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Proposed Draft of an Act for Nomination by Petition and Nonpartisan Primary Election of Candidates for the Office of Supreme Court Justice in Michigan

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PROPOSED DRAFT OF AN ACT FOR NOMINATION BY
PETITION AND NONPARTISAN PRIMARY ELECTION
OF CANDIDATES FOR THE OFFICE OF SUPREME
COURT JUSTICE IN MICHIGAN

INTRODUCTION

Michigan currently elects the justices of its Supreme Court in a non-partisan election, as required by the Constitution of 1963. The language of the Constitution¹ provides that Supreme Court candidates shall be nominated as provided by law. Under present Michigan law, such candidates are nominated by each political party at its Fall state convention.²

In April, 1967, the Notre Dame Law School Legislative Bureau prepared a draft of legislation, on request, for Michigan Supreme Court Justice Thomas Brennan. The purpose of this draft is to bring the nomination procedure into line with the election procedure by providing for a truly "non-partisan" method of selecting candidates for the position of Supreme Court Justice. By requiring a nominating petition similar to that used for the appellate and circuit court candidates,³ it would no longer be necessary for a candidate to identify himself with a political party in order to win endorsement at the party convention. It seems anomalous that a judge who has served independently at the circuit or appellate bench be required to submit himself for party approval in order to run for the highest judicial office in a state, but such is the state of Michigan law at present.

Justice Brennan took the 1967 Legislative Bureau draft to the State Bar of Michigan where he was then serving on the Judicial Selection and Tenure Committee. The Committee approved it and referred it to the Commissioners of the Bar. There the proposed act was tabled and no further action was ever taken by the organized Bar.

Justice Brennan then persuaded a member of the Michigan State Senate to introduce legislation to create the non-partisan supreme court primary. The State Senate re-worked the Notre Dame draft, and actually passed a bill, though in somewhat altered form.

The bill died in the House. The Michigan Democrats had two outstanding candidates for the court (both former governors) and it was the wrong time to seek their support, according to Justice Brennan.

1. Mich. Const., Art. VI, sec. 2: "The supreme court shall consist of seven justices elected at non-partisan elections as provided by law. . . . Nominations for justices of the supreme court shall be in the manner prescribed by law. . . ."

2. M.C.L.A. §168.392 (1967).

3. The nominating petition for Michigan circuit court candidates requires a minimum of 1% of the signatures cast (in the appropriate judicial district) for secretary of state at the last preceding election, but not more than 4% of such signatures, M.C.L.A. 168.413. The nominating petition for a Court of Appeals candidate requires at least ½ of 1%, but not more than 2% of the votes cast (in the appropriate appellate district) in such an election. M.C.L.A. §168.409(b)(1) (1967) as amended M.C.L.A. §168.409(b)(1) (cum supp 1971).

What follows is the full text and a sectional analysis of the Notre Dame Legislative Bureau's proposed draft for an act to create a non-partisan primary election of candidates for the office of Supreme Court Justice in Michigan. Since 1966, when the Legislative Bureau first began its work on this project, two incumbent members of the Michigan Supreme Court have been defeated in partisan-nominated election contests.

PROPOSED DRAFT

AN ACT

To provide for the nomination by petition and nonpartisan primary election of candidates for the office of justice of the supreme court of Michigan; and to make such nomination by petition and primary election procedure correspond, as far as practicable, to the nomination by petition and primary election procedure of candidates for the office of judge of the court of appeals and for the office of judge of the circuit court, and to repeal any inconsistent acts in conflict therewith.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

SECTION ONE.

As used in this act:

