STATE OF MICHIGAN

COURT OF APPEALS

TAXPAYERS OF MICHIGAN AGAINST CASINOS and LAURA BAIRD, State Representative in her official capacity,

Plaintiffs-Appellees/Cross-Appellants,

v

THE STATE OF MICHIGAN,

Defendant-Cross-Appellee,

and

GAMING ENTERTAINMENT, LLC, and LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS,

Intervening Defendants-Appellants/Cross-Appellees,

and

NORTH AMERICAN SPORTS MANAGEMENT CO,

Intervening Defendant.

FOR PUBLICATION
September 22, 2005
9:00 a.m.

No. 225017
Ingham Circuit Court
LC No. 99-090195-CZ

ON REMAND

Official Reported Version

Before: Owens, P.J., and Schuette and Borrello, JJ.

SCHUETTE, J.

The issue presented to this Court on remand from our Supreme Court's decision in *Taxpayers of Michigan Against Casinos v Michigan*, 471 Mich 306, 333; 685 NW2d 221 (2004) (*Taxpayers*), is whether the amendatory provision in the tribal-state gambling compacts purporting to empower the Governor to amend the compacts without legislative approval violates the separation of powers doctrine found in the Separation of Powers Clause in Const 1963, art 3,

§ 2. As will be thoroughly discussed, we hold that the Separation of Powers Clause in Const 1963, art 3, § 2 was violated in this instance. We affirm the decision of the circuit court on this issue.

I. PROCEDURAL HISTORY

A. Legislative Action

The legal issues confronting this Court and the Supreme Court stem from the expansion of casino gambling in the state of Michigan.

In January 1997, Governor John Engler, on behalf of the state of Michigan, signed gambling compacts with four Indian tribes[1] permitting class III gambling activities pursuant to the Indian Gaming Regulatory Act (IGRA), 25 USC 2701 *et seq*. These compacts were modified and reexecuted in December 1998. The Michigan Legislature approved these gambling compacts by passage of House Concurrent Resolution (HCR) 115. The House of Representatives approved HCR 115 by a resolution vote of 48 to 47, while the Michigan Senate passed HCR 115 by a resolution vote of 21 to 17. The passage of these compacts by resolution, instead of by bill, ironically had significance in 1998 and, as will be discussed, retains significance now. As acknowledged by our Supreme Court in *Taxpayers*, 471 Mich at 316 n 4, a bill must be passed by a majority of the representatives elected to and serving in each house of the Legislature.[2] However, passage of a resolution merely requires a simple majority of the members present and voting as long as a quorum is present.[3]

B. Circuit Court Action

The validity of the approval of these gambling compacts, by resolution rather than statute, spawned several lawsuits: two in federal court and this action originally brought in the Ingham Circuit Court. The Sault Ste. Marie Tribe of Lake Superior sued in federal court to enjoin the operation of the new casinos, but the United States Court of Appeals for the Sixth Circuit dismissed that suit on the grounds of lack of standing. *Sault Ste Marie Tribe of Chippewa Indians v United States*, 288 F3d 910 (CA 6, 2002). Two state legislators also challenged the approval by the Secretary of Interior of Michigan's 1998 compacts, but that suit also was dismissed on the grounds of lack of standing by the Sixth Circuit. *Baird v Norton,* 266 F3d 408 (CA 6, 2001).

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[1] These tribes are the Little Traverse Bay Bands of Odawa Indians, the Pokagon Band of Ottawa Indians, the Little River Band of Ottawa Indians, and the Nottawaseppi Huron Potawatomi.

[2] The Michigan Legislature is composed of 110 members of the House of Representatives; 56 votes are required at a minimum for passage of a statute. The Michigan Senate is composed of 38 members; 20 votes are required at a minimum for passage of a statute.

[3] Under the rules of the Michigan House of Representatives, a majority of the members of the House of Representatives must be present to constitute a quorum.

