

Summer August 10, 2014

On Michigan Judicial Qualifications Amendment, Proposal B (1996)

Taras Zenyuk, *Notre Dame Law School*

On Michigan Judicial Qualifications Amendment, Proposal B (1996)

I. Introduction

I was a law student at Thomas M. Cooley Law School in Michigan at the Lansing campus from 2008 to 2012. In 2007, when I had applied for 11 law schools, at the end, all of them rejected my application for one reason or another. That was my second straight year of trying to get in. I was told that I should have tried some other occupations, but I kept hoping to the end, since I was on the waiting list at Pace Law School. A few weeks before classes were about to begin, I received a flyer in my mail box. First, I was skeptical about it, since I have received similar in the past. However, this time was different: it was an invitation to apply for the same semester, not some future date. I did the 12th time, got accepted, received a scholarship, and arrived just on time to start Orientation Day.

During the school years, I saw judges on a regular basis coming to school and giving lectures and presentations as well as telling us their stories of success. Even on Orientation Day, after a swear-in ceremony, one judge told us how she obtained that position. In the hallway, there were hanging portraits of “successful” graduates who managed to become judges. Therefore, the ultimate message was being a judge is an example of life-time achievement. This message was not new to me. In my Personal Statement to law schools, I wrote: my natural sense of understating law would serve me well on my career path as well, where my ultimate goal is to become a judge. By “my natural sense of understating law”, I mean winning an academic grade appeal and persuading Columbia Law School to take my February LSAT although I was told not

to put such information because Law School Admission Committees would be viewing it as annoying.

Merely by coincidence, one judge of the 54-A District Court, a local court, regularly dined at a restaurant in the vicinity of the school. That was an opportunity for me to build a firm friendship with that judge for years to come. A typical day would look like when the judge asked me about my school and to keep up the conversation told me a few matters what occurred in court, or even I initiated a conversation from the information in the newspaper of general interest.

This judge was in his late age and thinking about retirement. There was a conversation among his friends in the restaurant as well as on the street who was going to substitute him. Some of them jokingly pointed a finger at me. There was no problem recommending me for his post, since I was his friend and politically neutral. Timing was good too though not perfect – I could make it perfect. The judge planned to retire a bit more than half a year before the next judicial election in Michigan, which scheduled to be in November, 2014. For a favor, I could have asked him to retire just enough for Governor to make an appointment.

As a general principle, once a person reaches the bench, it is very hard to overcome, since people get used to it and tend to vote over again and again unless there is some sort of wrongdoing going on. For example, Assistant Lansing city attorney Billie Jo O'Berry has lost five judicial elections.¹ The hardest part would have been to ask the judge for a letter of recommendation or endorsement. However, others have done similarly. For example, Democrat Governor Jennifer Granholm appointed Judge Amy Krause to the Michigan Appellate Court two

¹ Kyle Melinn, *Could Fifth Time Be the Charm for O'Berry?*, Citypulse (May 5, 2010) (available at <http://www.lansingcitypulse.com/lansing/article-4297-could-fifth-time-be-the-charm-for-oberry.htm>).

months before leaving her office in what it seems to be an overnight appointment.² Historically speaking, U.S. Presidents George Washington and Lyndon Johnson also nominated their friends to the federal court, and Harry Truman nominated Harold Burton, Fred Vinson, Tom Clark, and Sherman Minton to the Supreme Court.³

My plan started to fall apart when I took Election Law. It turned out there is Proposal B amended in 1996 to Article 6, Section 19 of the Michigan Constitution which now requires an attorney to be admitted to practice law, for at least 5 years before assuming a judicial position.⁴ To practice law means to have the state license.⁵ The Constitutional text is: “To be qualified to serve as a judge of a trial court, a judge of the court of appeals, or a justice of the supreme court, a person shall have been admitted to the practice of law for at least 5 years.”⁶ Although a 5-year limitation is not rare or extraordinary, other states including New York have similar ones, however, it is important to point out that the mere fact that such Proposal B did not exist before 1996, and my plan would have gained a realistic turn back then, but it still may work nowadays however under different parameters either in the federal court or in the English court.