- (a) "Primary" means a general non-partisan primary election which shall be held in every county of this state on the Tuesday succeeding the first Monday in August prior to the general election, at which time the electors may nominate nonpartisan candidates for each office.
- (b) "Office" means each office of justice of the supreme court.
- (c) "Elector" means any qualified and registered elector of this state.
- (d) "Justice" means justice of the supreme court of the State of Michigan.
- (e) "Secretary" means secretary of state of the State of Michigan.
- (f) "Number" means the number which the secretary assigns to each office so that identification may be made for election purposes.
- (g) "Within the filing deadline" means:
 - (1) that the incumbent shall have filed his affidavit with the secretary not less than one-hundred and eighty (180) days prior to the expiration of his term, or
 - (2) that any other candidate for office shall have filed his nominating petition with the secretary by 4:00 p.m., eastern standard time, on the seventh Tuesday preceding the primary.
- (h) "Nominating petition" means petitions signed by electors residing within this state which equal not less than $\frac{1}{2}$ of 1% nor more than 2% of the votes cast for the secretary of state at the last preceding general election. In addition, such petitions must be signed by at least 100 electors in each of at least 20 counties. No more than 25% of the

minimum number of signatures may be by electors of any one county. This petition shall be in the form as prescribed in section 544a of the Michigan election law as added by Number 23 of the Public Acts of 1960, and amended by Sections 544a and 544c of Number 312 of the Public Acts of 1965.

ALTERNATIVE (h)

"Nominating petition" means petitions signed by electors in each of the three appellate court districts. Any petitioning candidate shall obtain from each appellate court district nominating petitions signed by electors residing therein which equal not less than $\frac{1}{2}$ of 1% nor more than 2% of the votes cast in such appellate court district for secretary of state at the last preceding general election. This petition shall be in the form as prescribed in section 544a of the Michigan election law as added by Number 23 of the Public Acts of 1960, and amended by sections 544a and 544c of Number 312 of the Public Acts of 1965.

(i) "Affidavit" means affidavit of candidacy which an incumbent justice may use to express his intention to run for reelection as a justice of the supreme court by filing such with the secretary of state not less than 180 days prior to the expiration of his term of office. The affidavit shall contain statements that the affiant is an incumbent supreme court justice, that he is domiciled within the state, that he will not have attained the age of 70 prior to the date of election and a declaration that he is a candidate for election to the office of supreme court justice.

(j) "General election" means the general November election.

SECTION TWO.

(a) In any primary or general election at which any justice is to be nominated or elected, it shall be deemed that there is one office to be filled for each justice to be elected.

(b) No later than one-hundred and eighty (180) days prior to the primary, the secretary shall designate each such office by a number which shall:

- (1) be used by each candidate in his nominating petition or affidavit to designate the office he is seeking;
- (2) remain the same for all the purposes of both the primary and general election;
- (3) be used on any nominating petition, nomination or election papers of any kind, or any certificate relating to nomination or election;
- (4) have no significance after the general election.

SECTION THREE.

(a) Any candidate who submits his nominating petition for office within the filing deadline shall have his name printed on the official primary ballot after certification by the secretary that such petition meets the requirements of this act.

(b) Any elected incumbent justice who files his affidavit within the filing deadline shall have his name printed directly on the general election ballot.

SECTION FOUR.

No primary shall be held for an office when (a) there are two or less candidates seeking such office, whether by nominating petition or by affidavit, at the later filing deadline, or (b) a subsequent withdrawal of candidacy reduces the number of candidates for the office to two or less.

If either (a) or (b) occurs, the secretary shall certify to the state board of canvassers the name of any remaining candidate and such candidate shall be deemed a nominee for such office. Such a candidate's name shall be placed directly on the general ballot and may be omitted from the primary ballot.

SECTION FIVE.

Upon the filing of a nominating petition by or in behalf of a candidate for office, such candidate may not withdraw his candidacy unless a written notice of withdrawal is served upon the secretary or his duly authorized agent (a) at least three days prior to his filing deadline, or (b) if such a day is a holiday, Saturday or Sunday, by 4:00 p.m., eastern standard time, on the next regular working day.

SECTION SIX.

Based upon the primary returns from the various county boards of canvassers and election precincts, as reported to the state board or as determined by such board on recount, the following two persons shall be declared as nominees for each office at the next general election:

- (a) if an incumbent justice is seeking reelection, such incumbent and the person receiving the largest number of votes for nomination, or
- (b) if no incumbent justice is seeking reelection, the two persons receiving the largest number of votes for nomination.

SECTION SEVEN.

All justices shall be elected at the general election as provided by law.

SECTION EIGHT.

