Shaping the Judiciary

A framer traces the constitutional origins of selecting Michigan's Supreme Court justices

By Judge Robert J. Danhof

In his January President's Page, President Thomas J. Ryan said, "If there is even the possibility that the (s)election of judge's and justices of the Michigan appellate courts may be changed, discussion should begin and be led by us, as members of the organized bar." In keeping with his observation, the Journal *intends to publish articles that will inform our members on the issue of whether, and if so, what change in the method of selecting Supreme Court justices is advisable.*

The record of the debate at the 1961–1962 Constitutional Convention on Article 6, Section 2, which prescribes the method for selecting Supreme Court justices, is remarkably unilluminating; it includes no real discussion of the current method of nominating candidates for the Supreme Court by political parties at their conventions and then having them run without party designation on a nonpartisan ballot. In fact, the constitution does not prescribe that method; Const 1963, art 6, sec 2, merely provides that "Nominations for justices of the Supreme Court shall be in the manner prescribed by law." The only pertinent convention comment, at II, p 3385, is the observation that "Latitude is given to the legislature in the method to be prescribed for nominating candidates for the Supreme Court, but elections continue to be nonpartisan." The statute by which the legislature has "prescribed by law" the method of nominating candidates for the Supreme Court, MCL 168.392, provides:

> *At its fall state convention, each political party may nominate the number of candidates for the office of justice of the Supreme Court as are to be elected at the next ensuing general election.*

This statute was amended in 1963, after the new constitution was approved, but the amendment merely rewrote the provision previously in effect, which was very similar, to accommodate the change from the 1908 constitution's eight-justice court and the change in the date for electing Supreme Court justices. Under the new constitution, political parties continued to nominate candidates for the high court, as under the 1908 constitution.

In short, our current system of selecting candidates is one chosen by the legislature, carried over more or less intact from the 1908 constitution and enabling legislation under it. The one clear theme that runs through the record of the debate on Article 6, Section 2 is the idea that justices should be chosen by the electors, rather than appointed.

A logical point to begin an inquiry into the current selection method, then, is to ask one of the framers of Article 6, Section 2 for an account of how it was chosen. Fortunately, our current constitution is of relatively recent vintage, and one of the principal architects of Article 6 was willing and able to provide the background to the decision to retain the party nomination system.

As part of our effort to provide our members with some insight into the current debate over the manner of selecting Michigan's Supreme Court justices, we asked former court of appeals Chief Judge Robert J. Danhof to describe the proceedings that led to the adoption of Article 6, Section 2. At 36, Judge Danhof was one of the youngest delegates to the 1961–62 Constitutional Convention that produced Michigan's current constitution. A former U.S. Attorney for the Western District, he was the surprise appointment of convention President Stephen Nisbet to serve as chair of the convention's Judiciary Committee. In that capacity, Judge Danhof presided over the committee deliberations that produced Const 1963, art 6, the provisions delineating the judicial branch. In 1969, Judge Danhof was appointed to the new court of appeals created under the 1963 constitution he helped to frame, serving as its chief judge from 1976 until his retirement in 1992.

Following is his account of the convention's deliberations on the judiciary article, which is remarkable not merely because it was dictated from memory in one sitting, but also for the practical insights it offers on the virtues and shortcomings of the various methods of judicial selection that were considered. We thank him for sharing his recollections and offer it as the first in what we hope will be a series of articles addressing the important question of how Michigan's Supreme Court justices should be selected.

Access this webpage at www.state.mi.us/migov/Constitution/index.htm

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The Constitutional Convention was called primarily because the state had been experiencing financial difficulties. Funds were so earmarked that the state could not pay its bills. Another reason it was called was to

straighten out the executive branch. The executive branch had all kinds of boards and commissions, some were autonomous, some were semi-autonomous. There was a cleaning product at that time called, I remember, 20 Mule Team Borax, and a cartoon in one of the leading newspapers showed this 20-mule team hitched up pulling in different directions, and that depicted the executive branch.

The third reason was probably to do with apportionment, which was an issue with a lot of people. One man, one vote—*Baker v Carr*—had not yet come down. It didn't come down until the convention was over, but the state senate, for example, was horribly malapportioned. The Upper Peninsula had, I believe, three senators, Oakland County had one, Kent had two, and these were frozen in the old constitution. There had been a fight in the 1950s between Democrats and Republicans. The Democrats wanted more seats in the senate. Each party put a plan on the ballot, but this plan attracted more votes, it passed, and so it was frozen in the constitution. The house, while it was malapportioned, wasn't nearly as bad as the senate.