² Wikipedia contributors, *Amy Krause*, Judgepedia, The Free Encyclopedia (June 2013) (available at http://judgepedia.org/index.php/Amy_Krause).

³ Lee Epstein and Jeffrey A. Segal., *Advice and Consent. The Politics of Judicial Appointments*, 47, Oxford University Press (2005).

⁴ Wikipedia contributors, *Michigan Judicial Qualifications Amendment Proposal B*, Ballotpedia, The Free Encyclopedia (June 2013) (available at http://ballotpedia.org/wiki/index.php/Michigan_Judicial_Qualifications_Amendment,_Proposal_B_%281996%29).

⁵ Id.

⁶ Michigan Legislative Website, *Michigan Constitution, Article VI §19* (June 2013) (available at <http://www.legislature.mi.gov/%28S%28latj3v55wz2huqyub1xxpb55%29%29/mileg.aspx?page=getObject&objectName=mcl-Article-VI-19>).

II. Proposal B

Proposal B was enacted during the time of Republican John Engler's governance.⁷ The Citizens Research Council of Michigan, a public policy research organization, released a brief memo discussing pros and cons of the Amendment, and the Governor's explanation for enacting it.⁸ The advantages are experienced candidates and protected voters.⁹ The government asks the voters to elect 618 members of the judicial branch, and they may not necessarily familiarize themselves with each candidate.¹⁰ One of the disadvantages is Proposal B may actually preclude qualified candidates.¹¹ Since it does not say anything about practicing law, in theory, I may be a history or geography teacher at Lansing Community College for five years and still qualify. Opposite is also true: I may be litigating major cases for only four years.¹² The other disadvantage is not letting the voters decide whether one is qualified or not.¹³ As James Madison correctly pointed out, "it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose."¹⁴

Proposal B arose as a part of Governor Engler's recruitment process which starts at the county bar president and goes through the Judicial Qualifications Committee of the State Bar of Michigan for investigating background and any grievances, interviewing, and rating.¹⁵ A typical

⁷ Id. Wikipedia contributors, *Michigan Judicial Qualifications Amendment Proposal B*.

⁸ *CRC Memorandum*, 1-3, The Citizens Research Council of Michigan 1044 (September 1996) (available at <http://www.crcmich.org/PUBLICAT/1990s/1996/memo1044.pdf>).

⁹ Id. *CRC Memorandum*, 2.

¹⁰ Id.

¹¹ Id.

¹² Id.

¹³ Id. *CRC Memorandum*, 2-3.

¹⁴ Mitchel A. Sollenberger, *Judicial Appointments and Democratic Controls*, 194, Carolina Academic Press (2011).

¹⁵ John Engler and Lucille Taylor, *Judicial Selection: A View from the Governor's Perspective*, 3, Michigan Bar Journal (September 1996).

candidate must receive a “qualified” or higher rating in order to receive an appointment. There is also an NQLE rating which stands for “not qualified, lacks experience”.¹⁶ Since there is no advice and consent check from the State Senate in the judicial appointment process, the governor hinted that the proposal would serve this purpose.¹⁷ Before Proposal B went on the ballot, the State Legislature adopted it by a two-thirds vote with the governor’s endorsement.¹⁸ Later, the proposal was approved by 81.7%.¹⁹

The problem with Proposal B is that it closes down an opportunity. Realistically, it is hard to say whether there would be any difference between two selection systems with and without the 5 year-license period. There is simply no statistical proof. Moreover, Proposal B does not prevent corruption or similar actions as, for example, in a recent case, when Michigan Supreme Court Judge Diana Hathaway lost her prestigious job and was sentenced in the federal court to 1 year and 1 day for bank fraud.²⁰ Nevertheless, there is a significant difference in shutting down the opportunity in my case as well as may exist in other cases as opposed to open it.