Plaintiffs sought a declaratory judgment that the method of approval of the gambling compacts violated various provisions of the Michigan Constitution. Plaintiffs argued that legislative approval of the compacts by resolution violated Const 1963, art 4, § 22, which requires adoption of legislation by bill rather than mere resolution. Additionally, plaintiffs complained that the compacts violated Const 1963, art 4, § 29, the Local Acts Clause. Finally, plaintiffs alleged that the provision within the gambling compacts that permitted the Governor to amend a compact without legislative approval violated Const 1963, art 3, § 2, the Separation of Powers Clause, which is the very matter before this Court.

The trial court ruled in favor of plaintiffs in two instances, determining that the gambling compacts should have been approved by bill instead of by resolution and that the amendatory provision in the compacts ran afoul of the doctrine of separation of powers. The trial court determined that the approval of the gambling compacts did not violate the Local Acts Clause of Const 1963, art 4, § 29.

C. Court of Appeals Decision

A panel of this Court in *Taxpayers of Michigan Against Casinos v Michigan*, 254 Mich App 23, 43-49; 657 NW2d 503 (2002), reversed the trial court's determination that passage of the compacts by resolution did not conform to the Michigan Constitution, affirmed the trial court's reasoning with respect to the Local Acts Clause, and declared that the issue of the amendatory provision within each of the four compacts, which at that time had not been exercised by the Governor, was not ripe for judicial review.

D. Supreme Court Decision

Upon review, five justices of our Supreme Court held that legislative approval of the gambling compacts by mere resolution did not violate the Michigan Constitution, likening the tribal-state gambling compacts to a contract as distinguished from more traditional legislative or statutory actions of the Michigan Legislature. *Taxpayers*, 471 Mich at 327-328, 352. All seven justices of our Supreme Court also determined that there was no violation of the Local Acts Clause, Const 1963, art 4, § 29.[4]

In July 2003, and before the Supreme Court's ruling, Governor Jennifer Granholm exercised the amendatory provision contained within an individual compact negotiated between the state of Michigan and the Little Traverse Bay Bands of Odawa Indians. Chief Justice

[4] Justices Taylor and Young concurred in Chief Justice Corrigan's analysis concerning Const 1963, art 4, § 22 (constitutionality of approval by resolution, not by bill) and in her determination that Const 1963, art 4, § 29, the Local Acts Clause, was not violated by passage of HCR 115. Justice Cavanagh, while concurring only in part IV of Chief Justice Corrigan's lead opinion, joined Justice Kelly's concurring opinion concluding that no violation of Const 1963, art 4, § 22 or 29 occurred. Justice Markman concurred with part VI of Chief Justice Corrigan's lead opinion concerning Const 1963, art 4, § 29, and Justice Weaver also concurred with the holding of no violation of Const 1963, art 4 § 29.

Corrigan, in her lead opinion, acknowledged this fact and stated that "the amendment provision in the compact may now be ripe for review . . . ." *Taxpayers*, 471 Mich at 313. Again, five justices of our Supreme Court concluded that the separation of powers issue alleged by plaintiffs was now ripe for review, but in the absence of an appellate court ruling on this precise issue, a remand to this Court was appropriate.

Justices Taylor and Young joined Chief Justice Corrigan in her lead opinion, in which she stated that "we remand this issue to the Court of Appeals to consider whether the provision in the compacts purporting to empower the Governor to amend the compacts without legislative approval violates the separation of powers doctrine found in Const 1963, art 3, § 2." *Id.* at 333.

Justice Markman, in his dissent, determined that that the amendment by the Governor made the issue "ripe." *Id.* at 362. Justice Markman further stated that "the amendatory provision contained in each compact violates the separation of powers doctrine and is, thus, void insofar as it may be regarded as granting sole amendatory power over legislation to the Governor." *Id.* at 407. Justice Weaver did not address the ripeness issue or the separation of powers issue now before this Court, declining on the basis of her determination that the gambling compacts were violative of Const 1963, art 4, § 22. *Taxpayers*, 471 Mich at 354.

