

## **DRAFTING TASK FORCE'S NOTES TO THE HOUSE OF DELEGATES**

Following the Report of the Arkansas Bar Association's Task Force on Maintaining a Fair and Impartial Judiciary, a Drafting Task Force was formed to produce a proposed Arkansas Constitutional Amendment implementing an appointment process for selection of Supreme Court Justices. While many details were left to the Drafting Task Force, this proposed Amendment was carefully written to follow the dictates of the Task Force as approved by the House of Delegates. The Drafting Task Force considered fidelity to that mandate to be its overarching duty.

The Drafting Task Force further sought to accomplish three objectives with this proposed Amendment: 1) to assure a fair and impartial Court; 2) to create a Court independent of perceived improper influences arising from campaign finances and politics; and 3) to continue the high quality of Justices on our Supreme Court.

The proposed Amendment provides as follows:

### **Judicial Nominating Commission**

A nine member Judicial Nominating Commission will be established. The Commission will accept applications, interview candidates, and nominate three individuals for each vacancy on the Court. The Governor will select a Justice from the three nominees.

### **Commission's membership**

The Commissioners will be nominated by the Governor (2), the Speaker of the House (1), the Senate President *Pro tem* (1), the Supreme Court (2), and the Arkansas Bar Association (3). The Chief Justice or the Chief Justice's designee will chair the Commission as a non-voting member. The Supreme Court and Bar Association nominees will be attorneys.

### **Supreme Court Term**

Following a phase in period, each Justice will serve a single term of fourteen years. Once the phase in period is completed, a new Justice will be appointed each biennium. Positions on the Court that become available by virtue of resignation, retirement, or death will also be filled by appointment, with those appointees serving the balance of the departing Justice's term.

### **Current Court**

All present members of the Court and the Justice elected in 2018 will complete their full, elected term of office. Because the Task Force believes that past service will be an indication of qualifications for an appointment, the current Justices will be eligible to seek nomination after their elected terms have ended.

### **Phase In Period**

The current election cycle for the Supreme Court will result in one term expiring in 2018, one in 2020, three in 2022, and two in 2024. Beginning with the term ending in 2020, Justices will be appointed to staggered terms designed so that only one term will end every two years.

**Transparency**

The Commission will assure that its proceedings are transparent and open to the public, subject to the right of the Commission to conduct deliberations in executive session.

## **JUDICIAL NOMINATING COMMISSION**

Twenty-two states utilize judicial nominating commissions and gubernatorial appointments for selecting Supreme Court Justices. The Task Force on Maintaining a Fair and Impartial Judiciary recommended the judicial nominating commission process and the Drafting Task Force adhered to that recommendation. Our reasons were:

- a. Amendment 80 to the Arkansas Constitution permits the implementation of a judicial nominating commission to appoint Supreme Court Justices.
- b. As opposed to contested elections, the Judicial Nominating Commission is insulated from the influence of raising campaign funds because no campaign funds are required for the Judicial Nominating Commission's members.
- c. Appointed Justices are also insulated from raising campaign funds. By virtue of the nominating and appointment process, individuals will be able to assume the bench free from even the appearance of influence or conflict due to campaign financing.
- d. As opposed to contested elections, the nominating commission method is insulated from the influence of campaign politics. The utilization of a multi-member Commission, along with the diverse nominating structure of the Commission, serves to restrict the ability of any one issue or position to control the Commission's decisions.
- e. Appointed Justices are also insulated from the influence of campaign politics. The Commission would only require impartiality, fairness, and adherence to the rule of law. Again, appointees will be able to assume the bench free from even the appearance of preconception or doctrinal fealty.
- f. The nominating commission method allows for studied and deliberate decision-making. The Commission's interview processes will provide the ability to obtain information and impressions that would never be available from a campaign ad or event.

## **APPOINTMENT vs ELECTION**

While the Task Force on Maintaining a Fair and Impartial Judiciary's decision to propose a system of judicial appointment was already made when the Drafting Task Force commenced its efforts, it is instructive to set forth the basis for the decision to implement an appointment-based judicial selection process.