Sections 392, 393, 394 and 395 of Act No. 116 of the Public Acts of 1954, sections 392, 393, 394 and 395 as last amended by Act No. 61 of the Public Acts of 1963, Second Extra Session, being sections 168.392, 168.393, 168.394 and 168.395 of the Compiled Laws of 1948, and section 392a of Act No. 61 of the Public Acts of 1963, Second Extra Session, are hereby specifically repealed as are all other acts or parts thereof in conflict with or inconsistent with this act.

SECTION NINE.

If any portion of this act or the application thereof to any person or circumstances shall be found to be invalid by a court, such invalidity shall not affect the remaining portions or applications of the act which can be given effect without the invalid portion or application, provided such remaining portions are not determined by the court to be inoperable, and to this end acts are declared to be severable.

SECTION TEN.

This act is ordered to take immediate effect.

SECTION-BY-SECTION ANALYSIS**SECTION ONE.**

Paragraph (a) is intended to make the primary election procedure conform substantially to the requirements for the primaries of the Court of Appeals (M.C.L.A. §168.409a) and the Circuit Courts (M.C.L.A. §168.412).

Paragraphs (b) through (e) are self-explanatory.

Paragraph (f) requires a candidate to declare the particular office he is seeking. In addition, the number should clarify for the elector the number of justices to be elected and the names of opposing candidates. See comment to Section Two below.

Paragraph (g). Subparagraph (1) is adapted from the language of the State Constitution. See comment to Paragraph (i), below. Subparagraph (2) sets a filing deadline for Supreme Court primaries identical to that for the Court of Appeals (M.C.L.A. §168.409b) and Circuit Courts (M.C.L.A. §168.413).

It should be noted regarding subparagraph (2) that an incumbent justice need not file a nominating petition. Under Article VI, Section 2 of the 1963 Michigan Constitution the incumbent need only file an affidavit of candidacy within the prescribed period. If a vacancy is filled, the person appointed may not seek election (M.C.L.A. §168.404), so the question whether the appointee qualifies as an "incumbent" (so that he may use the affidavit) will not arise.

There are two reasons for having two separate deadlines: first, it appears desirable that the deadline for the nominating petition conform to that of the Court of Appeals and the Circuit Court candidates, and secondly, the affidavit deadline conforms to the language of the 1963 Constitution.

Since the primary will occur sometime between August 2nd (at the earliest) and August 8th (at the latest), the calendar date for the "seventh preceding Tuesday" will be between June 14th and June 20th. The one hundred and eightieth day prior to the expiration of the supreme court justice's term (January 1st) would be July 5th. Such is the closing day for an incumbent to file his affidavit of candidacy.

Paragraph (h) sets the signature requirements for nominating petitions. See Tables I and III for the minimum requirements of Arizona,

South Dakota and Wisconsin. Because of the difficulty in determining a reasonable minimum number for these petitions, the Bureau has provided an alternative method for consideration.

In determining the minimum percentage requirement of signatures on the nominating petition, the Bureau has attempted to bring this number in line with the requirements for a candidate for the office of appellate judge, circuit judge, U.S. Senator or U.S. Representative, each of whom must circulate a nominating petition. Table II illustrates these figures. The minimum requirement is intended to be sufficiently large to discourage those who are not serious contenders, while at the same time not so large as to make filing an impossible or overly expensive burden.

Paragraph (h) is nearly identical to the language of M.C.L.A. §168.93, which sets the requirements for a U.S. Senate candidate. There, however, as explained in Table II, the number of votes cast for the secretary *by his party* governs rather than the total state-wide votes. Using the total votes cast for secretary of state in 1964 (3,073,021), under this paragraph, a candidate would be required to obtain 15,366 signatures and at least 2,000 of these would be spread throughout 20 of Michigan's 83 counties. The limit on signatures coming from a larger county would fluctuate at about 2,000. Thus, the desired state-wide "exposure" would likely result.

The ALTERNATIVE paragraph would not change the total number of necessary signatures. It would merely require that the candidate acquire an approximately equal number of signatures from each of the three appellate court districts. See Table II, which shows that the votes from each district are comparable. Since the First District is composed solely of Wayne County, the candidate would be able to get approximately 5,000 signatures (one-third of the needed amount), yet he would be required to circulate in a substantially large number of the 66 counties that make up the Third District in order to obtain another one-third of the required signatures. Once again, the requirement is aimed at state-wide "exposure" to the voting public.