E. Procedures of the Court of Appeals on Remand

In October 2004, Judges Borrello and Schuette were randomly selected to replace retired Judges Hood and Holbrook, who were panelists on this Court's earlier decision in this case. In November 2004, this Court issued an order in this case, which, among other things, allowed the parties to file briefs addressing

> (1) whether the provision in the tribal-state gaming compact of the Little Traverse Bay Band [sic] of Odawa Indians, purporting to allow the governor to amend the compact without legislative approval, violates the separation of powers clause, Const 1963, art 3, § 2, (2) assuming that the amendment provision in the compact is constitutional, whether any aspect of the exercise of the power to amend violated the separation of powers clause, Const 1963, art 3, § 2, and (3) what effect will there be on the amendment as a whole if an aspect of the amendment violates the separation of powers clause.[5]

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[5] Judge Schuette acknowledges that, for clarity's sake, the order should have included a fourth item that would have requested the parties to discuss what effect will there be on the *compact* as a whole if an aspect of the amendment violates the separation of powers clause. However, given the thoroughness of the analyses submitted by all parties and amici curiae, and that the constitutional questions presented and determined have been fully and completely examined, the omission is not significant.

A second order, dismissing a motion to disqualify Judge Schuette, was entered on November 24, 2004. No appeal was filed challenging Judge Schuette's order dismissing the motion to disqualify.

II. THE 1998 COMPACTS

The gambling compacts negotiated in 1998 between Governor Engler on behalf of the state of Michigan and the four Indian tribes contained identical provisions, except that the geographic scope of gambling activity permitted within the state of Michigan varied among the four tribes.

Of significance to the case at bar are the following sections contained in each of the four gambling compacts. Section 12(E) provides:

> In the event that any section or provision of this Compact is disapproved by the Secretary of the Interior of the United States or is held invalid by any court of competent jurisdiction, it is the intent of the parties that the remaining sections or provisions of this Compact, and any amendments thereto, shall continue in full force and effect. This severability provision does not apply to Sections 17 and 18 of this Compact.

Section 16 of the gambling compacts outlines the methodology for amending a compact. This section provides in part:

> This Compact may be amended by mutual agreement between the Tribe and the State as follows:
>
> (A) The Tribe or the State may propose amendments to the Compact by providing the other party with written notice of the proposed amendment as follows:
>
> (i) The Tribe shall propose amendments pursuant to the notice provisions of this Compact by submitting the proposed amendments to the Governor who shall act for the State.
>
> (ii) The State, acting through the Governor, shall propose amendments by submitting the proposed amendments to the Tribe pursuant to the notice provisions of this Compact.
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> * * *
>
> (C) Any amendment agreed to between the parties shall be submitted to the Secretary of the Interior for approval pursuant to the provisions of the IGRA.
>
> (D) Upon the effective date of the amendment, a certified copy shall be filed by the Governor with the Michigan Secretary of State and a copy shall be transmitted to each house of the Michigan Legislature and the Michigan Attorney General.

Sections 17 and 18 of each gambling compact detail the financial transactions between the state of Michigan and a tribe, describe how payments are made from a tribe to the Michigan Strategic Fund, describe how funds flow to local units of government, describe how such payments are calculated, and indicate that such payments will be made only if nontribal gambling is restricted to the three licenses in the city of Detroit pursuant to MCL 432.201 *et seq.*

III. 2003 AMENDMENTS

On July 14, 2003, Governor Granholm, on behalf of the state of Michigan, exercised the amendatory provision in §16 of the 1998 gambling compact between the state of Michigan and the Little Traverse Bay Bands of Odawa Indians. Several changes were made to the original agreement. The preamble clause to these amendments indicated that any changes were in accordance with §16 of the 1998 gambling compact. Also noteworthy in the preamble was the specific inclusion of a statement that "[a]ll provisions of the Compact not explicitly added or amended herein shall remain in full force and effect." The 2003 amendments of greatest significance are summarized as follows:

(1) The amendment to § 2(8)(1) grants the Little Traverse Bay Bands of Odawa Indians the right to operate a second casino.