- a. Anonymously funded, unidentified attack campaign ads were purchased for use in Arkansas's last three Supreme Court Justice campaigns. Under present Arkansas law, the purchasers of those attack ads do not have to identify the source of their funds.
- b. While the Bar and the Task Force on Maintaining a Fair and Impartial Judiciary do not assert any fault or wrong doing on the part of the successful Supreme Court candidates in those three elections, the influence and potential misuse of such unidentified attack ads sounded an alarm. The Task Force on Maintaining a Fair and Impartial Judiciary was created to investigate the use of such ads and to suggest methods for eliminating their influence, while preserving our fair and impartial judiciary.
- c. Our current Arkansas Constitutional Judicial article, found in Amendment 80 permits implementation of appointed Supreme Court Justices.
- d. At present, 30 states operate an appointment process for selection of some or all of their judiciary. Another 22 states utilize contested elections. In four states the governor appoints justices with legislative or some other form of confirmation. In two states, the legislature chooses the judiciary.<sup>1</sup>
- e. It is the recommendation of the Task Force on Maintaining a Fair and Impartial Judiciary to implement an appointment-based judicial selection process for Supreme Court Justices to help eliminate the influence of unidentified money that is often contributed from out of state and is almost always spent in support of some special interest.

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<sup>1</sup> Choosing Judges: Judicial Nominating Commissions and the Selection of Supreme Court Justices, Institute for the Advancement of the American Legal System, University of Denver, at 2-3 (2014).

## **SINGLE FOURTEEN YEAR TERM**

The present term of office for a Supreme Court Justice is eight years. Re-election is only limited by the disincentive of retirement law: Justices who are elected to office after their 70<sup>th</sup> birthday forfeit their accumulated and future retirement benefits. According to the information produced by the Task Force on Maintaining a Fair and Impartial Judiciary, the average length of service of an Arkansas Supreme Court Justice is fifteen years. When considering length of terms and methods of reappointment, the Drafting Task Force selected the single fourteen-year term as a superior method over retention elections or resubmission to the Judicial Nominating Commission. The following is a summary of the rationale for this decision:

- a. Retention elections pose significant problems. In a retention election, a serving Justice seeking to remain on the bench stands before the electorate for a vote of approval or rejection. There is no opponent - only yes or no.
- b. Retention elections reintroduce campaign finances and campaign politics into the Justice selection process.
- c. While contested elections are susceptible to anonymous attack campaign ads, retention elections have proven to be subject to an even greater concentration of attack ads. Where the electoral process features only a yes or no vote, negative ads have been particularly successful. Ads honing in on single issues are prevalent. Meanwhile the responses of the retention candidate are limited by judicial canons. The disparity between the limitations on the candidate and the wide open airwaves for the attack ads creates an unlevel campaign playing field.
- d. Scholarly research shows that votes and opinions of the judiciary may become tailored to satisfy certain interest groups as retention elections grow close. Extending the length of the Justice's term and thereby eliminating the need for a retention election frees the Justice to vote according to conscience and the rule of law and not according to political necessity.
- e. Similarly, returning a sitting Justice to the Judicial Nominating Commission for a renewed nomination and appointment process may create those same vote and opinion tailoring issues.
- f. The single fourteen year term was determined by the Drafting Task Force to be the best approach for insulating Justices from actual and perceived improper influences and thus to achieve the desired goal of a continued fair and impartial Court.
- g. Given the average length of service as reported by the Judicial Council to the Task Force on Maintaining a Fair and Impartial Judiciary, and given the present length of service necessary to attain a full retirement benefit, the fourteen year term was adopted.

