

Malerman, Melissa (MDOS)

From: SOS, Elections
Sent: Friday, January 22, 2016 9:47 AM
To: Malerman, Melissa (MDOS)
Subject: FW: 180-day statute - reformulated CBFM comment
Attachments: canvassers2.lt.pdf; mcHargue.pdf; pollock.pdf

From: Ellis Boal [<mailto:ellisboal@voyager.net>]
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Subject: 180-day statute - reformulated CBFM comment

Canvassers,

Attached please find a re-formulated comment of the Committee to Ban Fracking in Michigan on MCL 168,472a, the 180-day statute, and two attachments.

This will substitute for the comments I made to you in person for CBFM on January 14.

Please call or write if there is any question.

Thank you.

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January 21, 2016

Michigan Board of Canvassers
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Re: Re-formulated comments of
Committee to Ban Fracking in Michigan
regarding the "180-day statute," MCL 168.472a,
as applied to legislative initiatives

Dear Canvassers:

A week ago on January 14 I appeared at your meeting with follow-up comments to those sent you on January 8 by LuAnne Kozma, the director of the Committee to Ban Fracking in Michigan.

As mentioned then, CBFM is a grassroots committee with no paid staff. We collected 150,000 signatures for a legislative initiative last summer, out of 250,000+ needed.

My remarks made several points for which I did not cite sources. I have now reviewed the sources. They bring me to look further into the statutory history and re-formulate CBFM's position. I also want to underline the spectacle of the two experienced commenters who appeared together at the podium at the start on January 14, though their written presentations six days earlier are hopelessly contradictory.

Accordingly I withdraw my remarks of January 14 for CBFM and substitute the following. CBFM speaks here only on the issue whether and how the 180-day statute,

MCL 168.472a, can apply to legislative initiatives (also called statutory initiatives) under article 2 section 9 of the Michigan constitution.

This is the type of initiative CBFM is sponsoring. Historically it has been the least used of Michigan citizen lawmaking devices. By my count only 14 have attained ballot status since the state began allowing them in 1913. Just eight have succeeded: sale of colored oleomargarine, daylight savings time, returnable beverage containers, parole standards, utility increases, nuclear weapons, casino gaming, medical marijuana. Only the last two came in the 30 years since 1986, when our supreme court revived the then-dormant 180-day statute.

History

Michigan's 1908 constitution established initiative only for constitutional amendments. A vote of the people amended it in 1913 to include statutory initiatives. There was little change until 1941 when another amendment gave you power “to check the names appearing on petitions against the names of registered voters” (according to Judge Lesinski of the court of appeals in 1970, discussed below). The same year by PA 246 the legislature enacted our election law. In 1954 the election law was repealed and re-enacted as our present law by PA 116, except the 1954 act now requires you to prepare a 100-word statement of the purpose of measures which make the ballot.

This history is taken from two sources. One is Daniel S. McHargue, Michigan Constitutional Convention Series, “Direct Government in Michigan: Initiative, Referendum, Recall, Amendment, and Revision in the Michigan Constitution”, <http://babel.hathitrust.org/cgi/pt?id=mdp.39015071176187;view=1up;seq=3> , at pages 23-24.

The other is James K. Pollock, “The Initiative and Referendum in Michigan”, Michigan Governmental Studies No. 6 (1940), which can be found at <http://babel.hathitrust.org/cgi/pt?id=mdp.39015003763557;view=1up;seq=5> .

I referred to these sources just as “googlebooks” on January 14.

As is also discussed below, Judge Lesinski cited the McHargue piece three times in his history of article 2 section 9, discussed below, and the Pollock piece twice.

The 180-day statute, enacted in 1973, provides that petition signatures made more

than 180 days before the petition is filed are “rebuttably presumed” to be “stale and void.” But it specifies no method for rebutting the presumption.

The 1974 AG opinion

Within a year of enactment the attorney general held the statute unconstitutional, in OAG 4813. He reasoned separately as to statutory and constitutional initiatives.

As to article 2 section 9 which governs statutory initiatives he wrote:

This provision has been held to be self-executing. *Wolverine Golf Club v Secretary of State*, 384 Mich 461, 466; 185 NW2d 392 (1971). Although that provision concludes with language to the effect that the legislature should implement the provisions thereof, such language has been given a very limited construction by the Michigan Supreme Court, which held that this provision is merely:

“... a directive to the legislature to formulate the process by which initiative petitioned legislation shall reach the legislature or the electorate....”

The opinion in *Wolverine Golf Club* makes it easy to see the AG's point. The supreme court affirmed a decision of the court of appeals which had ordered you “forthwith” to accept initiatory petitions “for canvass” and immediate submission to the legislature, though the petitions violated the 10-day timing provision of MCL 168.472, enacted as part of the election law in 1941. The reason: MCL 168.472 was not a “constitutionally permissible implementation” of article 2 section 9.

In the court of appeals, opinions in the case had been fractured. See 24 Mich App 711 (1970). The two judges in the majority did not agree with each other, nor of course did the dissenting judge. Even so the supreme court took care to compliment the “carefully detailed” history of article 2 section 9, as analyzed separately by the two in the majority. “It would serve no good purpose to repeat [the histories] here,” the supreme court said.

The histories are each instructive in showing how the genesis and development of article 2 section 9 are quite different from those of article 12 section 2. Indeed the former section entered our constitution five years after the latter, which governs constitutional initiatives.

The detailed history examined by Judge Lesinski in the court of appeals made note of the purpose of the “constitutional” authority granted to you by vote of the people in 1941. The purpose, he said, was to grant authority “to check the names appearing on petitions against the names of registered voters” (24 Mich App at 721), the phrase I quoted above.