(2) For purposes of this second casino, the amendment to § 4(I) changes the age of legal gambling from 18 to 21.

(3) Added § 4(O) requires the tribe to send reports of customer winnings to the state; previously such reports were sent only to the federal government as a requirement of federal law.

(4) The amendments to § 12(A) and (B) make the compact binding on the state and the tribe for 25 years from the effective date of the amendments, instead of it being binding for 20 years from the effective date of the compact, and make a corresponding change to a notice requirement.

(5) The original compact required the tribe to pay the state a percentage of the "net win" as long as there was no change in state law permitting the operation of electronic games of chance or commercial casino games and no other person (except another tribe or a person operating in the city of Detroit under MCL 432.201 *et seq.*) lawfully operated such games. The amendments to § 17(B) provide:

(a) that this includes the expansion of lottery games,

(b) that payments from the first casino (the Petoskey Site) will continue after the second casino has operated for 24 months despite changes in state law that expand permitted gaming as long as the change does not occur in ten specified northern Michigan counties, and

(c) that payments from the second casino will be made despite such a change in the law as long as the expansion does not operate in the designated counties.

(6) Instead of paying eight percent of the "net win" from all class III electronic games of chance at the Petoskey Site to the Michigan Strategic Fund or its successor as determined by

state law, the tribe must pay this eight percent to "the State, as directed by the Governor or designee." For the second casino, the tribe must pay ten percent of all such earnings up to $50 million and 12 percent of all such earnings over $50 million to "the State, as directed by the Governor or designee" See amendment to § 17(C). However, the payments could cease or diminish if another tribe opens a casino in the designated counties without the compacting tribe's consent. See added § 17(E).

IV. STANDARD OF REVIEW

This Court reviews de novo constitutional issues. *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 582; 640 NW2d 321 (2001). The party asserting a constitutional challenge has the burden of proof. *McDonald v Grand Traverse Co Election Comm*, 255 Mich App 674, 680; 662 NW2d 804 (2003).

V. ANALYSIS

The closely related core issues presented to this Court on remand are (1) whether the provision in the gambling compact between the state of Michigan and the Little Traverse Bay Bands of Odawa Indians, which provides for amendment by the Governor without legislative approval, violates Const 1963, art 3, § 2 and (2) whether the exercise of the amendatory provision in the gambling compact between the state of Michigan and the Little Traverse Bay Bands of Odawa Indians, by the Governor without legislative approval, violated Const 1963, art 3, § 2.

We hold that the provision in the gambling compact between the state of Michigan and the Little Traverse Bay Bands of Odawa Indians that provides for amendment by the Governor without legislative approval violates Const 1963, art 3, § 2. Further, we hold that the exercise by the Governor without legislative approval of the amendatory provision in the gambling compact between the state of Michigan and the Little Traverse Bay Bands of Odawa Indians violated Const 1963, art 3, § 2.[6] The provision contained in the compact (and in the additional three compacts described in footnote 6 of this opinion) is void insofar as it grants amendatory power solely to the Governor without legislative approval.

Although the lines separating the three branches of state government may converge from time to time, they are distinct boundaries, not mirages. The Michigan Constitution outlines the landscape of powers that separate the executive, legislative, and judicial branches of government. "By separating the powers of government, the framers of the Michigan Constitution sought to disperse governmental power and thereby to limit its exercise." *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 613; 684 NW2d 800 (2004).

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[6] As a corollary to our decision in this case, we also hold that the same provision in the three other gambling compacts between the state of Michigan and the Pokagon Band of Ottawa Indians, the Little River Band of Ottawa Indians, and the Nottawaseppi Huron Potawatomi violates Const 1963, art 3, § 2.