First of all, after electing Proposal B, in my case, the minimum waiting period is not 5 years, but rather 6 years because the judicial election falls on every even year. Second, Governor Engler himself acknowledged that “statistics indicate that one-half of all judges initially reach the bench through appointment.”²¹ Considering that, I cannot simply chose a random candidate to run against. For example, when Governorn Granholm appointed Judge Amy Krause to the

¹⁶ Id. John Engler, *Judicial Selection: A View from the Governor’s Perspective*, 2.

¹⁷ Id. 1.

¹⁸ Id. 2.

¹⁹ Id. Wikipedia contributors, *Michigan Judicial Qualifications Amendment Proposal B*.

²⁰ Ed White, *Disgraced ex-Michigan Judge Diana Hathaway Sentenced to 1 Year in Prison*, (May 28, 2013) (available at <http://www.lansingstatejournal.com/viewart/20130528/NEWS04/305280014/Diane-Hathaway-sentenced>).

²¹ Id. Engler, *Judicial Selection: A View from the Governor’s Perspective*, 1.

Michigan Appellate Court, there was a vacancy in the 54-A District Court. Governor Granholm made another overnight appointment this time Hugh Clarke.

Judge Hugh Clarke's legal biography is the following: "Judge Clarke spent over thirty years in the private practice of law, handling criminal, civil, probate and family law matters, and brings to the bench a varied and wide range of legal experience. He has served on a number of committees for the State Bar of Michigan, including the Committee on Standard Criminal Jury Instructions and the Character and Fitness Committee."²² That does not sound as something extraordinary. Let's assume that I decide to run against Judge Clarke or a similar in the upcoming election, and even I announce it publicly, not knowing what is waiting for me.

Now, when Republican Governor Rick Snyder took the office in January, 2011, he decided to challenge Judge Clark's late appointment through the State Attorney General in May, 2011. The claim is "the Governor [Granholm] is not entitled to fill a judicial vacancy for a term that does not begin until after the Governor leaves office."²³ The Michigan Supreme Court ruled in favor of Judge Clark explaining "[b]ecause defendant is entitled under article 6, § 23 [of the Michigan Constitution] to hold the office of 54-A District Judge until January 1, 2013, we hereby dismiss plaintiff's action for quo warranto [to oust the judge]."²⁴

Not only that, Judge Clarke won 100% vote confidence after running unopposed in the Michigan judicial elections in 2012.²⁵ I would probably lose in that election, and if I continue that patten, I would be another example of Billie O'Berry. I suspect someone has suggested that

²² City of Lansing, *About District Court* (June 2013) (available at <http://www.lansingmi.gov/court/>).

²³ *Attorney General v. Hugh Clarke*, Michigan Supreme Court, No 142550, 2, (May 17, 2011) (available at <http://www.lansingstatejournal.com/assets/pdf/A3174465517.PDF>).

²⁴ *Id.* *Attorney General*, 4.

²⁵ Wikipedia contributors, *Michigan Judicial Elections*, Judgepedia, The Free Encyclopedia (June 2013) (available at http://judgepedia.org/index.php/Michigan_judicial_elections,_2012_-_District_Courts).

current Governor Snyder nominates O’Berry for her effort and determination that she puts in the judicial election which has not happened at the time of writing this paper. My overall point is that it is about opportunities. For this reason, certain names and not others make to the list, and then certain candidates advance and not others, and finally one wins.

III. The 54-A District Court is a Trial Court or Maybe Not

In order to apply, the judicial qualifications amendment requires a court to be a trial court: “To be qualified to serve as a judge of a trial court, a judge of the court of appeals, or a justice of the supreme court.”²⁶ In comparison, to clarify ambiguity, the New York State Constitution’s language uses a court of record instead of a trial court: “The court of appeals, the supreme court including the appellate divisions thereof, the court of claims, the county court, the surrogate’s court, the family court, the courts or court of civil and criminal jurisdiction of the city of New York, and such other courts as the legislature may determine shall be courts of record.”²⁷

The 54-A District Court is the lowest court hierarchically in Michigan State and represents only the city of Lansing. Due to its limited jurisdiction, it hears mostly traffic violations, civil cases up to \$25,000, and all misdemeanor cases where punishment not exceeding one year.²⁸ On a preliminary examination, a judge determines whether a person is capable to stand trial, whether he or she is the right one whom the evidence offered against, or even whether the evidence indicates probable cause. In other words, the district judge is not present during the whole trial because depending on the outcome, the case then transfers to the circuit court, and

²⁶ Id. Michigan Legislative Website, *Michigan Constitution, Article VI §19*.