(Judge Lesinski also noted a Washington case, *Kiehl v Howell*, 77 Wash 651 (1914), which upheld a statute requiring signature collection to begin no more than 10 months before the election, on the ground that a 10-month limit allowed for greater certainty that signers were state residents on the date the petitions were “filed,” which date was four months before the election. In effect, *Kiehl* opted for “freshness,” about which more will be said below. But the case has no bearing here, being that Michigan allows signature collection years before an election. Lesinski's *Kiehl* discussion was not in the part of his opinion that detailed the history of article 2 section 9. No other judge on either court cited it.)

1986: *Consumers Power*

Faced with a threatening constitutional initiative in 1986, Consumers Power and others, represented by John Pirich, successfully attacked the AG opinion, but only as it applied to that type of initiative. See his letter to you of 8/7/86 (“Bell entered a declaratory judgment that [the 180-day statute] is constitutional *as applied* to petitions to propose a constitutional amendment”).

Language in the opinions of the court of appeals and supreme court (426 Mich 1 (1986)) confirm that they were not facial holdings. Both proceeded solely from the wording and history of article 12 section 2. Neither discussed article 2 section 9.

No court having overruled the AG opinion as to statutory initiatives, it continues to bind you as to that type. To be sure, in *Line v State*, 173 Mich App 720, 723 (1988), a statutory initiative case, the court of appeals stated:

The purpose of the presumption that signatures are stale and void after 180 days is to 'fulfill the constitutional directive of art 12, Sec. 2 that only the registered electors of this state may propose a constitutional amendment [or initiate legislation].' *Consumers Power, supra*, 426 Mich. at pp. 7-8....

But note the brackets, which the *Line* court itself used in its quote of *Consumers Power*. The bracketed words were not actually in *Consumers Power*.

In other words, *Line* did not itself hold that the 180-day statute applies to statutory initiatives. Rather it referred to them only as though they were comprehended by the holding of *Consumers Power*. But as seen above they were not. *Line* did not itself analyze the histories of article 2 section 9 spelled out in *Wolverine Golf Club*. It did not even cite article 2 section 9. It did not of its own strength overrule the AG's opinion as it applied to statutory initiatives.

You may not construe an incorrect quote that is in brackets as a precedential appellate holding that has overturned the AG opinion.

The reason citizens can make laws in Michigan

The rationale for citizen lawmaking was stated tellingly in *Hamilton v Secretary of State*, 227 Mich 111, 130 (1924). The case concerned a constitutional initiative. But CBFM is quite sure no one would disagree the following sentiment applies equally to both types of initiative:

The initiative found its birth in the fact that political parties repeatedly made promises to the electorate both in and out of their platforms to favor and pass certain legislation for which there was a popular demand. As soon as election was over their promises were forgotten, and no effort was made to redeem them. These promises were made so often and then forgotten that the electorate at last through sheer desperation took matters into its own hands and constructed a constitutional procedure by which it could effect changes in the Constitution and bring about desired legislation without the aid of the legislature. It was in this mood that the electorate gave birth to the constitutional provision under consideration. In view of this I am persuaded that it was not the intention of the electorate that the legislature should meddle in any way with the constitutional procedure to amend the State Constitution.

The process of canvassing

The word “canvass” is not defined in law, though the law uses it many times. At

page 9, Pollock, writing in 1940 said this of the process in Michigan, referring both to constitutional and statutory initiatives:

The mechanical procedure which is followed by the secretary of state and the various county clerks in receiving and filing petitions is routine. The petition is stamped 'filed' or 'received' and in due course is sent to the secretary of state. If frauds have been perpetrated in connection with the petitions, nothing is done unless some interested individuals or groups call the matter to the attention of the prosecutor, or bring some legal action. Most petitions are not checked, and the validity of signatures cannot effectively be called in question unless they are compared to the registration lists, and this is not required by the constitution. Consequently, a mere tabulation of the returns is all that is ordinarily done, and the filing officers have no authority to go behind the face of the petition. In such matters, which are entirely different from election contests, it is probably not necessary to have elaborate judicial action, for speed is necessary, and a final popular remedy for any fraud lies in the ballot box.

The only things the legislature changed about canvassing in 1941 after Pollock wrote were addition of requirements that (1) petition forms include a space for the signer to print his/her name (though per MCL 168.544c(2) it is not required that the signer actually fill the space), and (2) you check the names on petitions against the names of registered voters.

Lamentably, the 1941 changes did not result in an increase in the percentage of valid signatures, according to McHargue at page 26.

At page 21 McHargue admired Pollock as an “eminent scholar” whose study was “excellent.” Unless it is thought that Pollock was obliquely referring to statistical sampling in his observation that “most petitions are not checked,” neither he nor McHargue mention sampling anywhere as a permissible technique for canvassing. Instead, also on page 26, McHargue recounts the slow and costly process of signature checking, which up till the early 1950s at least, was done by local clerks.

Indeed neither the constitution nor the election law mention sampling either. As noted by LuAnne Kozma at page 2 of her letter, it is not clear when sampling began and became an accepted canvassing technique in Michigan.

But one change we do acknowledge from the days that Pollock (page 10) and McHargue (page 25) wrote, is the advent here of professional petition circulators, whom they disparage.

The US supreme court has a different view of professionals. *Meyer v Grant*, 486 US 414, 420-26 (1988), considered a Colorado statute prohibiting the use of professionals as “a limitation on political expression subject to exacting scrutiny” because the job of a circulator is “core political speech.” That is, the job is to persuade voters that a measure “is one deserving of the public scrutiny and debate that would attend its consideration by the whole electorate.” Without professionals, “whose qualifications for similar future assignments may well depend on a reputation for competence and integrity,” the court added that:

it makes it less likely that appellees will garner the number of signatures necessary to place the matter on the ballot, thus limiting their ability to make the matter the focus of statewide discussion.