The Governor's responsibility is to exercise the executive power, Const 1963, art 5, § 1, including the power to suggest legislation, Const 1963, art 5, § 17. The responsibilities entrusted to the executive branch of government are set forth in Const 1963, art 5, § 8:

> 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.
>
> The governor may initiate court proceedings in the name of the state to enforce compliance with any constitutional or legislative mandate, or to restrain violations of any constitutional or legislative power, duty or right by any officer, department or agency of the state or any of its political subdivisions. This authority shall not be construed to authorize court proceedings against the legislature.

Of significance in this constitutional provision is the specific, stated responsibility of the Governor to faithfully execute laws. Conspicuously absent is any reference whatsoever granting the executive branch any authority to assume any legislative role. While the Constitution provides the Governor the right to suggest legislation, it neither confers nor implies any power on the part of the Governor to invade, supersede, or assume powers conferred on the Legislature.

The powers of the legislative branch of government are set forth in Const 1963, art 4, § 1: "The legislative power of the State of Michigan is vested in a senate and a house of representatives."

Const 1963, art 6, § 1 outlines the breadth of responsibility of the judicial branch of state government. It states:

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

These constitutional provisions establish the framework for our analysis. Further, Const 1963, art 3, § 2 provides the boundary lines of the branches of government and contains the admonition that one branch of government shall not assume the responsibilities of another unless the Constitution *expressly* so provides.

> The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution. [Const 1963, art 3, § 2.]

The embodiment of the boundaries of the branches of government, known as the separation of powers, was summarized by Justice Cooley in *People ex rel Sutherland v Governor,* 29 Mich 320, 324-325 (1874):

> And that there is such a broad general principle seems to us very plain. Our government is one whose powers have been carefully apportioned between three distinct departments, which emanate alike from the people, have their powers alike limited and defined by the constitution, are of equal dignity, and within their respective spheres of action equally independent. . . . *This division is accepted as a necessity in all free governments, and the very apportionment of power to one department is understood to be a prohibition of its exercise by either of the others.* [Emphasis added.]

The Little Traverse Bay Bands of Odawa Indians and the dissent argue that in approving the compacts by resolution in 1998, the Legislature also approved any subsequent amendments, albeit in advance. We reject this argument. The tribe also notes that the Legislature has authorized other bodies in advance to make binding contracts, pointing specifically to the Social Welfare Act, which authorizes the director of the Family Independence Agency, now the Department of Human Services, to enter into agreements with federal, state or local units of government or private agencies to participate in any plan that the director deems desirable for the welfare of the people of the state. MCL 400.10(3).

However, unlike the authority for amendments to the compacts, the advance authority to contract under the Social Welfare Act is provided by statute. Directly applicable to this case is our Supreme Court's decision in *Roxborough v Michigan Unemployment Compensation Comm,* 309 Mich 505; 15 NW2d 724 (1944). In *Roxborough*, the issue presented was whether the Governor had the ability to appoint members of the Unemployment Compensation Commission Appeal Board and to fix their salaries as provided by an act of the Legislature. Our Supreme Court held:

> In fixing plaintiff 's salary, the governor could exercise only such authority as was delegated to him by legislative enactment. The rule is stated in 59 C.J. pp. 172, 173, § 286, as follows:
>
> "Public officers have and can exercise only such powers as are conferred on them by law, and a State is not bound by contracts made in its behalf by its officers or agents without previous authority conferred by statute or the Constitution." [*Id.* at 510.]

Further, the dissent's attempt to distinguish *Roxborough* is unpersuasive. The rule from *Roxborough* is essentially that "[g]enerally, only persons authorized by the state constitution or a statute can make a contract binding on a state . . . ." 72 Am Jur 2d, States, Territories, and Dependencies, § 71, p 457. Here the delegation of authority to amend a gambling compact was conferred by a resolution, a nonstatutory means. The nonstatutory nature of a resolution fails the *Roxborough* requirement that a valid delegation of legislative authority to the executive branch of government must be expressed in the Michigan Constitution or by means of a statute.

