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PETITION SIGNATURE NOT COUNTED IF MADE MORE THAN 180 DAYS BEFORE FILED

Senate Bill 776 (reported from House committee with amendment)
Sponsor: Sen. David Robertson
House Committee: Elections
Senate Committee: Elections and Government Reform
Complete to 5-16-16

BRIEF SUMMARY: Senate Bill 776 would amend the Michigan Election Law to provide that a signature on a petition to amend the Constitution or initiate legislation could not be counted if the signature were made more than 180 days before the petition was filed with the Secretary of State. Currently, a signature made more than 180 days before a petition is filed is rebuttably presumed to be stale and void. The bill would delete that language.

This bill implicates two sections of the Michigan Constitution: Article 2, Section 9, which deals with initiatives and referenda initiated by the electorate, and Article 12, Section 2, which addresses Constitutional amendments by petition of the electorate.

The instances prompting this bill stem from two initiative petitions. Those initiatives—to legalize recreational marijuana use for those over 21 and to ban fracking (or hydraulic fracturing) in Michigan—passed the typical effective deadline of 180 days and announced an intent to rebut the presumption that signatures gathered earlier were stale and void. On May 12, 2016, the Board of State Canvassers deadlocked on a proposal that would have allowed these groups to use the electronic Qualified Voter File (QVF) to prove that signatures over 180 days old are still valid. Both groups intend to turn in all compiled signatures on June 1, 2016, the deadline to place the initiatives on the November ballot.

FISCAL IMPACT: The bill would not have a fiscal impact on the state or local units of government.

THE APPARENT PROBLEM:

Currently, under the Michigan Election Law, for petitions to amend the constitution or initiate legislation, a signature made more than 180 days before a petition is filed is rebuttably presumed to be stale and void. In order to rebut the presumption, under a protocol developed by the Board of State Canvassers, the group initiating the petition must obtain an affidavit from the signer or the signer's local clerk that the signer was a qualified voter when making the signature and within the 180-day window. (See ***Background Information***.)

Historically, the requirements for rebutting the 180-day presumption on signatures for constitutional amendments, initiatives, and referenda have been more than any citizen group has been able to meet. In 2015, the Michigan Secretary of State (SOS) began looking into updating the rebuttal process by using the statewide Qualified Voter File (QVF), which

lists all individuals who are registered to vote in Michigan, including their names, current addresses, address histories, and other identifying information. The QVF did not exist until 1998, and would significantly shorten the validation process. Responses to the SOS solicitation for comments on that issue may be relevant to the current question, and can be found here:
https://www.michigan.gov/documents/sos/Comments_re_180_day_policy_-_Part_2_510315_7.pdf

Instead, this bill would do away with the rebuttal process and declare the signature void if made more than 180 days before the petition is filed with the Secretary of State.

THE CONTENT OF THE BILL:

The bill would amend the Michigan Election Law (at MCL 168.472a) to provide that a signature on a petition to amend the Constitution or initiate legislation could not be counted if the signature were made more than 180 days before the petition was filed with the Secretary of State. Currently, a signature executed more than 180 days before a petition is filed is rebuttably presumed to be stale and void. The bill would delete the rebuttable presumption language, and declare the signature stale and void if made more than 180 days before filing.

HOUSE COMMITTEE ACTION:

The proposed House committee amendment would reinstate the language making the bill effective January 1, 2017, if enacted. The January 1 effective date was originally in the bill, but was removed by the Senate Elections and Government Reform Committee in favor of giving the bill immediate effect.

BACKGROUND INFORMATION:

Constitutional amendment (Article XII, Section 2)
Contrary to popular opinion, the current rule is not that a group has 180 days to collect signatures but, rather, that signatures gathered more than 180 days before the petition is filed must be "rehabilitated" by rebutting the presumption that they are void or stale, in order to be counted toward the total. In order to do this, the group initiating the petition must obtain an affidavit from the signer or the signer's local clerk, in one of Michigan's 83 counties, 277 cities, 1,240 townships and 256 villages, that the signer was a qualified voter when making the signature and within the 180-day window, as discussed further below.

Because this practice may require the rehabilitation of many of the 315,653 signatures (ten percent of the total vote cast for all candidates for governor in the last gubernatorial election) currently required in order to be included on the ballot, based on the votes cast in the 2014 gubernatorial election, 180 days serves as an effective cap. This bill would eliminate the possibility of rehabilitation and designate 180 days as the absolute cap.

Initiative and Referendum (Article II, Section 9)
The number of signatures needed for an initiative (whereby citizens propose laws and enact and reject laws) and a referendum (whereby citizens approve or reject laws enacted by the legislature) differ slightly from those for a constitutional amendment.

In order to place an initiative on the ballot, a group must secure the signatures of eight percent of the total vote cast for all candidates for governor in the last gubernatorial election. The total number of gubernatorial votes cast in 2014 was 3,156,531; therefore, the number required between 2014 and 2018 is 252,523.[1]

In the case of a referendum, a group must secure five percent of the total vote cast for gubernatorial candidates in the last election, which is 157,827 between 2014 and 2018.

Timeline for Rebuttable Presumptions:

In 1973, the legislature enacted 1973 PA 112, which provided that "It shall be rebuttably presumed that the signature on a petition which proposes an amendment to the constitution or is to initiate legislation, is stale and void if it was made more than 180 days before the petition was filed with the office of the secretary of state."