²⁷ Department of State Division of Administrative Rules, *New York State Constitution* (June 2013) (available at <http://www.dos.ny.gov/info/constitution.htm>).

²⁸ Id. City of Lansing, *About District Court*.

since Lansing is in Ingham County, the 30th Circuit Court covers the place. From the beginning to the end is the type of state court system present in Florida where a judge has the responsibility of handling a case from arraignment to resolution.²⁹ Moreover, the Floridian judicial system is very similar to Michigan in terms of heavy reliance on election.³⁰

It is not hard to imagine that a person not familiar with the District Court's legal structure would assume that he or she is not in front of Judge Clarke for example but rather Magistrate Clarke. The common perception is that a judge hears a case in court to its resolution, but once it gets redirected, then the water gets muddy. For example, the 54-A District Court has five judges and one magistrate. In comparison, the 55th District Court, whose jurisdiction extends to the region besides Lansing and East Lansing in Ingham County, has only two judges and no magistrate.³¹ Therefore, if an individual commits a traffic violation or civil infraction in Mason, a district court judge will hear the case, not a magistrate as is the case with the 54-A District Court.

On the other hand, the 54-A District Court's operation is justified under the two-tiered system. That is county court judges hear felonies through the first appearance, and circuit court judges handle the rest.³² This is how the Floridian criminal side of the system works.³³ Another justification although less compelling for the 54-A District Court's operation is a master calendar. Such is the case in California and Minnesota, where the judges conduct a particular event only such as arraignment but are not present during the whole trial.³⁴ In a similar way, the 54-A District Court operates even a master calendar is not present usurping two ideas blended together: the case allocation and the scope of jurisdiction.

²⁹ Brian J. Ostrom and Charles W. Ostrom, Jr., *Trial Courts as Organizations*, 16, Temple University Press (2007).

³⁰ Id. Ostrom.

³¹ Ingham County Michigan, *55th Judicial District Court* (June 2013) (available at <http://dc.ingham.org/>).

³² Id. Ostrom, 13.

³³ Id.

³⁴ Id. 17.

IV. Under Federal Court

Although the main emphasis for electing Proposal B is experience, years of experience is not the key factor in the federal court appointment but rather accomplishments. A recent example of Supreme Court nominee Elena Kagan proves this merit. Republican and a few Democratic senators questioned Kagan's lack of judicial experience.³⁵ Nevertheless, the Senate Judicial Committee voted favorably 13 to 6 to approve her nomination, and later the Senate confirmed her by a 63 to 37 vote, just only 5 votes less than Sotomayor received a year before.³⁶

Originally, the President of the United States derives power of appointing federal judges from the Appointment Clause Section II, Article 2 of the U.S. Constitution. It states: "He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States."³⁷ One of the framers, Alexander Hamilton, a New Yorker, was perfectly familiar with his State Constitution but nevertheless failed to include any of its provisions.³⁸

However, as in the past and present, Congress does not follow individual state legislations. Senate does not have as a general rule of thumb 5 or 10-year legal experience for judicial candidates, and this opens opportunities or at least incentives. If in Kagan's case, a Supreme Court position requires to be the Dean of Harvard Law School and later Solicitor General, then what requires for a position of a district court. In theory, a college football star may

³⁵ Id. Sollenberger, *Judicial Appointments and Democratic Controls*, 91.

³⁶ Id.