Moreover, in *McCartney v Attorney General*, 231 Mich App 722, 726-728; 587 NW2d 824 (1998), citing *Tiger Stadium Fan Club, Inc v Governor*, 217 Mich App 439; 553 NW2d 7 (1996), this Court expressed careful recognition that although the Governor had the authority to negotiate and execute gambling compacts, the actions were subject to legislative approval. The Court concluded that the Governor did not act ultra vires in negotiating the compacts, but clearly stated that such gubernatorial authority was limited in nature:

> We emphasize that the Governor has executive power, Const 1963, art 5, § 1, and the power to suggest legislation, Const 1963, art 5, § 17. We also emphasize that there is no constitutional impediment to the Governor's negotiating with an Indian tribe where the product of his negotiations has no effect *without legislative approval*. [*McCartney, supra* at 729 (emphasis added).]

The expansion of tribal and nontribal gambling in Michigan and throughout the United States engenders a wide range of opinions. Nevertheless, the rule of law in Michigan has been enunciated in *Taxpayers*, in which our Supreme Court (as discussed in part I[D] of this opinion) held that the Governor may contract with a tribe to establish the ground rules pertaining to casino gambling. These ground rules, set forth in the contract, must be presented to the Legislature for approval, at the very least by legislative resolution. Here, no party has identified any statutory or constitutional authorization for the Governor to enter into compacts or amendments to compacts that are not subject to legislative approval. Thus, while the Supreme Court in *Taxpayers* held that the Governor could negotiate the gambling compacts subject to legislative approval by resolution, we conclude that the Governor does not have unbridled authority to amend a compact.

Absent a statutory delegation of authority by the Legislature to the Governor to amend a gambling compact, and being mindful of the constitutional prohibition that forbids the executive branch from assuming duties of the legislative branch unless expressly provided for in the Michigan Constitution, any amendment to a gambling compact must be presented to the Legislature for approval, at the very least by legislative resolution.[7]

The cases cited by Judge Borrello in his eloquent and well-reasoned dissent and referred to by the state and the tribe in their briefs are not applicable and are not dispositive of the issues before this Court. All the cases referenced by the parties have the embedded premise of a statutory or constitutional delegation of authority to the Governor. There was no valid

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[7] We decline to decide the specific question whether, if in 1998 the Legislature had approved the four gambling compacts by bill, in the form of a statute and not by a mere resolution, the Legislature would have properly delegated to the Governor the power to amend a compact without subsequent legislative approval. See also Justice Markman's view in his dissenting opinion in *Taxpayers*, stating, "The legislature may not, either by resolution or by bill, delegate to the executive branch a broad and undefined power to amend legislation." *Taxpayers, supra* at 471 Mich 407.

delegation of authority to amend gambling compacts in this case. Here, there was no statute or constitutional provision that gave the Governor the authority to unilaterally amend the compacts. This factor makes the cases on which the parties and the dissent rely readily distinguishable. In *Sutherland*, the Governor was to issue a certificate when satisfied that a canal and harbor had been constructed in a proper manner, a task that was assigned to the Governor by statute. The plaintiff sought a writ of mandamus to compel the Governor to issue the certificate. The Governor had refused, believing that the spirit of the law was undermined by the placement of the canal and harbor on private property. In refusing to grant mandamus to compel the Governor to issue the certificate, the Court stated:

> The apportionment of power, authority and duty to the governor, is either made by the people in the constitution, or by the Legislature in making laws under it; and the courts, when the apportionment has been made, would be presumptuous if they should assume to declare that a particular duty assigned to the governor is not essentially executive, but is of such inferior grade and importance as properly to pertain to some inferior office, and consequently, for the purposes of their jurisdiction, the courts may treat it precisely as if an inferior officer had been required to perform it. To do this would be not only to question the wisdom of the constitution or the law, but also to assert a right to make the governor the passive instrument of the judiciary in executing its mandates within the sphere of his own duties. Were the courts to go so far, they would break away from those checks and balances of government which were meant to be checks of co-operation, and not of antagonism or mastery, and would concentrate in their own hands something at least of the power which the people, either directly or by the action of their representatives, decided to entrust to the other departments of the government. [*Sutherland, supra* at 328-329.]