1 State of Arkansas  
2 90th General Assembly  
3 Fourth Extraordinary Session, 2016  
4

DRAFT MBM/MBM  
SJR

5 By: Senator <NA>  
6

7 **SENATE JOINT RESOLUTION**

8 AN AMENDMENT TO THE ARKANSAS CONSTITUTION CONCERNING  
9 THE PROCESS FOR SELECTING AND APPOINTING A JUSTICE OF  
10 THE SUPREME COURT AND AMENDING PROVISIONS CONCERNING  
11 TERMS AND SERVICE ON THE SUPREME COURT.  
12  
13

14 **Subtitle**

15 AN AMENDMENT TO THE ARKANSAS CONSTITUTION  
16 CONCERNING THE PROCESS FOR SELECTING AND  
17 APPOINTING A JUSTICE OF THE SUPREME COURT  
18 AND AMENDING PROVISIONS CONCERNING TERMS  
19 AND SERVICE ON THE SUPREME COURT.  
20  
21

22 BE IT RESOLVED BY THE SENATE OF THE NINETIETH GENERAL ASSEMBLY OF THE STATE  
23 OF ARKANSAS  
24

25 That the following is proposed as an amendment to the Constitution of  
26 the State of Arkansas, and upon being submitted to the electors of the state  
27 for approval or rejection at the next general election for Representatives  
28 and Senators, if a majority of the electors voting thereon at the election  
29 adopt the amendment, the amendment shall become a part of the Constitution of  
30 the State of Arkansas, to wit:  
31

32 SECTION 1. Subsection (A) of Section 2 of Amendment 80 to the Arkansas  
33 Constitution is amended to read as follows:

34 (A) The Supreme Court shall be composed of seven Justices, one of whom  
35 shall serve as Chief Justice. The Justices of the Supreme Court shall be  
36 selected ~~from the State at large~~ on the basis of merit and appointed as

1 provided under this amendment.

2

3 SECTION 2. Subsection (A) of Section 16 of Amendment 80 to the  
4 Arkansas Constitution is amended to read as follows:

5 (A)(1) Justices of the Supreme Court and Judges of the Court of  
6 Appeals shall have been licensed attorneys of this state for at least eight  
7 years immediately preceding the date of assuming office. ~~They shall serve~~  
8 ~~eight-year terms.~~

9 (2) A Justice of the Supreme Court shall serve a term of  
10 fourteen (14) years unless otherwise provided by this amendment.

11 (3) A Judge of the Court of Appeals shall serve an eight-year  
12 term.

13

14 SECTION 3. Section 18 of Amendment 80 to the Arkansas Constitution is  
15 amended to read as follows:

16 § 18. Election of ~~Supreme Court Justices and~~ Court of Appeals Judges.

17 (A) ~~Supreme Court Justices and~~ Court of Appeals Judges shall be  
18 elected on a nonpartisan basis by a majority of qualified electors voting for  
19 such office. Provided, however, the General Assembly may refer the issue of  
20 merit selection of members of the ~~Supreme Court and the~~ Court of Appeals to a  
21 vote of the people at any general election. If the voters approve a merit  
22 selection system, the General Assembly shall enact laws to create a judicial  
23 nominating commission for the purpose of nominating candidates for merit  
24 selection to the ~~Supreme Court and~~ Court of Appeals.

25 (B) Vacancies ~~in these offices~~ on the Court of Appeals shall be filled  
26 by appointment of the Governor, unless the voters provide otherwise in a  
27 system of merit selection.

28

29 SECTION 4. Amendment 80 to the Arkansas Constitution is amended to add  
30 additional sections to read as follows:

31 § 23. Judicial Nominating Commission.

32 (a) There is created the Judicial Nominating Commission, consisting of  
33 ten (10) members as follows:

34 (1)(A) Two (2) voting members appointed by the Governor.

35 (B) A member appointed by the Governor shall serve a term  
36 of four (4) years;

1           (2)(A) One (1) voting member appointed by the President Pro  
2 Tempore of the Senate.

3           (B) The member appointed by the President Pro Tempore  
4 shall serve a term of two (2) years;

5           (3)(A) One (1) voting member appointed by the Speaker of the  
6 House of Representatives.

7           (B) The member appointed by the Speaker of the House of  
8 Representatives shall serve a term of two (2) years;

9           (4)(A)(i) Three (3) voting members appointed by the Arkansas Bar  
10 Association.

11                   (ii) As used in this section, "Arkansas Bar  
12 Association" includes a successor of the Arkansas Bar Association as  
13 certified to the Secretary of State by the Supreme Court.