³⁷ Legal Information Institute, *U.S. Constitution* (June 2013) (available at <http://www.law.cornell.edu/constitution/>).

³⁸ Sollenberger, *Judicial Appointments and Democratic Controls*, 9.

become a federal judge after graduating from law school and successfully passing the bar exam considering that he is as strong in football as in the legal field.

One Professor suggests a set of factors for the Senate to consider where previous legal experience is just one of the criteria: a) demonstrated judicial temperament; b) professional expertise and competence; c) absolute personal as well as professional integrity; d) an able, agile, lucid mind; e) appropriate professional educational background or training; f) the ability to communicate clearly, both orally and in writing, especially the letter.³⁹ Although these terms may have multiple meanings, ABA Standing Committee on Federal Judiciary, another evaluating body, tries to define them. For example, judicial temperament means the nominee's "compassion, decisiveness, open-mindedness, courtesy, patience, freedom from bias and commitment to equal justice under the law."⁴⁰

As a guideline, the Federal Courts Improvement Act of 1982 provides certain criteria to nominate a candidate: "the President, in selecting individuals for nomination to the Federal judgeships created by this Act, shall give due consideration to qualified individuals without regard to race, color, sex, religion, or national origin."⁴¹ Not to be one-sided, the Act also suggests "the Federal judiciary is determined by the competence and experience of its judges," but the experience factor was not strongly emphasized in Kagan's case.⁴²

More to the point, the Appointment Clause mention does not mention current procedures that Senate excises for reviewing candidates such as senatorial courtesy, the Senate Judiciary Committee hearing, and certain disclosures. These procedures are in place to screen candidates

³⁹ Id. Sollenberger, *Judicial Appointments and Democratic Controls*, 173.

⁴⁰ Id. Sollenberger, 72.

⁴¹ Id. 68.

⁴² Id. 67.

for fitness, since they are going to be elected for life subject to the good behavior provision.⁴³ In actuality, it means that these later judges become independent as opposed to a state judge who needs to think about reelection in the upcoming years. At the end of the career, a federal judge resigns, retires, or dies.

Senatorial courtesy is the most magic part of the appointment process. It operates as an unwritten rule between President and the candidate's two home State Senators. The idea is that "[h]ome-state support and republican principles – a core part of democratic controls – were built into the concept of senatorial courtesy."⁴⁴ More specifically, if President and the Senators share the same party: D-D&D or R-R&R, statistically, the Senate confirms 90% of Supreme Court nominees.⁴⁵ However, this is not mainly the case because there are four other outcomes: D-R&D, R-D&R, D-R&R, and R-D&D. In that case, the Senate confirms only 59% of Supreme Court nominees.⁴⁶

If a single home State Senator returns a blue slip meaning rejecting a candidate, in all of the cases, other Senators will honor it. In fact, blue slips are popular in the four mentioned combinations when government is divided. Then, back-and-forth negotiations ensure between two parties to move candidates forward. For example, under President Clinton, to gain the vote of home state Senator Slade Gorton (R-WA) to guarantee confirmation of Ninth Circuit nominee William A. Fletcher, the administration agreed to fill the next vacancy at that circuit according to the Senator's option. Similarly, under President Bush, Fifth Circuit nominee Leslie Southwick

⁴³ Id. Legal Information Institute, *U.S. Constitution*, Article III, Section 1.

⁴⁴ Id. Sollenberger, 72.

⁴⁵ Id. Epstein, *Advice and Consent. The Politics of Judicial Appointments*, 107.