In either Paragraph (h) or its ALTERNATIVE, by comparison with the requirements for appellate court candidates (Table II), it can be seen that the Supreme Court candidate is required to obtain 3 signatures for every 2 that a Court of Appeals candidate must obtain. This is as it should be. Note that this figure could be somewhat less than the number a U.S. Senate candidate must obtain, however, the latter has the advantage of political assistance in circulating petitions. It was felt by the Bureau that such political assistance should not be available to a candidate seeking the independent office of supreme court justice.

The Bureau has attempted to strike a balance that is both reasonable and realistic. It is about half-way between Wisconsin's minimum of approximately 33,000 signatures (Table III) and the mere declaration of candidacy used by six of the foreign jurisdictions (see Table I). Of course, if the legislature ascertains that the minimum requirement is

either too high or too low, a mere change in the percentage base will produce the legislature's desired result.

Paragraph (i) merely re-enacts M.S.A. §1.1392(1) by setting forth the Constitutional privilege of an incumbent to merely declare his candidacy within the prescribed period in order to have his name printed on the general election ballot. Under present Michigan law, the incumbent need not acquire the party nomination and, under the proposed draft, he will continue to be excused from the primary race.

Paragraph (j) is self-explanatory. Refer to M.C.L.A. §168.5, which is part of the Michigan election law.

SECTION TWO.

The substance of this section on numbering the offices conforms to the practices of most of the other states which elect their judges on a non-partisan ballot. See Arizona, Revised Statutes, Section 16-725.

SECTION THREE.

Paragraph (a) provides the method for the printing of the candidate's name on the primary ballot. This is modeled after the provision for the Court of Appeals (M.C.L.A. §168.409b) and the Circuit Court (M.C.L.A. §168.413).

Paragraph (b) re-enacts the provision in M.C.L.A. §168.393 for the placing of the name of an elected incumbent on the general election ballot.

SECTION FOUR.

The purpose of the primary is to provide a means for narrowing the elector's choice at the general election to the two leading candidates for each office. Thus, it is clear that no primary is necessary if there are two or less candidates at the later filing deadline. (The word "later" is used to prevent the names of three candidates from being placed directly on the general election ballot. Thus, in the absence of the word, two candidates could conceivably file prior to the deadline on the seventh Tuesday preceding the primary and then claim that, since there had been two or less candidates at the deadline, their names should be placed directly on the general election ballot, although an incumbent might later properly file his affidavit after the seventh Tuesday). The provisions which have a similar effect in relation to the Court of Appeals and Circuit Court are M.C.L.A. §168.409b and §168.412 respectively.

SECTION FIVE.

This section is identical in substance to the withdrawal deadline for both the Court of Appeals (M.C.L.A. §168.409b) and Circuit Court (M.C.L.A. §168.414) candidates. The Supreme Court candidates currently operate under similar deadline imposed by M.C.L.A. §168.394, which this section would replace. It should be noted that the deadline falls at a different date, depending on whether the candidate is an in-

cumbent who has filed an affidavit or a person who has filed a nominating petition.

SECTION SIX.

Once again, language has been taken from provisions for the Court of Appeals and Circuit Court candidates (M.C.L.A. §168.409(b) and §168.415). The language has been revised, but there is no change in substance.

SECTION SEVEN.

This section merely repeats the language of Article VI, Section 2 of the 1963 Constitution which is used in all other Michigan judicial acts.

SECTION EIGHT.

The specific repealer refers to the 1954 Act which created the convention system of nomination. Amendments in 1963 did not appreciably alter the 1954 act, but must be specifically repealed in order to effectively change the present law. The "conflicts" repealer is merely a protective device in the event that an act in conflict with the proposed draft has escaped scrutiny.

SECTION NINE.

Section Nine is a standard severability clause.

SECTION TEN.

This section is self-explanatory, although subject to Michigan legislative concurrence requirement.