So those were the main reasons for calling a Constitutional Convention. I want to emphasize that before the Constitutional Convention there was no agitation for change with the judiciary. We didn't have clogged dockets. We didn't have today's enormous volume of criminal cases. In fact, we had vacant prison beds. Civil cases were not as numerous as today, and divorce had not reached anything like the volume we have today with the no-fault approach. By and large, there was no real dissatisfaction with the way the judicial system functioned, except some grumbling about the justice of the peace system, because they were paid by fees, but that was mostly in the rural districts, because most of the cities had municipal courts.

We had the probate courts, which in some cases were presided over by nonattorneys. The circuit court was much as it is today, but we had no court of appeals, and the only appeal was to the Supreme Court. The Supreme Court in those days was an eight-person court. It was reduced to seven under the new constitution. The idea was that when you went from the circuit court to the Supreme Court, if the Supreme Court split four to four, then the circuit court was affirmed, whatever the judgment was. In effect, the circuit judge was the ninth justice, so, in order to reverse, it took five votes on the Supreme Court. You really had eight persons sitting on the Supreme Court and the ninth justice was the trial judge.

A special election for delegates to the Constitutional Convention was held in September of 1961. I ran from a senatorial district comprising Muskegon and Ottawa County and I won quite easily. It was a very heavily Republican area, although Muskegon County was Democrat. Statewide, there were 99 Republicans elected and 45 Democrats.

We convened in Lansing on October 3, the first Tuesday in October of 1961. The Republicans, after one and a half days of caucus, on Saturday and Monday, selected a gentleman by the name of Stephen Nisbet, of Fremont, to be their candidate for president of the convention. The Republicans got two vice-presidents, one of whom was George Romney, then president of American Motors, the other was Edward Hutchinson, a former state senator who later served as a congressman, from Fenville. The Democrat vice-president was attorney Tom Downs, who came out of Detroit, but is now here in Lansing.

Our committee, the Judiciary Committee, was composed of 21 people. The committees were divisible by three. Ours was 21; we had 14 Republicans and 7 Democrats on the committee. We had 20 attorneys and one nonattorney, a pharmacist from Detroit by the name of Sid Barthwell. I remember one day we had been hearing all about courts and we had been haggling over this and that, there being 20 attorneys there, including ex-circuit judges, and he, being a lay person, brought in a huge jar of aspirin and set it right in the middle of the committee table.

As I said before, there was no agitation to change the judiciary system. We had not had in Michigan scandals amongst the judiciary like those that led to the Missouri Plan in Missouri and like those that later turned up in Chicago. We did not have clogged dockets. Criminal cases were nowhere nearly as plentiful as today. The drug epidemic had not started. Divorce was still by fault, so we did not have the number of divorces that you have today with no-fault and the general breakup of the family.

Politically, within the 99 Republican delegates, you had two groups. One, I would say, would be the "metropolitan area" Republicans, those that came out of Oakland, Wayne, Kent, Ingham, and Muskegon, and they comprised about 60 votes, and were led by George Romney. The remaining Republicans, 30-some in number, were the more rural type Republicans, and their leader was D. Hale Brake, a former state treasurer and candidate for governor, an attorney, and later general counsel for the Township Association. That was the Republican make-up. Then you had the Democrats, who came primarily from Wayne County, with two or three out of Macomb and maybe three or four from the Upper Peninsula. So they were basically Wayne County-oriented and probably labor-oriented. One of their leaders was Bill Marshall, who later served on the Michigan Transportation Commission but at that time was number two man of the AFL-CIO and later became the president.

The one clear theme that runs A rticle 6, Section 2 by the electors, rather than

We set up the court system quite easily. Everyone agreed there should still be a circuit court and everybody agreed there was still going to be a probate court. Probate judges were very insistent that the probate court remain a separate court and still have the juvenile jurisdiction. The first time I ever saw Chief Justice Mary Coleman was when she came to speak to us. At that time she was a probate judge in Calhoun County. Her husband had been a state senator.