Other than that, Pollock's observations – that petitioning and voting are entirely different, that speed is necessary, and that the “final popular remedy for any fraud lies in the ballot box” – ring true today.

We would only add this sensible observation of the court of appeals in *Jaffee v Allen*, 87 Mich App 281, 285 (1978):

It has long been recognized that handwriting similarity is so much a matter of opinion and so indefinite that generally it may not be acted upon in canvassing petitions. ... Thus, signatures appearing on petitions filed with the Secretary of State for initiative and referendum are presumed valid, and the burden is on the protestant to establish their invalidity by clear, convincing and competent evidence. In ... a case involving the sufficiency of signatures to petitions for the recall of the mayor of Hamtramck, the Court held that the city clerk was not to act as a handwriting expert. It is common knowledge that signatures change with age or illness. Penmanship when first registering is often different from a signature in later life. Handwriting hastily affixed to a petition at a shopping center or while standing on a street corner differs materially from handwriting leisurely affixed sitting at a desk.

“Freshness”

Supporting the 180-day statute, the Michigan Chamber of Commerce in its letter of January 8 argued for a “freshness” requirement – a showing that the “signatory is still

in support of the proposal.”

But the Lesinsky quote disposes of any requirement that you take account of freshness. Also dispositive is the 180-day statute itself which, inscrutably, allows signature collection 2 and 3 years before an election.

Finally as to freshness, according to *Consumers Power* at note 2, a different statute MCL 168.955 used to have a freshness requirement for recall petitions arising under article 2 section 8 of the constitution: “Any signatures obtained more than 90 days before the filing of such petition shall not be counted.” But the 90-day requirement was absolute. Unlike the 180-day statute (as described below) nothing about it was vague. In any case, by its terms article 2 section 8 is not self-executing: “Laws *shall* be enacted to provide for the recall...” The former MCL 168.955 has no bearing on the issues here.

Signature invalidity

There are several possible reasons you might consider a signature invalid including duplication, forgery, the signer was not registered when he or she signed, or the signature has facial problems such as a bad date or signing in the wrong county or jurisdiction. No one would argue with those.

But lack of freshness does not make a signature invalid, as explained above. Nor does non-compliance with the 1986 “two-timer” policy for the reasons stated by CBFM director Kozma in her letter.

That leaves the question of validity of a signature by a voter who dies or leaves the state between the dates of signing and canvassing. But that should not be an issue, because checking for such matters would detract from Pollock's points that voting and petition-signing are subject to entirely different standards, and that canvassing is to be speedy.

Void for vagueness

Without elaborating it in detail, the void-for-vagueness doctrine in the context of civil law is reviewed in *FCC v Fox Television Stations Inc*, 567 US 183 (2012) and *Michigan Department of Social Services v Emmanuel Baptist Preschool*, 434 Mich 380

(1990). The doctrine has particular force when the conduct sought to be regulated, as here, is “core political speech.”

Is the 180-day statute vague? Stunningly, the truth of that was brought home by the contradictory positions of the first two advocates before you on January 14, who appeared together, Gary Gordon speaking for the Michigan Chamber of Commerce, and John Pirich speaking for his firm.

These advocates, who have long battled before you representing institutional interests, could not agree on the meaning of “stale,” whether it even has a meaning, or whether your 1986 two-timer policy should remain in effect, even as they did agree that legislature should step in and clean up the mess it created:

Gordon, letter to canvassers, 1/8/2016, pages 2, 7: “Both the proposed change and the current [1986] policy miss the mark. ... 'Stale' means 'having lost freshness' ... Neither the existing policy and certainly not the proposed policy meet this test. ... The issues presented can be resolved by the Board deferring to the Legislature.”

Pirich, letter to canvassers, 1/8/2016, pages 1, 2: “We respectfully submit that the best course would therefore be for the Legislature to amend the statute.... [W]e do not know what the Legislature intended by the term 'stale.' ... [A]bsent a legislative amendment, the [1986] policy that has been in place for 30 years should remain.”

The *cri de coeur* for legislative deliverance was echoed in letters of the same date by CBFM's initiative opponents, Associated Petroleum Industries of Michigan and Michigan Oil and Gas Association.

Retroactivity of any new legislation

If you agree that the 1974 AG opinion controls statutory initiatives, or if you agree that it is impossible to comply with the demand of the 180-day statute because it is vague and incomprehensible, then the laws in effect before 1973 apply. When canvassing, no distinction may be made between signatures, just because they are young or old.

But suppose the legislature and governor do act, and suppose some new law

becomes effective during the collection period of an ongoing campaign. The new law could not apply retroactively to that campaign:

A petition must start out for signatures under a definite basis for determining the necessary number of signatures, and succeed or fail within the period such basis governs.

Hamilton v Deland, 221 Mich 541, 545 (1923).

Very truly yours,



Ellis Boal

Encl: Pollock, selected pages
McHargue, selected pages

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MICHIGAN CONSTITUTIONAL CONVENTION STUDIES

**DIRECT GOVERNMENT IN MICHIGAN:
INITIATIVE, REFERENDUM, RECALL,
AMENDMENT, AND REVISION IN THE
MICHIGAN CONSTITUTION**

By

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State of Michigan

September 1, 1961



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III

SOME DETAIL CONCERNING THE
DEVELOPMENT AND OPERATION
OF DIRECT GOVERNMENT IN
MICHIGAN. *Direct Legislation in General
History.

