From Justice Weaver's speeches on Need For Michigan Supreme Court Reform

I believe we all want a Michigan Supreme Court in which we can have trust and confidence…a court peopled with truly independent, nonpartisan Supreme Court justices.

Do we NOW have such a Supreme Court? From my almost 16 years Supreme Court experience, I say NO.

Can we EVER have it? I believe, YES. (Or I wouldn't be here today.)

But to have such a court, we need a Supreme Court of seven *independent justices* about whom we have *sufficient information* to hold each justice accountable for his/her individual and collective performance and administration of the people's judicial business.

What is an *independent justice*?

An *independent justice* is not agenda-driven and does not hold to and promote political party lines, or philosophies, or ideologies. An *independent justice* is dedicated to the rule of law, is impartial and courageous, exercises judicial restraint and self-discipline, applies common sense, and is wise, honest, fair and just, kind and charitable, orderly, civil and professional, open, not secretive, and non-partisan.

How can we get such a Supreme Court in which we can have trust and confidence?

First, we must find, develop, promote, and support to achieve solutions to two critical and chronic problems for and at the Michigan Supreme Court. They are:

1. The very obvious need to reform the system of selection of Supreme Court justices in order to make much more likely truly *independent justices* are elected and appointed.
2. The less obvious, but equally or even more important, need for transparency at the Supreme Court—transparency to eliminate the *unnecessary secrecy* under which the Supreme Court operates.

Unless *unnecessary secrecy* is eliminated, reform of the justice selection system will be futile. Selection reform alone will not solve the problems of and at the Michigan Supreme Court.

Our deeply flawed dual system of selection (the election and appointment of justices) that allows for political party nominations, exorbitant campaign spending with millions of dollars spent on often deceitful campaigns—untimely reported or not reported at all, the *unnecessary secrecy* and no transparency, and ignoring geographic diversity does not advance the cause and promotion of *independent justices*.

The flawed system produces power blocks of justices usually joining together with a majority of four (or more) votes to promote agendas of:

•Political parties and special interests
•Personal interests, philosophies and ideologies
•Biases and prejudices.

Further, at present all seven justices live in only four counties: Wayne, Macomb, Washtenaw, and Ingham—the "Detroit/Lansing Beltway." Those four counties make up only a little more than 33 percent of the state's population, leaving almost 67 percent of the people in the rest of the 83 counties with NO JUSTICES living in or close to their areas.[1] And adding insult to injury, four of the seven justices have come from the same Detroit law firm.

As to exorbitant campaign spending, in the 2010 Supreme Court justices' campaigns at least $11.4 million was spent. Mind you, that was for only two seats. In the 2012 election—for three seats—at least $18.6 million was spent. [2] Much of this is deceitful spending—untraceable, unidentifiable, and unaccountable.

Further, *unnecessary secrecy* allows for the misuse and abuse of the Supreme Court's huge powers of interpretation and discretion in decision-making and power of administrating (too often unjustly and unfairly) the operations of the Court itself and its offices (State Court Administrative Office [SCAO]), its commissions (Judicial Tenure Commission [JTC] and Attorney Grievance Commission [AGC]) and its boards.

An example of this misuse and abuse of the Supreme Court power that resulted in the unfair and unjust treatment is the case of Kent County Judge Steven Servaas. …A tyranny condoned by five Supreme Court justices when they refused to investigate or have investigated the egregious conduct of the JTC director in the Servaas and the *Brady v Attorney Grievance Commission* matters.
There are throughout this state including in the Lansing, Detroit, Traverse City areas and elsewhere in Michigan many other examples of the Michigan Supreme Court's misuse and abuse of its power to administer the operations

of the court system and of its power of interpretations and discretion in decisions.

Unnecessary secrecy is the crux of the problem. It allows the worst propensities in human nature—hatred, lust for power, revenge and deceit—to take root and grow. *Unnecessary secrecy* enables and facilitates people, even good people, to do bad things.

While some justices, sometimes even a majority of the court, have exhibited some of the worst propensities in human nature, Michigan Supreme Court justices, even when kind, collegial, charitable, orderly and professional, clearly should not "go along to get along" while doing the people's business.