We then discussed and decided that the justice of the peace system would go, along with the circuit court commissioner. We studied and tried to put in place a lower court, but we simply did not have time. So we said to the legislature, you have five years, after which the justice of the peace and the

circuit court commissioner would cease to exist. The legislature in the 1908 constitution had the authority to create courts by a two-thirds vote. For example, recorders court in Detroit was a statutory court. That power was continued under the new constitution, so we used that approach to create the new district courts. Once it was decided that in criminal cases there would be an appeal as a matter of right, there was just no question you would have a court of appeals, but the district court was going to have to be provided by the legislature.

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Now, then the question came regarding selection of judges—how were we going to pick judges? In the committee, we considered every conceivable plan known at that time. We had appointment, as in the federal system, confirmed by the senate for life; we considered a modified Missouri plan, with a committee that recommended candidates to the governor, who would select one to serve for a certain time and then run on a retention ballot.

We even considered going back to partisan elections. Remember, judges used to be selected in partisan elections prior to the 1930s. They elected Democrats and Republicans to the Supreme Court and the lower courts. The change to nonpartisan election basically happened because Wayne County swung from being Republican to being Democrat. Judges went to a nonpartisan ballot because they were afraid they were going to lose. And that method then went statewide.

We also decided that all judges would be attorneys. Bear in mind that justices of the peace were hardly ever attorneys. Bill Ford, an attorney from Taylor Township, made thousands of dollars a year as JP, because he got all the speeding tickets between Detroit and Toledo. Yet even he voted to do away with the justice of the peace and its fee system. The same rule applied to the probate judges. Although we provided that all judges should be attorneys, we did say that the incumbent nonattorney probate judges would be grandfathered. Finally, I think only about four or eight years ago, the last one retired; he was up there for years and years.

The selection of justices or judges was never considered on an individual court basis. That is, we looked at what we were going to do about selection for the whole state and the whole judiciary.

Today, the proposition is to change selection just for the Supreme Court. That was never even thought of at the convention. I don't think it would have flown. They would have said, if we're going to do it, we're going to do it for all of the courts in the same way. So this idea of splitting the selection of Supreme Court justices, doing it differently from the way court of appeals and circuit judges are selected, was not considered.

The Judicature Society appeared and recommended a Missouri plan. Every justice was invited to attend. At that time, and I just checked it, of the eight justices on the Supreme Court in 1961 and early 1962, five had gotten there originally by appointment by the governor to fill a vacancy. Two were Republicans, Justices Dethmers and Carr, who were appointed by then Governor Harry Kelly, who himself later was elected to the Supreme Court. Three were Democrats, appointed by Governor Williams; Kelly, Kavanagh, and Black had been elected. So five of the eight were appointees. Though not all the justices appeared before the committee, I recall Justice Dethmers coming over, and he urged an appointive system, even though he had been elected, because he was first appointed by then Governor Harry Kelly. Justice George Edwards came over, and he was quite emphatic that we have an elective system, even though he served as a probate judge, a circuit judge, a Supreme Court justice, and later as a judge on the Sixth Circuit Court of Appeals in Cincinnati, and was appointed initially to all of those seats. Of course, after you were appointed, you still ran for re-election.

The votes went up and down and no proposal could get enough support. The reason was that all the Democrats were opposed to anything, basically, except election, and they were joined by D. Hale Brake and the so called "rural Republicans," and that was the

majority of the convention, even on the floor. So it was just simply a matter of keeping the elective system we had. There was no big agitation, no editorials were calling for a change.

Bear in mind that television 40 years ago was nothing like it is today. We had television, but in Muskegon I had two channels: Grand Rapids and Kalamazoo. If I got interviewed here in Lansing, you couldn't even see it. So the newspaper, the written media, was still very dominant, and there were no *Free Press* or *News* editorials calling for change, simply because nothing really had happened to prompt that.

The big fight came on the Supreme Court. Six former circuit judges served in the Constitutional Convention. They did not like the Supreme Court because the convention was held not too long after the Eugene Snow Huff case, which was the first time the Supreme Court exercised the writ of superintending control over a circuit judge. Judge Huff was in Saginaw. The docket was backed up. They said to Judge Huff, you go to Detroit, and Judge Quinn (from Caro), you go to Saginaw and take over the docket. Judge Quinn got there and Judge Huff refused to leave. The Saginaw bar was upset and backed Judge Huff. The Supreme Court issued a writ, Judge Huff ignored it, and he was later summoned before the Supreme Court for contempt and fined $500, which he never paid.