The Michigan constitutions of 1835 and 1850 were popularly ratified, provided for the submission of amendments to a popular vote and allowed the legislature to ask the people whether they wished to call a constitutional convention. Between 1850 and 1908 some 85 propositions, most of them proposed amendments to the constitution, were submitted to the voters.³⁵ Hence, the idea of the referendum was far from being a novel one when a constitutional convention was called in 1907.

More attention was paid to the devices of direct legislation than any other question before the convention.³⁶ However, only a brief sketch of the prior efforts to secure direct legislation and the contest at the convention can be given here.³⁷

The earliest advocates of extensive direct government in Michigan were the various "third party" movements of the 1890's, which were ultimately absorbed by the Democratic party in 1902. However, to no one political party or political group goes the credit or blame for securing the adoption of the provisions for direct legislation in the Michigan constitution of 1909.

Among the groups whose dissatisfaction with the state legislature was reflected in their advocacy

of the initiative and referendum were the National Greenback Labor party, the Patrons of Industry and the Industrial party. These urban elements joined to form the People's party. By 1898, the Silver Republicans effected an alliance with the Democrats and the growing Populist party to form the Democratic-People's-Union Silver party. By 1901, however, the Democrats had returned to their old party name, having practically absorbed the Populist and Silver Republican parties.³⁸

One very real struggle for power was between the rural interests (mainly Republican) and the urban interests (mainly Democratic). The rural voters feared that their control over the legislature would be undermined by the adoption of provisions for direct legislation because of the increasing

* This portion (Part III) of the study was undertaken initially as one of the author's duties while a part-time Research Associate, Institute of Public Administration, University of Michigan (1950-52). It has been updated but not in detail because of space limits. Necessarily the picture of the operation of the initiative and referendum in Michigan has been drawn in bold strokes which omit or oversimplify much of significance. More detail, for many aspects prior to 1941, is available in the excellent study by James K. Pollock. The author wishes to acknowledge his indebtedness to that eminent scholar. To the members of his class in American State Government, who undertook difficult special assignments on the subject of direct government in Michigan, grateful acknowledgement is likewise extended.

number of voters locating in the urban areas. On the other hand, many of the farm granges favored direct legislation as a means of subverting the influence over the legislature exercised by the railroad and other corporations.

At the Constitutional Convention of 1907, however, regular party lines were not firm.³⁹ The radicals (both Republicans and Democrats from urban areas and some disgruntled agrarians) wished to establish the Oregon plan of direct government. The conservatives, primarily rural Republicans, who feared the growth of city voter influence, and attorneys, who sought to maintain strong corporate influence over the legislature, desired to exclude any provisions for initiative and referendum. The moderate faction, which held the balance of power, did not favor adoption of the Oregon plan but felt that the constitution should include limited provisions for the initiative and referendum.

Feelings ran high on the part of representatives of both extremes. Opponents of direct legislation claimed it was socialistic, unconstitutional, demagogic, dangerous and foreign. Proponents claimed it was democratic, would reduce bossism and undue influence by large corporations and charged that their opponents did not trust the people.

The convention finally decided, by the narrow margin of 3 votes, that amendments to the constitution (no general legislation) might be proposed by petitions signed by qualified voters in numbers not less than 20% of those who had voted for Secretary of State in the last election. The

petitions had to be verified by registration or election officials. Once these steps had been taken, the proposed amendments would be placed upon the ballot, unless the legislature in joint session vetoed them by a simple majority vote. The legislature was also free to place alternative measures on the ballot. In addition, amendments were to go into effect only if they received an affirmative vote equal to one-third of the vote cast at the election.

Direct Government.

In 1908, the people of Michigan accepted the work of the convention and the new constitution became operative in 1909. It is clear that no party was responsible for the enactment of the provision for popularly initiated constitutional amendments. It had its roots in the early third party movements and later received the approval of most Democrats and many Republicans. The main controversy was between rural and urban interests and conservative and radical economic interests. Party lines were largely suspended because real interests (as distinguished from nominal, partisan interests) varied among the parties on the issue of direct government.

The legislative veto and the high percentage required for petition qualification rendered the provision for popularly initiated constitutional amendments ineffective.⁴⁰ It was never used. Nevertheless, it served as a stepping stone to the more liberal provisions adopted in 1913.

Some of the main events in the movement toward a more liberal plan were the introduction by Fred Woodworth of unsuccessful bills in the 1909

and 1911 sessions of the legislature, Governor Chase Osborn's advocacy of a practical I. and R. amendment,⁴¹ the increased liberalism of the legislature due to larger Democratic and Progressive party membership and the effects of the "Bull Moose" movement,⁴² the election of Democratic Governor Woodbridge N. Ferris who favored the Oregon type,⁴³ and finally, by 1913, the endorsement of a liberal I. and R. plan by the Democratic, Republican, National Progressive, Prohibition and Socialist parties.

Observation of the 18 states with I. and R. provisions for ordinary legislation and the 12 using the devices for constitutional amendments convinced most party leaders that liberalizing Michigan's provisions would not destroy party responsibility or efficient government. Advocates of more direct government in Michigan included the Michigan Political Science Association, the League of Michigan Municipalities, the State League of Republican Clubs, the Direct Voter's League, the Detroit Progressive League, various labor and farm organizations, the Detroit News and the Detroit Free Press. Most of the conservative Democrats and Republicans, who opposed a more liberal plan, were silent.

The prevailing sentiment of the time was too great to ignore. With little difficulty a new plan was adopted.⁴⁴ As was the case previously, no one party or political group was responsible for securing the new provisions for direct legislation.

The new provisions embraced the following: (1) direct initiative on constitutional amendments; (2) compulsory referendum on constitutional amendments whether proposed by the legislature or by the initiative process; (3) indirect initiative on laws; (4) referendum on laws; and (5) referendum on laws by direction of the legislature. The percentage of qualified voters necessary to the sufficiency of the various types of petitions were 10% to initiate a constitutional amendment, 8% to initiate a statute and 5% to secure a referendum on a statute.