14           (B) The members appointed by the Arkansas Bar Association  
15 shall:

16                   (i) Serve terms of six (6) years; and

17                   (ii) Be licensed Arkansas attorneys in good standing  
18 with the Arkansas Supreme Court;

19           (5) Two (2) voting members appointed by the Arkansas Supreme  
20 Court.

21           (B) The members appointed by the Arkansas Supreme Court  
22 shall:

23                   (i) Serve terms of four (4) years; and

24                   (ii) Be licensed Arkansas attorneys in good standing  
25 with the Arkansas Supreme Court; and

26           (6)(A) The Chief Justice of the Supreme Court or a Justice of  
27 the Supreme Court designated by the Chief Justice.

28           (B) The Chief Justice or the Chief Justice's designee  
29 shall:

30                   (i) Serve as chair of the Judicial Nominating  
31 Commission; and

32                   (ii) Be a nonvoting member of the commission.

33           (b)(1) Except as provided in subdivision (b)(2) of this section, a  
34 member of the commission may be reappointed by the appointing authority.

35           (2)(A) In no event shall an appointed member of the commission  
36 serve more than six (6) years in the aggregate on the commission.

1                   (B) An appointment shall not be made if the aggregate  
2 service on the commission of a proposed appointee would exceed six (6) years.

3                   (c)(1) A person holding an elected public office shall not be  
4 appointed to the commission.

5                   (2) A member of the commission shall not file as a candidate for  
6 an elected office without first resigning from the commission.

7                   (d) A member of the commission appointed under subdivisions (a)(1) -  
8 (4) of this section shall not be eligible for appointment to the position of  
9 Justice of the Supreme Court:

10                   (1) During the term of the member's appointment to the  
11 commission; and

12                   (2) For two (2) years following the expiration of the member's  
13 term.

14                   (e)(1) A vacancy on the commission shall be filled by the appointing  
15 authority.

16                   (2) The commission shall notify the appointing authority of a  
17 vacancy on the commission.

18                   (3) The appointing authority shall appoint a replacement to fill  
19 the vacancy on the commission within thirty (30) days of notification under  
20 subdivision (e)(2) of this section.

21                   (4) A member appointed to fill a vacancy on the commission shall  
22 be eligible for reappointment to the commission subject to subdivision (b)(2)  
23 of this section.

24                   (5) An appointment to fill a vacancy on the commission that  
25 occurs for any reason other than the expiration of a term shall be for the  
26 balance of the unexpired term.

27                   (6) A member of the commission shall serve without compensation,  
28 but may receive reimbursement for necessary travel and expenses incurred  
29 while performing duties as a member.

30                   (f) A member appointed to the commission shall:

31                   (1) Be knowledgeable of the role and characteristics that should  
32 be exemplified by a member of the judiciary; and

33                   (2) Agree to be bound by the code of ethical conduct adopted by  
34 the commission under subdivision (h)(1) of this section.

35                   (g) A majority of the members of the commission shall constitute a  
36 quorum for the purpose of conducting the business of the commission.

1           (h) The commission shall determine:

2                   (1)(A) The content of a code of ethical conduct that shall  
3 govern the actions of each member as it relates to their role on the  
4 commission.

5                   (B) After adoption of the code of ethical conduct, the  
6 commission shall provide appropriate training on the code of ethical conduct  
7 to a newly appointed member of the commission before the member engages in  
8 official duties as a member;

9                   (2) The policies and procedures that govern the activities of  
10 the commission, including without limitation:

11                   (A) Establishing a system for selection of Justices of the  
12 Supreme Court on the basis of merit;

13                   (B) Assuring that commission proceedings are transparent  
14 and open to the public, subject to the right of the commission to conduct  
15 deliberations in a private executive session;

16                   (C) Providing a uniform application form and process for  
17 applicants seeking consideration for appointment to a position of Justice of  
18 the Supreme Court;

19                   (D) Conducting public interviews with applicants for  
20 appointment to a position of Justice of the Supreme Court and providing an  
21 opportunity for members of the public to submit comments to the commission  
22 regarding an applicant; and

23                   (E) Conducting a comprehensive background check of  
24 applicants for appointment to a position of Justice of the Supreme Court and  
25 requiring an applicant to give consent for a comprehensive background check;  
26 and

27                   (3) Whether the qualifications of applicants to hold the  
28 position of Justice of the Supreme Court have been met.