Under present Michigan law, a Supreme Court candidate may have his name printed on the non-partisan judicial ballot only if he either (a) can obtain one of the two nominations by a political party, or (b) files an affidavit of candidacy as an elected incumbent justice of the Court. Such a system not only hampers and discourages a qualified "independent" from seeking office, but will also eventually narrow the composition of the Court to the rare incumbent justice who is under the age of seventy⁴ and to those persons who manage to survive the political processes of a party convention.

The law of other states is set out in Table I, "Comparison of Foreign Jurisdictions Which Provide for Non-Partisan Election of the Highest State Judicial Office." This table shows the current nomination and election procedure in Michigan and other states for comparison purposes, and is used in formulating the percentage standard by which the nominating petition would be determined under the proposed act.

Table I shows the nomination requirement for the other states⁵ which

4. Mich. Const. Art. VI, sec. 19 provides that ". . . no person shall be elected or appointed to a judicial office after reaching the age of 70 years." Similarly, a candidate must be admitted to the state bar, M.C.L.A. 168.391, and must file a statement to this effect in his affidavit of candidacy, M.C.L.A. 168.392(a).

5. See *The Book of the States*, 124-125 (1970).

provide for non-partisan election of the court of last resort. Seven states provide for a minimum of signatures, ranging from a low of ten (Nevada) to a high of approximately one-hundred thousand (Ohio; see Table III, "Number of Votes Cast for Governor in General Election of Foreign Jurisdictions). Six states do not require a nominating petition, but simply allow each candidate to merely declare his candidacy by affidavit. Primary elections are held in all of the states, and although some of these state statutes contain language requiring that there be two or more seeking one office, it is implied that no state would hold a primary when there is an insufficient number of candidates to warrant one. All of these states, with the exception of Ohio, conduct the primary on a non-partisan basis.

Table II, "Votes Cast for Secretary of State in 1964 Michigan General Election as Determinant of Signature Requirements for Nominating Petitions," makes a comparison of the nominating petition requirements for four other offices in Michigan: Judge of the Court of Appeals, Circuit Judge, United States Senator, and United States Representative. Each of these candidates must obtain a minimum number of signatures in his petition determined by the number of votes cast for Secretary of State. It is felt that this compilation will aid in setting the similar requirement for Supreme Court Justice. All figures in Table II are based on the 1964 General Election, except for the 1966 figures inserted for United States Senator. Congressional district votes were chosen at random.

Table III converts the percentage base of Arizona, South Dakota, and Ohio into the signature requirements, for comparison purposes.

TABLE 1
COMPARISON OF FOREIGN JURISDICTIONS WHICH PROVIDE FOR NON-
PARTISAN ELECTION FOR THE HIGHEST STATE JUDICIAL OFFICE

STATE (Statutory reference)	Nominating Petition	Requirement for Minimum Number of Signatures on Petition	Is Primary Election Held?	Partisan or Non-Partisan
Arizona (A.R.S. 16— 301 et seq.)	Yes	Based on last elec- tion for governor; more than 1% but less than 10% of votes cast; implica- tion that signers limited to candidate's party.	Yes	Non-Partisan
Idaho (Id. Stat. 34— 701 et seq.)	Yes	200 electors of the state.	Yes	Non-Partisan
Minnesota (M.S.A. 202.04)	No	None; mere declara- tion by affidavit.	Yes, if more than two seek office	Non-Partisan
Montana (R.C.M. 23— 4501 et seq.)	No	None; mere declara- tion by affidavit.	Yes	Non-Partisan
Nevada (N.R.S. 293.180)	Yes	10 registered voters.	Yes	Non-Partisan
North Dakota (N.D. Cent. Code 16-04-02)	Yes	300 legal voters.	Yes	Non-Partisan
Ohio (Ohio R. Code 3513.05)	(1) No (2) Yes	(1) None; mere decla- ration and payment of filing fee for par- ty nominees; (2) 4% of electors for governor or president in last pre- ceding election for independent candi- dates.	Yes	Partisan
Oregon (O.R.S. 249.000 et seq.)	Yes	Based on last presi- dential election, 2% of votes cast or 1000 whichever is less	Yes, if more than two seek office	Non-Partisan
South Dakota (C.L. 12-9-1)	Yes	More than 1% but less than 5% of votes cast at last gubernatorial election.	Yes, if more than two seek office	Non-Partisan
Utah (U.C.A. 20— 1-7.7)	No	None; mere declara- tion by affidavit.	Yes, if more than two seek election	Non-Partisan
Washington (W.S.A. 29. 21.020)	No	None; mere declara- tion by affidavit.	Yes	Non-Partisan
Wisconsin (W.S.A. 8.10)	Yes	More than 200 but less than 400 signa- tures of electors.	Yes	Non-Partisan
Wyoming (22-118.172)	No	None; mere declara- tion by affidavit.	Yes	Non-Partisan