The procedure for the use of direct legislation is spelled out in some detail in the Michigan constitution. Article V, section 1, and Article XVII, sections 1 and 2, provide for the popular proposal of laws and constitutional amendments and the chance to approve or disapprove laws and constitutional amendments already passed by the legislature. Article V, section 38, empowers the legislature to refer measures to the people.

Most of the constitutional provisions respecting direct legislation date from 1913 but there was one fairly significant change made in 1941. Prior to that date the Secretary of State lacked real power to challenge petitions no matter how patently fraudulent they might be. Secretary of State Harry F. Kelly and Mr. Oakely Distin, Detroit Supervisor of Elections, led the movement to authorize a check of the signatures on petitions against the names of registered voters and to tighten up and regularize the petitioning process generally.⁴⁵

Constitutional amendments to that effect passed both houses of the legislature by an overwhelming vote early in 1941 and were placed on the spring election ballot.⁴⁶ They won approval by votes of 386, 859 to 295, 083 and 372, 769 to 273, 275.

Public Act 246, passed June 16, 1941, implemented the constitutional changes. It was entitled, "An act to regulate the form, circulation, filing and canvassing of initiatory and referendum petitions; to prescribe the duties of certain officers in connection therewith; to provide the manner in which questions or proposals originated by the filing of such petitions shall be submitted to the electors; to provide penalties for the violation of any of the provisions of this act, and to repeal all acts and parts of acts inconsistent herewith."⁴⁷ This statute gave considerable power to the Board of State Canvassers (then made up of the Secretary of State, State Treasurer and Superintendent of Public Instruction) and the Attorney General to decide on the sufficiency of petitions. On several occasions, to be noted later, they used that power. Act 246 of 1941 was repealed by Act 116 of 1954. This act, effective June 1, 1955, commonly known as the Michigan election law, retains the provisions of Act 246 concerning petitions and is, in fact, almost identical in language with Act 246 except that Act 116 requires the director of elections to prepare the 100 word statement of the purpose of any proposed amendment going on the ballot. Credit for regularizing the petition process belongs primarily to the Republican party.⁴⁸

While the courts have made no really profound imprint on the initiative referendum in Michigan, they have rendered decisions of some significance in the field of direct legislation. A series of decisions holding the powers of the Secretary of State to be primarily ministerial with respect to the sufficiency of petitions⁴⁹ led to the amendments and legislation of 1941 discussed above. The courts have held that the Secretary of State can refuse to place a proposed amendment on the ballot if its intent is unclear because of contradictory provisions,⁵⁰ that the title is an essential part of a popularly initiated statute,⁵¹ that the full text of a proposed amendment must appear on the petition,⁵² that the court will not pass upon the constitutionality of a proposed amendment⁵³ and that in the absence of prior objection it is irrelevant whether a petition is initiated as legislation under Article V, section 1, or as an amendment under Article XVII, section 2, as amended in 1941.⁵⁴

Other judicial decisions have determined that signatures not accompanied by the signer's place of residence, street and number and election precinct should not be counted,⁵⁵ illegible names and names appearing twice or more on the same petition should be rejected; typewritten names are unacceptable, although printed names can be counted; some well-known abbreviations for counties or cities can be used; circulator's affidavits are not required on each page but only on each section; and petitions cannot be accepted by the Secretary of State from any one other than the county clerk of the county in which such petitions were circulated. Many other

decisions, too numerous to mention, have settled minor procedural points with respect to the circulation, filing and validating of petitions.⁵⁶ At a later point, the effect of judicial interpretation upon so-called "emergency" or "immediate effect" legislation will be described.

Petition Circulation

Michigan's experience with petition circulation has by no means been exemplary. Despite the greater control exercised by the Board of State Canvassers (particularly the Secretary of State as Chairman) after the adoption of the 1941 amendments and Public Act 246 of the same year, the situation remained far from perfect. Edward W. Frey, then Director of Elections, who during 1951-52 directed the greatest check of petitions in the history of Michigan, declared:

It becomes obvious that our petition system leaves much to be desired. From it, we learn that failure on the part of circulators to apprise the citizen as to his or her legal and vested rights caused many signatures to be voided. The petitions contained many signatures of persons who did not reside within the voting district claimed. Many persons claiming to be registered voters in the city, village, or township shown at the top of the petition were not so registered. Indistinguishable names naturally could not be checked. Failure to denote an address occurred all too frequently. In all too many cases, the affidavit form was incomplete, more the fault of the Notary than the circulator. In other cases, the circulator disfranch-

chised citizens because he himself was not a registered voter in the jurisdiction claimed, although he signed a sworn affidavit that he was so registered.⁵⁷

The petitions described by Mr. Frey were not atypical. The same sort of malpractice also characterized some prior and subsequent petitions.

It can be said with reasonable assurance that Michigan has few "professional" petition circulators at work. This was not the case in the author's native state of California, where organizations stood ready, for a fixed fee of so much per signature, to obtain the signatures requisite to the qualification of a petition. Some years ago Professor James K. Pollock wrote with respect to Michigan that "so-called 'petition mills' are alleged to exist, but none has been discovered and prosecuted. Sometimes circulators are paid. . . . In other cases the work of circulating petitions has been largely voluntary. No provision seems necessary at the present time to prevent the paying of 'petition pushers'."⁵⁸ The situation in 1961 remains the same as it was 21 years ago when Professor Pollock described it. Professional circulators are seldom used. Organizations interested in pushing petitions have their own members or employees do the job.