Here, unlike the executive power at issue in *Sutherland*, the power to amend the compacts was not granted by the Constitution or by law. It was contained in a gambling compact that was approved by the Legislature by means of a resolution, but not by means of a bill. While the Court was loath to interfere with an executive power held by the Governor in *Sutherland*, an essential element of this restraint was that the power had been properly given to the Governor. Thus, *Sutherland* is only applicable if the amendment power was delegated properly by the legislative branch to the executive branch. *Sutherland* does not say that every delegation of authority is constitutional or even discuss the parameters of a lawful delegation of authority, but merely addresses whether mandamus is appropriate to compel the Governor to act where statutory authority to act was conferred.

Straus v Governor, 459 Mich 526; 592 NW2d 53 (1999), is similarly unhelpful to the state and the tribe. *Straus* dealt with an executive order transferring duties from the State Board of Education to the Superintendent of Public Instruction. The authority to take this action was granted by Const 1963, art 5, § 2, which authorizes the Governor to "make changes in the organization of the executive branch or in the assignment of functions among its units," subject to legislative disapproval of an executive order by resolution. Thus, *Straus* addresses deference to the Governor in the exercise of authority conferred by statute or by the Constitution.

The dissent cites *Flint City Council v Michigan*, 253 Mich App 378; 655 NW2d 604 (2002), in support of the contention that it is not the function of this Court to invalidate a decision made by the Legislature after the Legislature elected to grant the Governor broad amendment powers and validly did so. In *Flint City Council*, this Court held that because the Legislature did not impose procedural requirements for the conduct of a hearing to be conducted by the Governor or the Governor's designee under MCL 141.1215(2), it "inten[ded] to leave the scope of review to the Governor's discretion." *Flint City Council, supra* at 391. However, *Flint City Council* involved power conferred by statute, whereas here the Legislature never validly conferred the power at issue to the Governor.

The state cites *Judicial Attorneys Ass'n v Michigan*, 459 Mich 291; 586 NW2d 894 (1998), for the proposition that there can be an overlapping of powers between the separate branches of government. However, this presumes that the overlapping powers have been properly delegated. In *Judicial Attorneys*, the Legislature, through statute, provided a new employer for certain employees of the Wayne Circuit Court and the Recorder's Court. The question was whether this action impinged on the power of the judiciary. It was recognized that the judiciary's authority to manage the courts was constitutionally based:

> That the management of the employees of the judicial branch falls within the constitutional authority and responsibility of the judicial branch is well established. The power of each branch of government within its separate sphere necessarily includes managerial administrative authority to carry out its operations. [*Id.* at 297.]

The Court noted that "the separation of powers doctrine does not require so strict a separation as to provide no overlap of responsibilities and powers" and that "[i]f the grant of authority to one branch is limited and specific and does not create encroachment or aggrandizement of one branch at the expense of the other, a sharing of power may be constitutionally permissible." *Id.* at 296-297. However, it held that the Legislature had overstepped the line and that the statute it enacted had violated the separation of powers doctrine. Significantly, the judicial power being discussed was a power that was conferred by the Constitution. *Judicial Attorneys* in no way suggests that there can be an overlapping of powers where, as here, the power at issue was never conferred by the Constitution or by statute.

VI. CONCLUSION

We conclude that under the facts of this case, Const 1963, art 3, § 2 was violated. We reinstate the decision of the circuit court relative to this issue. We decline to address plaintiffs' additional arguments.

Owens, P.J., concurred.

/s/ Bill Schuette
/s/ Donald S. Owens