TABLE II⁷

VOTES CAST FOR SECRETARY OF STATE IN 1964 MICHIGAN GENERAL ELECTION AS DETERMINANT OF SIGNATURE REQUIREMENTS FOR NOMINATING PETITIONS

COURT OF APPEALS CANDIDATE:

Appellate Court District	County	Votes Cast in District	Percentage Base	Signatures Required			
First	Wayne	1,032,655	1%	10,327			
	Genesee						
	Hillsdale						
	Huron						
	Ingham						
	Jackson						
	Lapeer						
	Lenawee						
	Livingston						
	Macomb						
Second	Monroe	1,012,459	1%	10,125			
	Oakland						
	St. Clair						
	Sanilac						
	Shiawassee						
	Tuscola						
	Washtenaw						
	Balance of Counties, which total sixty-six				1,027,907	1%	10,280

CIRCUIT COURT CANDIDATE:

Circuit Court District	County	Votes Cast in District	Percentage Base	Signatures Required
6th	Oakland	289,184	1%	2,892
9th	Kalamazoo	65,759	1%	658
16th	Macomb	169,003	1%	1,691
17th	Kent	149,647	1%	1,497
22nd	Washtenaw	65,883	1%	659
25th	Delta			
	Marquette	33,369	1%	334
29th	Clinton			
	Gratiot	26,827	1%	269
37th	Calhoun	50,825	1%	509

7. Source: State of Michigan, OFFICIAL CANVASS OF VOTES (Compiled by James M. Hare, Secretary of State), 1965; Note that Table II has been prepared by use of information contained in the following pages of the Secretary's report, pp. 7-11, 56,57.

TABLE II

CANDIDATE FOR UNITED STATES SENATOR:⁸

Party	Election Year	Votes Cast for Party Secretarial Candidate	Percentage Base	Signatures Required
Democrat	1964	1,933,584	1%	19,336
Democrat	1966	1,058,565*	1%	10,586
Republican	1964	1,130,267	1%	11,303
Republican	1966	812,341*	1%	8,124

CANDIDATE FOR REPRESENTATIVE IN UNITED STATES CONGRESS:⁹

Congressional District	Party	Votes Cast for Party Secretarial Candidate	Percentage Base	Signatures Required
4th	Democrat	80,975	1%	810
	Republican	73,723	1%	738
5th	Democrat	86,492	1%	865
	Republican	78,474	1%	785
7th	Democrat	103,127	1%	1,032
	Republican	54,721	1%	548
8th	Democrat	83,950	1%	840
	Republican	70,725	1%	708

TABLE III

NUMBER OF VOTES CAST FOR GOVERNOR IN GENERAL ELECTION OF FOREIGN JURISDICTIONS¹⁰

State	Election Year	Total Votes Cast	Percentage Base	Number of Signatures Required on Petition
Arizona	1966	483,998	1%	4,840
South Dakota	1968	276,906	1%	2,769
Ohio	1966	2,887,331	4%	115,493

* Unofficial returns, based on Associated Press release as published in *The Niles (Michigan) Daily Star*, November 9, 1966, p. 8. The lesser total in 1966, is attributable to the fact that this was an "off-year" (non-presidential) election.

8. M.S.A. §6.1093 requires a minimum number of signatures equal to 1% of the votes cast by his party for the secretary of state in the last preceding general election. This number must also include at least 100 electors from each of 20 counties and no more than 25% of the total number of signatures required may come from electors of one county.

9. M.S.A. §6.1133 requires a lesser amount than for the Senate aspirant because the 1% factor is based on the total votes cast for secretary in the congressional district for which the candidate is seeking office rather than on state-wide basis.

10. The Book of the States 42 (1970).