Use By Interest Groups

Professor Austin F. MacDonald was correct when he wrote, "The people do not draft a measure, frame a petition, go from door to door for signatures, and stimulate the necessary enthusiasm. These things are done by organized interests--manufacturers' associations, labor federations, farm bureaus, utility corporations, war

veterans' organizations.⁵⁹ Obviously, the "people" lack the money and organization required to operate the initiative and referendum. Certain it is that organized groups in Michigan lend support to the circulation of petitions. Examples would include the activities of the Michigan Retail Grocers' and Meat Dealers' Association in favor of the sale of colored margarine and the efforts of the Michigan Education Association in pushing the sales tax diversion amendment. Again, the U. A. W. - C. I. O. aided greatly in securing signatures for the gas tax referendum and the 1952 proposal to reapportion the state legislature on a strict population basis. A decade ago the Detroit News editorialized as follows respecting the activities of labor unions in petition pushing:

It has been evident for some time that in the use of the initiative and referendum the heads of the great union labor organizations have a vast advantage over other citizens. They have at their command a state-wide force of organizers they have money, office facilities and, in fact, all the requisites, ready-made, for a petition drive.

These advantages are capable of misuse. They can be used trivially. . . . They can be used to obstruct the operation of State law. . . .

The initiative and referendum should be re-examined by the next legislative session with a view to assuring responsibility by those invoking them.⁶⁰

Signature Verification

Signature verification prior to 1941 was spotty and limited. Court decisions held that the Secretary of State could not reject signatures merely because of similarity in the handwriting, name, address or voting district⁶¹ and that he could not investigate beyond the face of the petition for fraud; being able to reject only signatures or petitions which were faulty in form.⁶² The courts made it clear that neither they nor the Secretary of State were responsible for testing the genuineness of signatures. Instead, it was the responsibility of the legislature to create the proper machinery.⁶³

The assumption that the percentage of valid signatures would increase due to the more clearly spelled out instructions and the enlarged reviewing powers given to the Board of State Canvassers⁶⁴ proved ill founded. The rechecking of the validity of signatures, which is done by the clerks of the political subdivision in which the petitions were circulated, is extremely slow and quite costly. The recheck of the gas tax referendum petitions lasted from October, 1951, to January, 1952, and disclosed that only 62.4% of the signatures were valid. Of the 153,542 checked, only 94,029 (59 more than the required number of 93,970) were valid, while 59,513 (37.6%) were found invalid.⁶⁵ The city of Detroit alone was forced to employ 10 additional clerks for a period of over 1 month in order to check the 75,000 signatures collected within its jurisdiction. Even greater difficulty and expense would be

entailed in the recheck of a petition involving 10% or 8% of the qualified electors as compared to this particular referendum effort in which only 5% was sufficient.

It is apparent, then, that further legislation⁶⁶ and/or a greater educational and instructional campaign is necessary before Michigan's record with respect to the validity of petition signatures approaches a reasonably high level.⁶⁷

So far as is known opponents to petitions have never succeeded in disrupting proceedings by persuading signers to withdraw. However, "There have been a few instances where the necessary number of signatures to petitions was not secured or where the petitions at any rate were not filed."⁶⁸

Aside from the legislation of 1941 and 1954 which failed to improve petition circulation materially, only Act 204 of 1923 (repealed by Act 116 of 1954) which was more tangential to the problem, need be mentioned. It required that any committee, club or other organization seeking to circulate petitions to initiate legislation or constitutional amendments make known its identity to the Secretary of State, give the names and addresses of its officers, state the purpose of the group, list the names of persons contributing money to push the petition and tell how the money was expended. In addition it forbade fraudulent statements as to the purpose, scope or effect of the laws proposed to be initiated. However, none of the 1923 legislation applied to referendum petitions designed to suspend laws already

passed by the legislature.⁶⁹ Its efficacy was further reduced in 1924 by a court decision negating its application to petitions designed to secure popularly initiated constitutional amendments.⁷⁰ Apparently the law remained valid (until repealed in 1954) as applied to those initiating statutes but the overwhelming majority of initiative petitions in Michigan are of the exempt constitutional variety.⁷¹ The present author agrees with Professor Pollock that, "Something would be gained by requiring each petition to have a sponsor. In this way the people would be better informed as to the source of the proposed legislation and could better label and identify proposals as being genuine public proposals or merely proposals of interested groups."⁷² Perhaps the constitutional convention will propose such a change.

Voter Participation

It is an arduous task to compile the election data on direct legislation proposals and on candidates. Fortunately, the job had been done for the period 1910 through 1939 by Professor James K. Pollock.⁷³ His findings were as follows.

The people of Michigan voted on 84 ballot proposals of which only 27 were originated by the people themselves. Of the 27, only 4 were statutory measures (all rejected) while 23 were constitutional amendments. Only 1 statutory measure was submitted by the legislature to a popular referendum. Voter participation on proposals (as measured against the vote for Governor in November elections and that for Superintendent of Public Instruction in April elections)