Each justice must be free to fulfill his/her duty to the people—to inform them of what they need to know—no more, no less—as each justice deems necessary, about not only what the Supreme Court decides, but how, when, why, and where.

Canon 3A(6) of the Code of Judicial Conduct sets the proper standard for *temporary secrecy* for pending and impending proceedings. There should be no "gag order" as the majority of the Michigan justices asserted to attempt to keep any justice from speaking (communicating) to the public FOREVER about the decisions, performance, and operations of the Court.

The business of the Michigan Supreme Court does NOT deal with treason, sedition, national defense or international diplomacy where permanent secrecy is sometimes (often) necessary. The Court's work is basically dealing with people's lives—their property, businesses, families and freedom. There is no need for forever secrecy. Those who believe they must have "forever secrecy", a "gag order"—sometimes disguised as "deliberative privilege"—to do the Court's work are not ready or worthy of the privilege and responsibility to serve.

The Michigan Supreme Court should not be a secret club. Instead it should consist of seven truly independent justices who act in a transparent, open, accountable, independent manner. It should be the <u>SUPREME</u> example of conducting government business publicly, openly, fairly, orderly, professionally and justly.

It's a simple fact: An uninformed and misinformed public cannot make wise decisions on the suitability and performance of justices and the Supreme Court. As long as there is *unnecessary secrecy*, no transparency and no accountability can exist.

The proposed solutions for the needed reform of our dual system of selecting Supreme Court justices are seven specific proposals for reform, a Seven-Point

Plan that does *not eliminate* our dual system of electing and appointing Supreme Court justices, but *reforms* it. The proposed solution [listed below] grew out of common sense and my more-than 35 years' experience as a judge, justice and chief justice.

As you review and consider these solutions—the seven-point plan and other proposals (such as those from the spring 2012 report of the Task Force on Judicial Selection) ask yourself: are they rooted in basic American democratic principles for preventing, detecting and eliminating misuse and abuse of government power? That is, the democratic principles of:

•Rotation in office
•Check and balances
•Transparency—no *unnecessary secrecy*.

Do the proposed reforms contain and/or promote these principles?

Recognize and remember:

•The judiciary has the ultimate power—the power of interpretation. That's the power to have the last say on what something means and having it followed by the other branches and the people. That power of interpretation is combined with the power of administration of the courts, including making the court rules and appointments and combined with the power of contempt—to order jail (to take away personal freedom) and to order fines and costs (to take property).
•This power of the judiciary to interpret and have the last say and to administer the courts and make their rules is necessary for our system of government to function.
•Yet because it is so powerful, the judiciary is potentially the most dangerous branch if the power can easily be misused and abused by a power block of agenda-driven justices acting in a majority and in *unnecessary secrecy* through the unrestrained misuse and abuse of the judicial powers.

We need to guard against, prevent, and, if necessary, discover and correct the misuse and abuse of the Supreme Court's powers of interpretation and administration. We need reforms of the system for the selection of justices. And we need to eliminate *unnecessary secrecy* at the Supreme Court; it must be replaced with transparency in the justices' performance of their individual and collective powers or duties of interpretation and administration including constitutional affirmance of each justice's duty to the people, what the justice believes the people need to know—no more, no less. Justices who abuse and misuse their powers and who believe the court should be cloaked in secrecy are mistaken and not ready or fit to serve.

Here is the Seven-Point Plan for Michigan Supreme Court Reform:

A Seven-Point Plan for Michigan Supreme Court Reform

Justice Elizabeth A. Weaver (Chief Justice 1999-2001; retired August 2010)

Here is my proposed solution, a seven-point plan for not eliminating our dual system of electing and appointing Supreme Court justices, but reforming it. Of note: the election of Supreme Courts justices is retained. There is no reason to assume that a system that allowed only appointments would be any less flawed and political than the current elections and appointments. Then too, why should we modify the Michigan Constitution in order to give us citizens less direct say in our government? There is nothing inherently wrong with elections; with accurate information, they allow the people to hold accountable their high officials. It's our justice selection process of party nominees and unregulated, untraceable, unaccountable, unidentifiable, deceitful spending, unchecked gubernatorial power to appoint justices for vacancies, lack of rotation in high office, and *unnecessary secrecy* that's doing us in.