In 1974, Attorney General Frank Kelley issued an opinion concluding that the 180-day provision was unconstitutional for both constitutional and statutory initiatives and that, because the requisite number of signatures is set by the number of votes cast in the previous gubernatorial election,[2] "signatures on petitions are to be considered valid so long as they are gathered during a single four-year term bounded on both sides by a gubernatorial election."[3]

In 1986, Consumers Power Company and the Detroit Edison Company sought a declarative judgment that MCL 168.472a was not, in fact, unconstitutional. The Ingham Circuit Court sustained the constitutionality of the statute, and it was affirmed by the Court of Appeals and the Michigan Supreme Court later that year.[4]

Also in 1986, the Board of Canvassers found that in order to rebut the presumption of invalidity, the petitioner or proponent of the initiative petition must "(1) prov[e] that the person who executed the signature was properly registered to vote at the time the signature was executed and (2) prov[e] with an affidavit or certificate of the signer or appropriate clerk that the signer was registered to vote in Michigan within the '180 day window period' and further, that the presumption posed under MCL 168.472a could not be rebutted through the use of a random sampling process."[5] (Opponents of this bill reject the authority of the Board to make this judgement.)

Initiative Petitions:

Although the above cases address the rebuttable presumption issue under MCL 168.472a, they primarily address *constitutional amendments* rather than *initiative petitions* (both of which are controlled by that statute). In a 1971 case,[6] the Michigan Supreme Court addressed the initiative petition question. The case predated MCL 168.472a, which was enacted in 1973, but initiative petitions were enshrined even in the 1908 Michigan Constitution. In *Wolverine*, crucially, the court held that for initiative petitions, the

[1] http://miboecfr.nictusa.com/election/results/14GEN/
[2] Michigan Constitution of 1963, Article 12, Section 2 & Article 2, Section 9
[3] Report of the Michigan Attorney General http://www.ag.state.mi.us/opinion/datafiles/1960s/op04104.pdf
[4] *Consumers Power Co v Attorney General*, 426 Mich 1, 392 NW2d 513 (1986)
[5] Solicitation for Comments from the Michigan Department of State
https://www.michigan.gov/documents/sos/Announcement_-_Comments_re_180_days_508443_7.pdf
[6] *Wolverine Golf Club v Secretary of State*, 384 Mich 461, 185 NW2d 392 (1971)

language in the constitution that "the legislature shall implement the provisions of this section" applies to the *process* whereby the initiative reaches the legislature or electorate, but that the initiatives themselves were self-executing (meaning they required no additional action in order to take effect, once approved by the electorate). Further, they cited previous holdings by the Michigan Supreme Court that "[t]he only limitation, unless otherwise expressly indicated, on legislation supplementary to self-executing constitutional provisions is that the right guaranteed *shall not be curtailed or any undue burdens placed thereon*."

ARGUMENTS:

For:

Proponents of the bill say it would provide clarity to current law. Since the rebuttable presumption was put in place 30 years ago, it has never been utilized to rehabilitate signatures, so they argue that a change in statute would not create a hardship to voters (since as a practical matter it is how the law works now). The 180-day signature provision provides ample time for citizens to exercise their rights under the State Constitution to place issues on the ballot for which there is strong public support and which the Legislature has declined or been unable to address.

Proponents also argued that the proposal to use the qualified voter file (QVF) instead of affidavits would present an insufficient alternative to the current process. According to testimony, the QVF would check signatures against the list of registered electors, but would not provide access to the actual signatures. Because there were 50,000 duplicates on petitions last year, parties aiming to remove the duplicates need access to the actual signatures to determine whether two or more signatures were executed by the same person.

Response:

If the possibility of rebutting the presumption that signatures are stale and void is removed from the statute as unworkable, then perhaps the length of time should be extended, as some proposed in committee, to 270 days, or even longer.

Against:

Opponents of this bill argued that this bill is a ploy to frustrate the will of the people. The initiative is one of the few forms of direct democracy: citizens can speak and initiate legislation independently, rather than funneling their opinions through their elected representatives, in hopes of being heard. Critics say that the possibility of rebutting the presumption that signatures are stale and void was ignored by the Legislature so long as the bar seemed too high for a citizen group to overcome, but now that two groups have come close to the required number of signatures, along with the proposal that those signatures be checked by the QVF, the Legislature has decided to take action.

The QVF represents a potentially crucial new development in the ability of the electorate to advocate for their own values and needs; rather than requiring a grassroots group of volunteers who are passionate about an issue to seek affidavits to rehabilitate thousands of signatures individually, the QVF would allow groups to check names against the state's list of qualified voters electronically, in a fraction of the time. In this way, the 180-day provision would serve as a check on the process, rather than a limitation—or, if this bill is enacted, an absolute bar.

Opponents argue further that the 180-day absolute bar presents an indefensible burden on the initiative process. In *Wolverine*, above, the Michigan Supreme Court found that requiring groups compiling an initiative petition to file within ten days of the beginning of the legislative year (which was the rule at that point) "restrict[ed] the utilization of the initiative petition and lacks any current reason for so doing." Here, the bill would similarly restrict the utilization of the initiative process.

Response:

It should be noted that the initiative process and the process to put constitutional amendments on the ballot, have been used successfully a number times over the years since the rebuttable presumption language was adopted.

POSITIONS:

The Michigan Chamber of Commerce supports this bill. (3-16-16)

The Michigan Manufacturers Association supports this bill. (3-16-16)

The Michigan Secretary of State is neutral on this bill. (3-16-16)

A representative of the Michigan chapter of the National Organization for the Reform of Marijuana Laws (MI NORML) testified in opposition to this bill. (3-16-16)

A representative of MI Legalize testified in opposition to this bill. (3-16-16, 4-27-16)

A representative of the Michigan Environmental Council testified in opposition to this bill. (3-16-16)

A representative of Let's Ban Fracking testified in opposition to this bill. (3-16-16)

Representatives of the Committee to Ban Fracking in Michigan testified in opposition to this bill. (4-27-16)

The American Civil Liberties Union of Michigan opposes this bill. (4-27-16)

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