⁴⁶ Id. 107.

has received a lot of criticism, but two sides have reached an agreement where Majority Leader Harry Reid (D-NV) has agreed to vote for a favor over spending measures.⁴⁷

It is a common misconception that a federal judge reflects President's ideology. That would be true in a few instances where President and two State Senators are from the same party. Even in those cases, there is simply no guarantee a candidate will not change sides over time. Most district court judges look to avoid reversals from circuit courts pushing them against their own preferences.⁴⁸ The reality is that President has certain objectives to accomplish through the appointment process and may look at the whole picture instead.⁴⁹ An example of objective could be to appoint a female, minority or disadvantaged, young, or foreigner to a certain court. The opposition will definitely attack the nominee's social background and economic record. As two previous examples of negotiations show, President has to act in a strategic way to achieve his preferences taking into account other views.⁵⁰

Opposing Senators' concern is to select certain individuals to receive a check in their constituent States for the next term. That may not be necessarily the case with Senator Chuck Schumer (D-NY) as well as some other Senators, since he won re-election with 71% and 66% respectively in 2004 and 2010 years. Another concern is to express opposition views, not to be passive, so that they may not look powerless, since then the voters' confidence declines accordingly. However, senatorial courtesy boosts each Senator's power in individual cases. A typical battle facing Senators during a nomination hearing is a two-side sword: despite numerous

⁴⁷ Id. Sollenberger, *Judicial Appointments and Democratic Controls*, 148.

⁴⁸ Id. Epstein, *Advice and Consent. The Politics of Judicial Appointments*, 128.

⁴⁹ Id. Epstein, 52.

⁵⁰ Id.

vacancies, packing the court with unqualified individuals will not serve public any good, whereas it is not always the most competent candidate gets appoints.⁵¹

The Judicial Committee plays an arbiter's role in recommending candidates to the Senate floor. First, the process starts with a vacancy on a district court. Then, a home State Senator from President's party will normally submit some names.⁵² Once the Committee receives reports from other agencies such as the ABA's ranking and FBI's background check, by voting they decide whether a candidate proceeds forward. On the other hand, considering senatorial courtesy, there is not going opposition from same-party senators for the lower courts.⁵³ Moreover, once candidates pass the Committee, the Senate approves them most of the time.⁵⁴ The reason is the Senate has more important matters on their very tight schedule, so they rely more on the agencies' evaluations in district court nominations, and there is always a check in a circuit court.

The hearing itself for a district court appointment is "brief, low-key affairs, with few witnesses testifying and very limited (if any) press coverage."⁵⁵ Even for Supreme Court nominee John Roberts, the New York Times has published five stories between 2001 and 2003, not including any questions he receives.⁵⁶ Although a lawyer, President Clinton with a few exceptions was not interested in nominations to district courts mainly because of a high number of them.⁵⁷ Senators are not an exception either as Eight Circuit Judge Richard S. Arnold points out: "if you're a nominee for one of the lower courts and a lot of senators show up at your

⁵¹ Id. Epstein, 102, 106.

⁵² Id. Sollenberger, *Judicial Appointments and Democratic Controls*, 22.

⁵³ Id. Epstein, 102.

⁵⁴ Id. 92.

⁵⁵ Id.

⁵⁶ Id.

⁵⁷ Id. 50-51.

hearing, you're in trouble.”⁵⁸ In theory, for the Judicial Committee to constitute a quorum, 6 members need to be present for business matters, but to make a decision, 8 members must be present including 2 minority members with 1 voting in favor.⁵⁹ Moreover, the Judicial Committee is not different than any other Committee: it reviews legislation and if it passes, brings it to the Senate floor for a final approval.⁶⁰ An overall conclusion from this analysis is somewhat contradictory to the general perception. That's the fewer Senators appear for the confirmation and the less public spot light a candidate receives is actually the better. It just indicates that everything is alright, on its proper place.

The essence behind a judicial appointment is energy which produces necessary accomplishments. An opportunity like in my case with the 54-A District Court is simply not enough. To advance it to the next level, it needs to be supported by accomplishments. An example of accomplishment would be a combination of factors that puts a candidate forward over 474 thousand individuals, since the U.S. population is 316 millions divided by 667 judges among 94 districts.⁶¹ There is no unique formula though –it varies from candidate to candidate.

However, I have one I formula in mind to share called call back. That's when a candidate goes clerking to a federal court for a one year, later goes to work for a private law firm, and then is called back to be a judge within a very a short period of time. To increase opportunities, an example of private general practice law firm could be Curtis, Mallet-Prevost, Colt & Mosle LLP, a U.S. international law firm with offices not only in New York but also in

⁵⁸ Id. Epstein, 120.