The retired circuit judges did not like that. What they wanted to do was to end the influence of the metropolitan area on the Supreme Court. So they proposed that the state of Michigan be divided into election districts for Supreme Court, giving Wayne County (at that time) two seats, and then dividing up the other five statewide. Actually, that is what came out of my committee, it was the only thing I could get out, so we took it out to the floor, and I was opposed to it, as were the moderate Republicans, along with the Democrats, so we took that out on the floor. It stayed out, but then, to be quite honest, the election of the court of appeals from districts was sort of a quid pro quo. It was a deal—like it or not, it was a deal. They tried again on the last reading—44 Republicans signed an amendment to go back to this Supreme Court district plan.

In one of my longest speeches, the most impassioned I ever gave, I argued that if we changed this we were going to guarantee the defeat of the new constitution. I was convinced of it because the League of Women Voters and others who were heavily involved would not agree to it. There were 44 Republicans in favor of Supreme Court districts when the vote was taken, but only 42 of them voted. I talked two of them out of voting for their own amendment.

> *"Latitude is given to the legislature in the method to candidates for the Supreme Court, but elections continue*

On the method of selection, we said, as it was in the old constitution, nomination will be "as provided by law." Many an editorial today will assert that the procedure of nomination by political party convention is in the constitution. It is not. It can be changed by the legislature at any time. If they want to go to nominating Supreme Court justices by petition, all the legislature has to do is adopt the same procedure used for the court of appeals. If you want to run for the court of appeals, you circulate a petition.

Don't forget, though, under the current system you can still get around the political party nomination requirement. Justice Levin formed his own political party, nominated himself, dissolved his political party, and got elected, because he had sufficient funds to do it.

Normally, at least before the last [2000] election, the political parties looked for people with name identification, candidates the voters would recognize easily. For example, Governor Harry Kelly in 1953 ran for Supreme Court. Former Governors Williams and Swainson ran in 1970 and won. Thomas M. Kavanagh, who served as attorney general, ran for the Supreme Court and won. Gene Black, another attorney general, ran for the Supreme Court and won. Thomas Giles Kavanagh won because he had the same name as Thomas M. Kavanagh. Under the 1908 constitution, judges were elected in April of the odd year. Spring elections garnered much less turnout, which normally favored the Republican. But the fact that you are elected or appointed does not always guarantee that you are going to stay on the court. Incumbent justices, even when the voters see that designation, have been defeated.

Of course, if you are going to change to any type of appointive system, you are going to have to amend the constitution. You are going to have to determine whether you want the governor to appoint with the consent of the senate, or a sort of Missouri plan, under which a committee of lawyers or a committee of lawyers and nonlawyers recommend three names to the governor and he has to appoint one. In some states, if the governor doesn't act, the chief justice does. And then normally such plans call for the person selected to run after so many years on a retention ballot.

Remember, running on a retention ballot isn't necessarily a great panacea either. When a justice has the newspapers and the media to contend with and isn't fighting a live opponent, it is like fighting a wisp, and that is hard. Can you raise the money to refute the media? They had a big scandal in Illinois, and it tarnished some innocent judges who had to run on a retention ballot.

By the way, at the time we were in convention, Illinois had districting for the Supreme Court, and it was horrible. The justices were parochialized. They would write for their constituents, and the law would be slanted toward the philosophy of their particular district, whether you liked it or not. They abandoned districts, Illinois went to statewide election and now they've got retention, as far as I know.

New York surprised everybody. New York, not too many years ago passed a constitutional amendment for an appointive system where candidates were nominated by a committee and appointed by the governor. I think Governor Cuomo was the first one to do it and he appointed the court of appeals, their Supreme Court.

Does appointment take politics out of the process? No. You will never get politics out of the process based upon the philosophy or procedure of any selection process. If you have a Republican governor, you can be sure that at least one out of the three candidates for appointment is going to be a Republican. If you've got a Democrat governor, you can be sure that one out of the three is going to be a Democrat. Now, it may not be his friend, it may not be who he wants, but appointment does not take it out of the partisan realm.

be prescribed for nominating to be nonpartisan."