29

30           § 24. Filling of Justice of the Supreme Court vacancy.

31                   (a) A vacancy in a Justice of the Supreme Court position which occurs  
32 after the effective date of this section shall be filled in the following  
33 manner:

34                   (1)(A) When a vacancy in a Justice of the Supreme Court position  
35 is certified to the Secretary of State by the Chief Justice of the Supreme  
36 Court, the Judicial Nominating Commission, after giving notice to the public

1 of the vacancy, shall consider the qualifications of all persons submitting  
2 timely applications under rules established by the commission.

3 (B) If a vacancy in a Justice of the Supreme Court  
4 position will occur due to the expiration of the term of a Justice of the  
5 Supreme Court, the Chief Justice of the Supreme Court shall certify the  
6 vacancy to the Secretary of State no later than ninety (90) days before the  
7 end of the term scheduled to expire.

8 (C)(i) If a Justice of the Supreme Court delivers a  
9 written resignation to the Chief Justice of the Supreme Court, the Chief  
10 Justice shall certify to the Secretary of State within ten (10) days of the  
11 delivery of the writing that a vacancy will occur on the effective date of  
12 the resignation.

13 (ii) If the Chief Justice is resigning, the Chief  
14 Justice shall deliver a resignation in writing to the then most senior  
15 Justice of the Supreme Court, who shall certify to the Secretary of State  
16 within ten (10) days of the delivery of the writing that a vacancy in the  
17 position of Chief Justice will occur on the effective date of the  
18 resignation.

19 (D) If a vacancy in a Justice of the Supreme Court  
20 position occurs for any reason other than as described in subdivisions  
21 (a)(1)(B) and (a)(1)(C) of this section, the Chief Justice of the Supreme  
22 Court shall certify the vacancy to the Secretary of State within ten (10)  
23 days of the vacancy occurring.

24 (2) Within sixty (60) calendar days of the vacancy being  
25 certified under subdivision (a)(1) of this section or as soon thereafter as  
26 is reasonably practicable, the commission shall submit to the Governor the  
27 names of three (3) qualified applicants as nominees for the position of  
28 Justice of the Supreme Court; and

29 (3)(A) The Governor shall make an appointment from the three (3)  
30 nominees submitted under subdivision (a)(2) of this section and certify the  
31 appointment to the Secretary of State within thirty (30) days of receipt of  
32 the names of the nominees under subdivision (a)(2) of this section.

33 (B)(i) If the Governor fails to make an appointment from  
34 the three (3) nominees within thirty (30) days of receipt of the names of the  
35 nominees under subdivision (a)(2) of this section, the commission shall  
36 appoint one of the three (3) nominees in a special meeting called for that

1 purpose.

2 (ii) The Chair of the Judicial Nominating Commission  
3 shall certify the appointment to the Secretary of State.

4 (b) A person appointed to fill a vacancy under subdivisions (a)(1)(B)  
5 and (a)(1)(C) of this section shall not assume office until:

6 (1) The end of the term of the Justice of the Supreme Court whom  
7 the appointee shall replace; or

8 (2) The resignation of the Justice of the Supreme Court whom the  
9 appointee shall replace.

10 (c)(1) The term of a Justice of the Supreme Court appointed under this  
11 section shall be fourteen (14) years except as otherwise provided in this  
12 amendment.

13 (2) A Justice of the Supreme Court appointed to a fourteen-year  
14 term under this section is not eligible for reappointment.

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16 § 25. Vacancy occurring during term of office.

17 (a)(1) Except as provided in subsections (b) and (c) of this section,  
18 a vacancy in a Justice of the Supreme Court position that occurs after  
19 January 1, 2019, for any reason shall be filled as provided in § 24 of this  
20 amendment.

21 (2) A person appointed to fill a vacancy occurring for any  
22 reason other than the expiration of a term of office shall serve the  
23 remainder of the term of office.