⁵⁹ Id. Sollenberger, *Judicial Appointments and Democratic Controls*, 126.

⁶⁰ Id. Epstein, 88.

⁶¹ Id. Epstein, 14-15.

London.⁶² The upcoming 2016 presidential election will trigger a change of government, which will cause a change of opinions and subsequently a change of measures.⁶³ It is a good chance to advance, since an individual candidate's qualifications are not static, instead also fluctuating in response to a political situation.⁶⁴ Then, it would be a masterful job if that candidate ends up in the same court fulfilling the call back formula. It proves consistency and determination. I can't give you a specific example who has done it, but critics would say that this is not realistic because that's not how it works in real life. However, the reality is that "candidates for the federal bench receive their nominations precisely because through their political work or interests they came to the attention of some politician, most likely a U.S. senator or a member of the president's staff."⁶⁵

Now, the question becomes how to attract a senator or a member of the president's staff attention. For example, Senator William Roth (R-DE) secured his wife Jane Roth's appointment to a District Court in Wilmington, Delaware.⁶⁶ I'm not inferring that wives need exclusively to be married to Senators to advance in career. There could be an analogous situation where, for example, a wife's parent is a New York State Commissioner.

Finally, as to a judicial candidate's energy, it is a drive. From the earliest days, founders saw energy in government as "essential to that security against external and internal danger, and to that prompt and salutary execution of the laws which enter into the very definition of good

⁶² Curtis, Mallet-Prevost, Colt & Mosle LLP, *About Curtis* (June 2013) (available at <http://www.curtis.com/sitecontent.cfm?pageid=2>).

⁶³ James Madison and Alexander Hamilton, *The Federalist Papers*, 355, Penguin Books (1987).

⁶⁴ Id. Epstein, *Advice and Consent. The Politics of Judicial Appointments*, 104.

⁶⁵ Id. Epstein, 3.

⁶⁶ Id. Sollenberger, *Judicial Appointments and Democratic Controls*, 85.

government.”⁶⁷ Since people are at the heart of government authority providing it energy, the judicial appointment is nothing else than an “election without voters”.⁶⁸

In conclusion, as I soccer player, I compare a lower court appointment to a soccer game. First, there are a limited number of players, while as evidence indicates a limited number of Senators will attend the confirmation hearing. Second, there are opponents, whereas there always will be opposing Senators even within the party that promotes the candidacy. Third, there is a time limit for a game, while the Judicial Committee hearing will be timely as well. Fourth, there are forwarders and midfielders who try to score a goal, whereas in the senatorial courtesy scope, they are President and two home State Senators. Then, the question becomes what strategy to employ to give a pass, score a goal, and win a game or in other words how to get appointed. Perhaps, it is a subject for a different paper. Since I’m neither a participant nor an observant, I don’t know who is playing, when, and where.

V. Conclusion

Governor Engler ended his view on Proposal B by saying, “When I am no longer governor of Michigan, I will look back with gratitude on the opportunity I had to impact the judiciary of this state through the appointment process.”⁶⁹ However, this paper would not come into existence, and I would not try to implement my desired plan somewhere else if “the opportunity” was truly meant: “a good chance for advancement or progress” but not simply as in

⁶⁷ Id. Hamilton, *The Federalist Papers*, 135.

⁶⁸ Id. Sollenberger, *Judicial Appointments and Democratic Controls*, 7,12.

⁶⁹ Id. John Engler, *Judicial Selection: A View from the Governor’s Perspective*, 3.

his case “a favorable juncture of circumstances” to do some reform.⁷⁰ By that time the judge is going to retire, someone will take his seat, and my opportunity will be a history, but the idea behind it will live.

⁷⁰ Id. Merriam-Webster, *Opportunity* (June 2013) (available at <http://www.merriam-webster.com/dictionary/opportunity>).