34. Ibid. The measure concerned capital punishment and was defeated 352, 594 to 269, 538.
35. John A. Fairlie, "The Referendum and Initiative in Michigan, " 43 The Annals of the American Academy of Political and Social Science (Sept., 1912) pp. 146-147.
36. See Proceedings and Debates of the Constitutional Convention of the State of Michigan, 1907-08 (Lansing, 1907-08) 2 Vols., hereafter cited as Proceedings. . . . The Detroit News of January 4, 1908, editorialized that direct legislation was the greatest single issue of popular interest that had concerned the state in years. It mentioned that 150,000 petitioners had taken a stand on the issue. For a list of the groups which petitioned see Proceedings. . . . pp. 1493-1496.
37. Labor unions and farm granges were among the first elements urging the extension of political democracy in the form of the initiative and referendum. Individuals who did pioneer work in the promotion of direct government in Michigan included George J. Robinson of Alpena, Dr. George H. Sherman of Detroit, Dr. A. M. Webster of Grand Rapids and Governor Hazen Pingree. Organizations prominent in the fight for the I. & R. were the National Direct Legislation League, the National Referendum League and the Michigan Direct Legislation League. Some of the arguments of the opponents of direct legislation are to be found in the Proceedings. . . . Vol. I, pp. 548-549, 556-559, 563-564, 577-580. A leading opponent was Henry M. Campbell as is evident from his initiative and Referendum, " 10 Michigan Law Review(April, 1912) pp. 427-436. Other outspoken opponents of direct legislation were F. F. Carter (See Detroit News, January 3, 1908) and W. W. Potter, who joined with Campbell to write a pamphlet severely criticizing direct government. At a later stage in the fight, Mayor Thompson and J. L. Hudson of Detroit and Arthur H. Vandenberg of Grand Rapids came out for more direct government. More detail concerning the parts played by the proponents and opponents of direct legislation are found in Edward P. Baklarz, The Initiative and Referendum In Michigan, 1908-1913 (Unpublished manuscript).
38. For party stands and alliances during this period see Arthur C. Millspaugh, Party Organization and Machinery in Michigan Since 1890 (Baltimore, 1917) pp. 11-19.
39. Of the 96 members of the convention, 8 were Democrats and 88 were Republicans.
40. Governor Chase S. Osborn in a letter to Fred Sparks dated September 21, 1910, said, "The people were hoodwinked by its 'joker' provisions." The Letters of Chase S. Osborn from 1909-1913. Found in Vol. 2 of 4

vols of untitled, unnumbered and unindexed letters located in the Michigan Historical Collections.

41. George N. Fuller (ed.) Messages of the Governors of Michigan (Lansing, 1927) Vol. 4, pp. 587-589.
42. Alice P. Campbell, "The Bull Moose Movement in Michigan," 25 Michigan History Magazine (Winter, 1941) pp. 34-47.
43. See the Detroit News of January 2, 1913, and Fuller, op. cit., Vol. 4, p. 646.
44. In early January, 1913, Senator Woodworth and Representative Kappler introduced almost identical bills. The proposed amendments received practically unanimous support in both houses. In April, 1913, the people approved the constitutional I. and R. by 204,796 to 162,392 and the statutory I. and R. by 219,057 to 152,388. For more detail on the legislative history of the bills and the general political situation in Michigan at the time see Richard Wolf, Michigan Politics and the 1913 Change in Initiative and Referendum (Unpublished manuscript).
45. In 1941, Kelly said, "All that is thought is to place in the hands of real people the right to petition - not fictitious people and to protect the people at large against those who have in the past, and can in the future, make a racket out of our petition system." For details of the struggle over regularizing the petition process see George F. Qua, The Use of Direct Legislation in Michigan For the Election of April, 1941 (Unpublished manuscript).
46. Among those favoring greater control over the petition process were the Michigan and Detroit Bar Associations, the Detroit Free Press, the Ann Arbor News and Senator Harry F. Hittle. Opponents included the Detroit Citizen's League, Senator Ernest Brooks and the C. I. O. and A. F. of L.
47. See Public and Local Acts, 1941, p. 399.
48. See Marvin D. Frankel, The Political Groups that were Responsible for Securing the Provisions of Initiative and Referendum in the Michigan Constitution of 1909 and the Further Changes Secured in 1913 and 1941 (Unpublished manuscript).
49. Most important were Thompson v. Secretary of State, 192 Mich. 512 (1916) and Michigan State Dental Society v. Secretary of State, 294 Mich. 503 (1940).
50. Barnett v. Secretary of State 285 Mich. 494 (1938).

51. Leininger v. Secretary of State, 316 Mich. 644 (1947).
52. Scott v. Secretary of State, 202 Mich. 629 (1918).
53. Ibid. and Hamilton v. Secretary of State, 212 Mich. 31 (1920)
54. City of Jackson v. Commissioner of Revenue, 316 Mich. 694 (1947).
55. Thompson v. Secretary of State, 192 Mich. 512 (1916). After 1941, date of signing replaced the election precinct requirement.
56. For more information concerning the influence of judicial decisions upon the initiative and referendum in Michigan see William Dachuk, What Has Been the Impact of the Courts on Direct Legislation (Unpublished manuscript) and James R. Hubbell, The Effect of the Courts in Michigan Upon The Use of Direct Legislation (Unpublished manuscript).
57. In his report of January 11, 1952, to Secretary of State Fred M. Alger, Jr., regarding the checking of signatures on the so-called gas tax referendum petition.
58. James K. Pollock, The Initiative and Referendum in Michigan (Ann Arbor, 1940) Michigan Governmental Studies, No. 6, p. 10.
59. American State Government and Administration (New York, 1951) (p. 150).
60. "Too Much I & R Irresponsibility," November 17, 1951.
61. Thompson v. Secretary of State, 192 Mich 512 (1916).
62. However, the court would permit the Secretary of State to exercise judgment and discretion to the extent that he might reject absurd, facetious names such as "Charlie potatoes," "Lefty Louie," and "jip the blood." See Michigan State Dental Society v. Secretary of State, 294 Mich. 503 (1940).
63. Ibid.
64. Public Act No. 246. See supra, pp. 32-33.
65. Report to the Statutory Board of Canvassers by Edward Frey,
66. The current germane provisions are found in Chapter XXII of the Michigan Election Law - especially 6.1474 to 6.1479 and the following: "6.1484 unlawful acts; penalty. Sec. 484. It shall be unlawful for any person to cause or aid and abet in causing any fictitious or forged name to be affixed to any initiative or referendum petition or to any petition proposing an amendment to the constitution of the state of Michigan, or

for knowingly causing any such petition bearing fictitious or forged names to be circulated. It shall be unlawful for anyone to sign any such petition more than once, or sign a name other than his own. Any person found guilty of violating the provisions of this section shall be deemed guilty of a misdemeanor. (C. L. '48, 168.484.)" See Michigan Statutes Annotated, Vol. V (1956 ed.), pp. 182-188.