24 (b) If the vacant term remaining to be filled is two (2) years or  
25 less, the nominee appointed is eligible at the conclusion of that remaining  
26 term to apply to the Judicial Nominating Commission to be considered, with  
27 other timely applicants, for a successive fourteen-year term.

28 (c) If a vacant term to be filled is more than two (2) years, the  
29 nominee appointed may not seek appointment to a successive fourteen (14) year  
30 term.

31  
32 § 26. Implementation of amended terms of Justices of the Supreme  
33 Court.

34 (a)(1) A Justice of the Supreme Court elected before January 1, 2019  
35 shall continue in office until the expiration of his or her elected term.

36 (2) A Justice of the Supreme Court elected before January 1,

1 2019 is eligible to apply to the Judicial Nominating Commission to fill a  
2 future vacancy in the position of Justice of the Supreme Court.

3 (b) To ensure that, after January 1, 2019, the term of one (1) or more  
4 Justices of the Supreme Court will expire every two (2) years, the initial  
5 appointment of each Justice of the Supreme Court shall be implemented as  
6 follows:

7 (1)(A) The Justice of the Supreme Court elected to serve in  
8 Position 4 shall expire on January 1, 2021, and the person initially  
9 appointed to the position shall serve a term of eight (8) years.

10 (B) Persons subsequently appointed to Position 4 shall  
11 serve a term of fourteen (14) years.

12 (2)(A) The Justices of the Supreme Court elected to serve in  
13 Position 2, Position 6, and Position 7 shall expire on January 1, 2023, and  
14 the persons initially appointed to those positions shall draw lots so that  
15 one (1) person serves a term of eight (8) years, one (1) person serves a term  
16 of ten (10) years, and one (1) person serves a term of twelve (12) years.

17 (B) The chair of the Judicial Nominating Commission shall  
18 supervise the drawing of lots for length of terms under subdivision (b)(2)(A)  
19 of this section, which shall occur after persons are appointed as Justices of  
20 the Supreme Court to serve in Position 2, Position 6, and Position 7.

21 (C) Persons subsequently appointed to Position 2, Position  
22 6, and Position 7 shall serve a term of fourteen (14) years;

23 (3)(A) The terms of the Justices of the Supreme Court elected to  
24 serve in Position 1 and Position 5 shall expire on January 1, 2025, and the  
25 persons initially appointed to those positions shall draw lots so that one  
26 (1) person serves a term of twelve (12) years and one (1) person serves a  
27 term of fourteen (14) years.

28 (B) The chair shall supervise the drawing of lots for  
29 length of terms under subdivision (b)(3)(A) of this section, which shall  
30 occur after persons are appointed as Justices of the Supreme Court to serve  
31 in Position 1 and Position 5.

32 (C) The person appointed to serve in Position 1 shall  
33 serve as Chief Justice of the Supreme Court.

34 (D) Persons subsequently appointed to Position 1 and  
35 Position 5 shall serve a term of fourteen (14) years; and

36 (4) The term of the person elected to serve in Position 3 shall

1 expire on January 1, 2027, and all persons subsequently appointed to that  
2 position shall serve a term of fourteen (14) years.

3 (c) A Justice of the Supreme Court appointed to a term under  
4 subsection (b) of this section is not eligible for reappointment.

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6 SECTION 5. EFFECTIVE DATE. (a) This amendment shall become effective  
7 on January 1, 2019.

8 (b)(1) The initial members of the Judicial Nominating Commission shall  
9 be appointed and their appointment certified to the Secretary of State no  
10 later than March 1, 2019.

11 (2) The Chief Justice of the Supreme Court or the Chief  
12 Justice's designee shall call the initial meeting of the commission no later  
13 than April 1, 2019.

14  
15 SECTION 6. BALLOT TITLE AND POPULAR NAME. When this amendment is  
16 submitted to the electors of this state on the general election ballot:

17 (1) The title of this joint resolution shall be the ballot  
18 title; and

19 (2) The popular name shall be, "An Amendment to the Arkansas  
20 Constitution Concerning the Process for Selecting and Appointing Justices of  
21 the Supreme Court and Amending Provisions Concerning Terms and Service on the  
22 Supreme Court".

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