If you go to a retention ballot, what are you going to have? In Illinois, retention requires 60 percent plus one. I know judges who got caught up in the Graylord scandal who were not involved at all, and they were scared because they were up for a retention vote, and they needed 60 percent plus one. When you start out, 25 or 30 percent of the people are going to vote against you, no matter who you are. The Illinois judges did not like it because the scandal was tainting them all. Some judges were taking bribes, but most were not, yet they were hard put to win 60 percent plus one.

This past election, to be quite honest, I have never seen the like of it. I agree totally with Chief Justice Maura Corrigan. I couldn't believe it. I mean both sides. I don't care who started it, I know the people involved, and it was just bad. Yes, there were ads run before, but they were normally pretty innocuous, "vote for so and so because he's got experience." This negative advertising, and the amounts of money involved, were literally obscene—over a million dollars on each side. I can remember running for the court of appeals, where we had one-third of the state to cover, and if we raised $25,000 to $30,000 we thought we were doing well. We often ran joint campaigns to economize if we had an opponent.

In conclusion, I would say we did not change the method of selection probably because there was no great agitation, no dissatisfaction with the system of nomination and election in place. We did provide, however, that once a justice or judge was elected, they could file an affidavit of candidacy; no party nomination was required for an incumbent. They were not beholden to a party once elected.

Probably, at a minimum now, the nomination ought to be taken out of the party conventions. That won't stop the parties from getting involved because the parties are going to pick somebody and help get the nominating petitions signed, but at least it would take some of the hypocrisy out of it. You walk into a party convention, you're nominated by the Republicans or the Democrats, you go out the door and suddenly you're supposed to be nonpartisan. It doesn't work that way. The problem for every candidate is trying to raise all the money.

I would hope that the Bar would print a lot of views on this question. Publish what Chief Justice Corrigan wants, what the governor wants, but confine it strictly to the Supreme Court. If you go beyond that and change the system for the lower courts, I'm telling you right now anything you do is doomed. Do not include the court of appeals because there is no reason to change the court of appeals. Nobody is complaining about their ads. Bear in mind that you elect judges, not to represent people, but simply as a method of picking a person to do a job.

Of course, you don't have to elect judges. In the federal system they're appointed, and always have been, because basically the Founding Fathers didn't trust the people to elect judges. That is why, in the eastern states, such as Massachusetts, they are still appointed, although maybe not by the governor. But when Michigan came into the Union, in 1837, we were caught up in what was called Jacksonian Democracy. That called for electing everyone from dogcatcher on up, on bedsheet ballots. The drawback of that approach is that people have no idea what they are doing when they go to vote on that ballot. Take, for example, the University of Michigan Regents and MSU Board of Trustees. The voters have no idea who is running. All the other university boards, such as Western, Eastern, Central, are appointed by the governor and they function very well. Why are people electing regents? Two reasons: it was historical and there was no agitation to change.

When writing a new constitution, there was agitation to change the executive branch, and we did, and we made a lot of changes in apportionment, though we never really got a chance to put them into effect because of *Baker v Carr.* Even without a call for change, when you consider the changes we did make in the judiciary, they were really fairly substantial: We created a court of appeals, allowed for the creation of a district court to take care of misdemeanors and small claims, got rid of justices of the peace, got rid of all fee systems, and provided that all judges must be attorneys and were to be paid salaries, rather than fees.

These changes corrected some real problems. Under the fee system, if you sent to the probate court for a power of sale and asked for one, you'd get five because that is the way the probate judge made his money. And you didn't argue because the next time you wanted one it might take six months. Somehow it would get lost in the pile. So really, in all, we made enough changes to address the problems that existed. The Township Association opposed the constitution, and one of the reasons was because we got rid of the justices of the peace. They were township officers and the townships didn't like losing that office.

As for doing anything to change the method of selecting justices or judges, there simply was not any interest or driving force, so consequently it stayed the same, at least up until the last election.

Maybe the last election was an aberration. We had three people running simultaneously, all of whom had been appointed by the current governor, and I don't know if that is ever going to happen again. I think those in the opposition, the Democrats, wanted desperately to alter the balance. Even though the court is not quite as important as it used to be in that process, maybe they saw reapportionment coming down the road.

One thing is clear, though: To change the method of selecting Supreme Court justices from election will require a two-thirds vote in the legislature to put a constitutional amendment on the ballot. ✦