in some cases the legislature has brought both the speaker of the house and the senate majority leader into the appointment process.

There are a number of other ways in which a governor is limited in appointing individuals to boards and commissions. Many limitations relate to **statutory conditions** regarding those eligible for appointment. For instance, pursuant to article V, section 5, of the state constitution, ". . . A majority of the members of an appointed examining or licensing board of a profession shall be members of that profession." Furthermore, during the mid-1970s, the legislature amended various laws establishing licensing boards to assure each board had at least one member representing the interests of the general public.

Some statutes establishing boards require that certain groups be represented in the body's total membership. **Bipartisan representation** is mandated for some boards, including the Public Service Commission and Transportation Commission. An example of how the governor is restricted in making appointments is reflected in the composition of the Board of Boiler Rules. Of the 11 gubernatorial appointments, 2 must represent owners and users of boilers within the state, 1 of whom must represent owners and users of power boilers operating at 1,000 p.s.i.g. or more; 2 must represent organized labor in the state engaged in the erection, fabrication, installation, operation, or repair of boilers; 1 must represent boiler repair contractors within the state in the business of repairing boilers by welding and riveting; 1 must represent mechanical contractors within the state having experience in the installation, piping, or operation of boilers; 1 must represent consulting engineers within the state having boiler experience; 1 must represent water tube boiler manufacturers doing business within the state; 1 must represent fire tube boiler manufacturers doing business in this state; 1 must represent boiler insurance companies licensed to do business within the state; and 1 must represent the general public.

Other statutes creating boards or commissions require the governor to appoint members from a **list of nominees** submitted by nongovernmental groups. For example, the members of the Veterans' Facilities of the Michigan Board of Managers are appointed from lists submitted by congressionally chartered veterans organizations.

Certain **territorial divisions** of the state must be represented on certain boards and commissions. For example, of the 7 members appointed to the Ski Area Safety Board, one must be a ski

area manager from the Upper Peninsula and one of the body's public members must be an Upper Peninsula resident with skiing experience.

Advice and Consent

A primary concern of the framers of the U.S. Constitution was preventing a concentration of power in any one branch of government. Accordingly, a system of **checks and balances** was incorporated into the federal constitution. A good example of a check on the legislative branch by the executive is the veto power; and, the advice and consent process represents one method by which the legislative branch can check the executive. In other words, regarding the appointment process, the branch that approves persons to hold office (legislative), does not nominate them (executive); and the branch that nominates (executive), does not originally create the post (legislative).

Article II, section 2, clause 2 of the U.S. Constitution provides, in part, that the President

> . . . shall nominate and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States. . . .

This provision has manifested itself in state constitutions in a variety of ways. Most states have a mix of gubernatorial appointments — some requiring confirmation, while others do not. On the other hand, several states, including Indiana, Massachusetts, and Nevada, have no provision for the legislative confirmation of executive appointments, while others, such as Hawaii and New Jersey, require all executive appointments to be so confirmed.

As mentioned previously, the 1963 constitution includes a provision defining **advice and consent**. Article V, section 6, states:

> Appointment by and with the advice and consent of the senate when used in this constitution or laws in effect or hereafter enacted means appointment subject to disapproval by a majority vote of the members elected to and serving in the senate if such action is taken within 60 session days after the date of such appointment. Any appointment not disapproved within such period shall stand confirmed.

The incorporation of this provision in the 1963 constitution effectively reversed the advice and consent process practiced under previous constitutions, none of which provided a definition of advice and consent. Rather than the senate approving an appointment by positive action, this provision requires the senate to disapprove an appointment within 60 session days after submission for consideration. In other words, no action by the Senate constitutes a confirmation of an appointment after 60 session days. The count of 60 session days commences when the secretary of the senate receives written notification of an appointment from the governor's office.

The advice and consent provision incorporated into the 1963 constitution was designed to provide the senate with reasonable time to reject an appointee while at the same time making confirmation definite should the senate choose not to act on an appointment.

This variation of the advice and consent process contrasts with the concept as practiced by the U.S. Senate. Individuals named to federal positions cannot assume the office until they are confirmed. On the federal level, the President nominates and the U.S. Senate appoints; while in Michigan, the governor appoints and the senate confirms or rejects the appointment.