67. A competent evaluation is found in Daniel Klinghoffer, The Provisions, Problems and Difficulties Involved in the Use of the Petition in Michigan (Unpublished manuscript.)
68. Pollock, op. cit., p. 9 note 5.
69. See Michigan Statutes Annotated, (Chicago, 1936) Vol. 5, pp. 296-297.
70. Hamilton v. Secretary of State, 227 Mich. 111 (1924). As explained in Michigan Statutes Annotated (1936 ed.) Vol. V, pp. 296-297, "This act, relative to the initiation of amendments to the constitution, places a burden on those circulating the petitions in addition to those imposed by Const. 1908, Art. XVII, sec. 2, and amounts to an amendment thereof and is therefore unconstitutional."
71. See Eleanor Schulz, Are Promoters of Initiatives in Michigan Required to Disclose Themselves as Authors and Assume Responsibility? (Unpublished manuscript).
72. Pollock, op. cit., p. 68.
73. Ibid., pp. 17-57, 78-86.
74. I am indebted to Charles Jacob for much of the date. See his Voter Participation in Direct Legislation in Michigan (Unpublished manuscript).
75. Article XVII, section 4. The effective date of the 16 year provision was changed from 1926, 1942, 1958, and 1974 (projected) to 1961 and 1977 (projected) by an amendment adopted in 1960.
76. The decrease cannot be explained by the slightly greater number (30%) of proposals voted on in the spring election during the years 1940-1951 as compared with the 28% during the 1910-1939 period because voter participation on direct legislation measures is normally higher on the short spring ballot than on the long fall ballot.
77. John P. White, Voting Machines and the 1958 Defeat of Constitutional Revision in Michigan (Ann Arbor: Institute of Public Administration, The University of Michigan, 1960), p. 13.
78. Polloc , op. cit., p. 18.

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cretion was given to the secretary of state to withhold the vote on an amendment, not because of any petition difficulties, but because of faulty and inconsistent wording of the proposal.

The mechanical procedure which is followed by the secretary of state and the various county clerks in receiving and filing petitions is routine. The petition is stamped "filed" or "received" and in due course is sent to the secretary of state. If frauds have been perpetrated in connection with the petitions, nothing is done unless some interested individuals or groups call the matter to the attention of the prosecutor, or bring some legal action. Most petitions are not checked, and the validity of signatures cannot effectively be called in question unless they are compared to the registration lists, and this is not required by the constitution. Consequently, a mere tabulation of the returns is all that is ordinarily done, and the filing officers have no authority to go behind the face of the petition. In such matters, which are entirely different from election contests, it is probably not necessary to have elaborate judicial action, for speed is necessary, and a final popular remedy for any fraud lies in the ballot box.

The number of signatures required by the constitution to put the machinery of direct legislation in motion seems not to have been unduly large.⁵ Despite the increasing number of signatures required under present voting conditions, there has been an increasing use of the initiative and referendum. In 1912 only 39,000 signatures were necessary to initiate a constitutional amendment. In 1940 the number required had risen to 161,000. The task of collecting this large number of signatures is not easy, and when one finds that the common

⁵ There have been a few instances where the necessary number of signatures to petitions was not secured or where the petitions at any rate were not filed. The following are a few recent unsuccessful efforts to use the initiative or referendum:

- 1920, Constitutional initiative—County home rule.
- 1931, Constitutional initiative—Possession of liquor.
- 1933, Referendum—Ruff election law.
- 1934, Constitutional initiative—Homestead exemption.
- 1934, Constitutional initiative—Repeal of liquor control.

practice is to secure from a fourth to a third more signatures than the number required, in order to provide an offset for any invalid signatures, the task becomes much greater. It is fair to say, therefore, that present requirements as to the number of signatures on petitions are rigid enough to prevent capricious use of the constitutional privilege of direct legislation without interfering with its use. Any higher percentages would certainly hinder the use of the initiative and referendum.

Probably the same point should be made regarding the circulation of petitions and the determination of their sufficiency. It is not difficult to discover many invalid signatures on petitions, and some cases at least of improper circulators of petitions. To tighten up on this part of the procedure without at the same time reducing the number of required signatures might work many injustices against the presentation of desirable issues. Ideally, it would be safest to require petitions to be signed only in those offices where an immediate check could be made against the registration records.⁶ But, quite obviously, this would make the task of lining up signatures an almost impossible one. Furthermore, the constitution uses the words "qualified voter," not "registered voter," and this provision makes it very difficult to prove that a signature on a petition is invalid. A requirement might well be insisted upon to make certain that the circulators of petitions are bona fide citizens and voters. To tighten up on one part of the procedure, however, would in all fairness require a reconsideration of the number of signatures required, and its probable reduction.

No serious abuses have arisen in connection with the circulators of petitions. So-called "petition mills" are alleged to exist, but none has been discovered and prosecuted. Sometimes circulators are paid and in these instances sums of \$5,000 to \$10,000 have been spent for this purpose. In other cases the work of circulating petitions has been largely voluntary. No provision seems necessary at the present time to prevent the paying of "petition pushers." Such a prohibition

⁶ In Germany under the Weimar Republic, this was the method followed.