Four of the proposals of the seven-point plan require legislative action and only three require constitutional amendment.

Concerning elections and appointments we should:

1. Provide no political party nominations for elections. Supreme Court candidates would earn a spot on the ballot by petition—the same way trial and Court of Appeals judge candidates do. [In 2010 former Senator Alan Cropsey introduced Senate Bills 1296-1300 to accomplish this, but no action was taken.] (To be achieved by legislation.)

2. Achieve rotation in high office by limiting to only one term of a maximum of 14 years for any justice together with removing the upper 70 age limit as a qualification for running for the office of justice, and a justice never would be eligible for reelection or appointment. In recent discussions much has been made of the idea of removing an upper age limit for the election of justices. Many would be well qualified to serve into their later years, but it could become a serious issue if there is no limit on their tenure at the Supreme Court. The 14-year limit will insure rotation in this office. (To be achieved by constitutional amendment.)

3. **Establish for the appointments process, a non-partisan advisory Qualifications Commission composed of 15 voting members and the chief justice as the non-voting chair. Five (5) attorney members to serve on the commission shall be submitted by the Board of Commissioners of the State Bar of Michigan and shall be appointed by the governor. Ten non-attorney members to serve on the commission shall be appointed by the governor.**

The process for appointment would require:

• The commission will meet and publicly provide in writing to the Governor two nonbinding recommendations within 60 days of a vacancy. Those written recommendations are to include why those two candidates are best qualified for a position on the Michigan Supreme Court.
• The Governor then can choose one of the two candidates recommended by the Qualifications Commission, or choose someone not recommended by the Qualifications Commission. If the Governor chooses someone not recommended by the Qualifications Commission, the Governor must give public, written reasons why her or his appointee is the best choice before or at the time of submitting an appointee's name to the Senate. The Governor must submit the appointee's name to the Senate within 60 days of receipt of names from Qualifications Commission or lose the right to make an appointment. In such a case, the Senate must appoint one of the Qualifications Commission's recommended candidates.
• The state Senate must hold at least one public hearing on the Governor's appointee within 60 days of the Governor's appointment. The Senate has the right to confirm or reject the appointment by majority vote. If the Senate does not vote to confirm or reject the appointee within 60 days of the Governor's submission of the appointee, the Governor's appointment takes effect. If the Senate rejects the appointee by majority vote, the Senate must publish promptly its reasons in writing whereupon the Qualifications Commission will have 30 days to reconvene and begin the process anew. If the Qualifications Commission fails to timely reconvene, the vacancy shall be filled at the next general election for the remainder of the term.
• If both the Qualifications Commission and the Governor fail to timely and properly perform, the vacancy shall be filled at the next general election for the remainder of the term.
• The appointed or elected justice only serves for the remainder of the vacant term and shall not serve an additional term or partial term. (To be achieved by constitutional amendment.)

4. Require transparency and accountability in campaign finance reporting requirements. Allow no secret or unnamed contributors. This would involve real-time reporting (and within 48 hours for all elections). (To be achieved by legislation.)

5. Provide public funding. Use tax check-off money designated for gubernatorial campaigns for Supreme Court campaigns. (To be achieved by legislation.)

6. Provide election by district. The state should be divided into seven (7) Supreme Court election districts with one justice coming from each district. That will allow the geographic diversity in representation now so clearly absent. [In 2009 former Senator Michelle McManus introduced Senate Bill 745 to accomplish this; it had one hearing in committee in 2010 but no action was taken.] (To be achieved by legislation.)

