

TO: Interested Parties
FROM: Robert F. Bauer
RE: **Michigan Primary**
DA: March 19, 2008

In the short time available, I have reviewed the proposed legislation to establish the June 3, 2008 primary, considering primarily those issues that bear on the central question of whether this election can be conducted successfully without undue risk of legal challenges, including those challenges arising out of errors or other breakdown induced by the schedule the State has proposed.

No one disputes that the election will have to be hurriedly prepared; and it is further accepted that it is, in material respects, unprecedented in conception and proposed structure. Michigan will be, for example, the first to state to have re-run an election in circumstances like these, to redress violations of party rules, and it will be the first to do so with the state supplying the legislative and administrative support but with private parties underwriting the costs with "soft money". Whether the state can achieve its goals here depends on the nature and seriousness of the legal and administrative questions presented by this initiative—questions that, raised after the election, could put at risk the running of the election, undermine acceptance of the results if the election is held, and in both cases effectively deny Michigan voters, a second consecutive time, meaningful participation in the nominating process.

For the reasons discussed briefly below, there are such questions and they are serious both in nature and in their potential, if not likely, impact on the June election proposal.

Voter Disqualification

Although Michigan has always run open elections, which allow voters to vote in whatever primary they prefer, voters who participated in the Republican primary in January could not vote in the June election under the proposed law. This class of voters includes Democrats and Independents who chose not to vote in the invalid Democratic primary at the time because the majority of active candidates did not appear on the ballot and the results would not be accepted under party rules.

This provision raises a significant constitutional question and, along with it, the prospect for litigation that would undermine the perceived legitimacy of the election and bring preparations to a standstill under circumstances in which such delay is effectively fatal.

The claim here could also be presented to the party, under party rules, with a similar effect of putting the election and its results in serious question.

The burden on voters here is one of complete disqualification—they cannot participate in the Democratic primary in June if they voted in the January Republican primary. Their claim of a violation of their rights would rest on the fact that that the state "changed the rules in the middle of the game." These voters' choice was entirely reasonable in the circumstances: there was no valid Democratic primary available to them at the time, and they could not know that, when their choice was made, that they were disqualifying themselves from participating in a re-run Democratic primary this year that they could know would be held.

Moreover, the state will have difficulty justifying this disenfranchisement by reference to any legitimate state interest. Michigan cannot argue that it wants to limit the June primary to those who are genuinely Democrats, because it has always run fully open

primaries. Voters, in other words, have a state-conferred right to vote in the Democratic party no matter what their affiliation. The primaries in January were fully open; and the decision to close them in June will not easily stand constitutional scrutiny. In any challenge, Michigan will be criticized for proposing a re-run without, in effect, restoring to voters the original choice they had—whether to participate in a meaningful Democratic primary.

In other words, the proposal offers a re-run for the State but not for all the voters. The state will have to assert an interest sufficient to justify this infringement on the voting rights of its citizens. Its challenge will be to show how, when the state is seeking to remedy a problem of its own making—failure in the first instance to observe party rules on timing—it can somehow discriminate against groups of its own citizens.

The State is also vulnerable to challenge under the party rules. Since any Republican or independent who did not vote in January in the Republican primary is fully free to participate in the June primary, the effect of the proposal is to enfranchise a class of Republicans while disenfranchising a class of Democrats—the ones who chose to vote in the Republican primary when they correctly understood that the Democratic contest was meaningless. A challenge along these lines would consume time, when time is not available, and it is not clear that the party would or could approve this exclusionary feature even if the participating candidates were to agree to it. The DNC would subject itself to legal action if it proceeds with approval of the plan with these terms included. These voting rights issues constitute a serious vulnerability in the proposed legislation and a threat to its successful enactment and implementation.

Voting Rights Act Pre-Clearance

The June primary proposal is clearly subject to pre-clearance under the Voting Rights Act. Because of the voter disqualification feature, together with the other extraordinary circumstances, there is no reason to believe that this review will conclude promptly or without issues raised. The Justice Department is not even required to issue its ruling until 60 days have elapsed. This timeline simply does not fit within the state timeline and may only further delay preparations.

Further, should the Department of Justice object, the state would be barred from proceeding with its plan. Even if the Department pre-clears the election, objections could be pursued further in litigation initiated under another provision (Section 2) of the Voting Rights Act.