7. Eliminate *unnecessary secrecy* and require transparency in the Supreme Court. Reaffirm every Michigan Supreme Court justice's duty to the people to inform them of what they need to know—no more, no less—as each justice deems necessary, about what the Supreme Court decides and how, why, when and where. Prohibit any attempt to keep any justice from communicating to the public forever about the decisions, performance and operations of the Court. Reaffirm as amendment to the Constitution the standard of only *temporary secrecy* for pending and impending proceedings in Canon 3A(6) of the Code of Judicial Conduct that provides: "A judge should abstain from public comment about a pending or impending proceeding in any court …" (To be achieved by constitutional amendment.)

So, there it is: a proposed solution a seven-point plan growing out of my long experience as a judge and justice…and with a dose of common sense.

NOTE: To implement the Seven-Point Plan, a transition period will be necessary

A transition period will be necessary to reform and convert the present unchecked and unbalanced dual system of election and disorderly secret appointment of Supreme Court justices.

In the transition period the present election system of elections every two years of eight year terms for justices with incumbency designations would be converted to the reform system of one election without incumbency designations every two years of one justice for one of the seven election districts for one 14 year term (with no age limitation), with only one term of no more than 14 years for any justice, with no reelection or appointment of an elected justice, and with no reappointment or election for an appointed justice.

In addition, during the transition period the present disorderly secret appointment system of unchecked secret gubernatorial appointments of justices for vacancies would be converted to the transparent and open reformed check-and-balance system for vacancies filled by gubernatorial

appointment with advisory committee recommendations and Senate confirmation for only the remainder of the vacant terms.

For example, assuming the necessary reform laws were adopted into law effective for the 2014 Supreme Court justices' election (by needed constitutional amendment vote of the people and/or the needed implementing legislation of the House and the Senate) the following transition rules would allow fairness to justices elected and/or appointed under the old system laws and holding office on or before November 1, 2014, the following one time exceptions:

• the terms for the elections during the transition period may be less but not more than 14 years;
• a serving elected or appointed justice would be able to run for election in his/her district one time as long as the justice's total number of years of service on the court if elected would be no more than 14 years.

The transition election terms, districts, and schedule would be as follows: The present Michael Cavanagh seat would be in District 1 with 14-year terms; Cavanagh with 32 years of service would not be able to run.

The present David Viviano seat would be in District 2 with a one-time, 12-year term and 14-year terms thereafter; Viviano with almost two years of service would be able to run.

The present Brian Zahra seat would be in District 3 with a one-time, 6-year term and 14-year terms thereafter; Zahra with almost four years of service would be able to run.

The present Mary Beth Kelly seat would be in District 4 with a one-time, four-year term and 14-year terms thereafter; Kelly would be able to run.

The present Robert P. Young, Jr. seat would be in District 5 with 14-year terms; Young, with more than 17 years of service would not be able to run again.

The present Bridget Mary McCormack seat would be in District 6 with a one-time, four-year term and 14-year terms thereafter; McCormack would be able to run.

The present Stephen J. Markman seat would be in District 7 with a one-time, 10-year term and 14-year terms thereafter; Markman, with more than 17 years of service would not be able to run.

Election Schedule

Election Year	District#1	Dist#2	Dist#3	Dist#4	Dist#5	Dist#6	Dist#7
	Term						
2014	14yr	12yr	6yr				
2016	No election for justices						
2018				4yr	14yr		
2020			14yr			4yr	10yr
2022				14yr			
2024						14yr	
2026		14yr					
2028	14yr						
2030							14yr

It is time to stop counting on our elected and appointed officials, special interests, the press, the rest of the media and "just anybody else" to lead in the preservation of our vital institutions like the judiciary and the Michigan Supreme Court.

It is time for everyone of us to take individual responsibility, to take the lead—to educate ourselves, our families, friends, neighbors, co-workers, local county, city, township, state officials, the press and the media, to recognize the problems and the need for reform at and transparency in the Michigan Supreme Court, and to join with others who have done the same, to propose and pursue to achievement the solutions through legislation and constitutional amendments in order to correct the problems and meet the needs.

It is time to Do Right and Fear Not. It's time to Demand and Get Reform.

Chief Justice Elizabeth A. Weaver, retired
ew@justiceweaver.com
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