Additional Issues: Implications for Litigation

Under the bill, and in connection with meeting the demands of an election under the schedule it establishes, there are additional sources of potential legal challenge. Each of these is addressed briefly here:

(1) **Voter Affirmation**

The proposed legislation would call for voters to affirm that they have not participated in any other Presidential primary election in this calendar year. Should the election be close, it is foreseeable that these affirmations would become a source of challenges, as we have already seen, in Texas, similar demands for the verification of up to one million voters' eligibility. Any such challenge would delay results on a timetable that does not allow for delay.

There is also a significant danger here of potential voter confusion: a voter might affirm that he or she did not participate in any other Presidential primary, by which the voter

might mean the prior *Democratic* primary, with the result that the voter would be subject to investigation for falsely affirming what he or she believed to be true.

The result here could be extensive litigation, embarrassment to the voters, and eventual loss of credibility for the election.

(2) UOCAVA

.It is a serious risk that, under the highly compressed timetables established under the proposed bill, Michigan will be unable to satisfy the requirements for compliance with the Uniformed And Overseas Citizens Absentee Voting Act (UOCAVA),, which was designed to protect our men and women in uniform, among others. The Election Assistance Commission's report in September, 2007 on the low turn-out in overseas voting called on States and local election authorities to attend closely to the requirements for the timely and reliable delivery and receipt of ballots. The fact that, as noted below, election administrators within Michigan have already raised the potential for administrative strain, if not breakdown, in the proposed June election squarely raises the foreseeable consequences for Michigan's performance of its obligations to these voters under the law.

(3) Strain on Election Preparations

Those with the most detailed knowledge about, and the greatest responsibility for, how well the proposed election will work—the clerks who will actually be charged with administering the election—have stated that the election cannot be planned and administered within this time

frame. http://blog.mlive.com/kzgazette/2008/03/saginaw_county_clerk_says_redo.html

(reporting the President of the Michigan Association of County Clerks conclusion that "Our software and other equipment are not designed to run (multiple) elections at the same time. There are just so many reasons why this [June election] wouldn't work").

The professional judgments in advance of the election, warning of breakdown, will be cited in litigation over any difficulties Michigan experiences over the course of endeavoring to run this election. If breakdowns occur, and especially if the election is close, it is likely that Michigan's attempt to hold this election on this timetable, in the face of these warnings from the responsible local officials, will weigh heavily against its legal position. In any litigation, it is sure to be noted, as in the past, that "Michigan is the largest . . . state that today place[s] responsibility for conducting elections primarily at the municipal level. . . . Some 274 city clerks and 1,242 township clerks . . . are primarily responsible for the actual administration of Michigan elections." Steven F. Huefner, et al., *From Registration to Recounts: The Election Ecosystems of Five Midwestern States* 88 (2007). An election held without regard to the independent and professional judgment of the responsible officials will, in the event of breakdown, subject the state and the party to adverse consequences in any subsequent legal accounting.

A Note on Financing

I have further reviewed the state's plan to collect the funds needed for this election from private sources. It appears that, under Michigan law, the State may, if it "appropriates" the money by separate enactment, invite private parties, individuals or groups, to contribute on an unlimited basis to support a public function such as this conduct of this election.

To the extent that this extraordinary financing provision raises issues, these arise under the Federal Election Campaign Act of 1971. Throughout press accounts, supporters of the

proposal and others commenting on it have referred to the private funding as "soft money." Now in formal use following the enactment of the Bipartisan Campaign Reform Act of 2002, this term covers any funds raised and spent outside the FECA's contribution limits, source restrictions and reporting requirements to influence a federal election. Neither the national party nor candidates may solicit such funds, nor may others "acting on their behalf" as their agents.

We could expect that this issue may be raised—and it has already been identified by a leading reform organization, Democracy 21, a leading supporters of the BCRA "soft money" reforms.

http://www.democracy21.org/index.asp?Type=B_PR&SEC={91FCB139-CC82-4DDD-AE4E-3A81E6427C7F}&DE={93E58584-8019-4201-A02C-4519BC65B974}

Since the state is acting on behalf of the party, with the expected assistance of the candidates, a creditable case may be made that all soft monies raised have been impermissibly solicited on behalf of at least the Democratic National Committee and, possibly, Senators Obama and Clinton (to the extent that their donors are encouraged or motivated to volunteer funds). It is therefore well within the realm of possibility that such a case will be made, subjecting the party and its candidates to potential liability.