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### In Defense of Popular Elections

Former Justice Robert L. Brown

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## IN DEFENSE OF POPULAR ELECTIONS

*Former Justice Robert L. Brown\**

Arkansas is in a crisis over how to select Justices of the Arkansas Supreme Court. Arkansas has had popular elections of its justices since 1864,<sup>1</sup> but the impact of money on judicial elections, and suspicions surrounding it, have now caused public confidence in the selection of our justices to dip to an all-time low.<sup>2</sup> Reform, as a result, is very much in the air, and the prevailing wisdom is that dramatic changes need to be made to the judicial selection process.<sup>3</sup> This article will address the effectiveness and viability of the proposed reforms.

### I. POPULAR ELECTIONS

Arkansas fell in step with the new wave of Jacksonian Democracy that swept many southern states following the Civil War and converted to the popular election of supreme court justices rather than appointments by either the general assembly or the governor.<sup>4</sup> One reason was the widely-held suspicion that the appointment system was political, and it was thought that corruption could be avoided if the voting population as a whole selected the justices.<sup>5</sup>

Popular elections have now been the process for more than 150 years.<sup>6</sup> This dovetailed well with the state's motto, *Regnat Populus*, the People Rule, which was part of the Great Seal of the State when Arkansas entered

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1. ARK. CONST. of 1864, art. VII, § 7.

2. Jim Hannah, Chief Justice, Ark. Supreme Court, State of the Judiciary (June 13, 2014) (transcript available at <https://courts.arkansas.gov/sites/default/files/tree/2014%20State%20of%20the%20Judiciary.pdf>).

3. Max Brantley, *Judicial Campaign Contributions and a Change to Appointment on the Legislature's Agenda Soon*, ARK. TIMES, (Mar. 17, 2016), <https://www.arktimes.com/ArkansasBlog/archives/2016/03/17/judicial-campaign-contributions-and-a-change-to-appointment-on-the-legislatures-agenda-soon>.

4. Kermit L. Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary*, 46 HISTORIAN 337, 337 (1983).

5. *Id.* at 344–45.

6. ARK. CONST. of 1864, art. VII, § 7.

statehood in 1836.<sup>7</sup> In 2000, the Judicial Article of the Arkansas Constitution was overhauled by Amendment 80 to the Arkansas Constitution which provided, for the first time, the nonpartisan election of justices.<sup>8</sup>

The biggest argument waged against popular elections then and now is that they force judicial candidates to become “politicians” with all that entails.<sup>9</sup> For example, they must campaign throughout the state and raise money.<sup>10</sup> There is also the impact of unidentified, dark money that has poured into the state in recent elections with scurrilous attack ads that have been patently false, but still have had the power of skewering election results.<sup>11</sup> As a final point, opponents of popular elections argue that justices are less inclined to make difficult decisions that might carry with them adverse political ramifications if they must stand for a future election.<sup>12</sup>

Proponents of popular elections, on the other hand, point to the educational value of traveling the state, both for the public and the candidates.<sup>13</sup> They further underscore various reforms that can minimize the “political” aspect, which are discussed in this article. Most importantly, proponents emphasize that from 1991 to 2012, weighty decisions concerning term limits for state and federal officials, sodomy laws, equal and adequate funding for public schools, adoption and fostering of children by same-sex couples, and the death-penalty were handled by the court without fear of political consequences.<sup>14</sup>

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7. David Ware, *Official State Motto*, ENCYCLOPEDIA OF ARK. HIST. & CULTURE, <http://www.encyclopediaofarkansas.net/encyclopedia/entry-detail.aspx?search=1&entryID=3136> (last updated Nov. 26, 2015).

8. ARK. CONST. amend. LXXX, §18.

9. Robert L. Brown, *From Whence Cometh Our State Appellate Judges: Popular Elections Versus the Missouri Plan*, 20 U. ARK. LITTLE ROCK L. REV. 313, 317 (1998) [hereinafter *Popular Elections*].

10. *Id.*

11. Alex Kotch, *Conservatives Jockey to Tighten Grip on State Supreme Courts Across the South*, FACING SOUTH, (Mar. 4, 2016), <https://www.facingsouth.org/2016/03/conservatives-jockey-to-tighten-grip-on-state-supr.html>.

12. Alicia Bannon, *Rethinking Judicial Selection in State Courts*, BRENNAN CTR. FOR JUST. 12-13 (June 6, 2016), <https://www.brennancenter.org/publication/rethinking-judicial-selection-state-courts>.

13. *Popular Elections*, *supra* note 9, at 317.

14. See generally Robert L. Brown, *A Judicial Retrospective: Significant Decisions by the Arkansas Supreme Court from 1991 Through 2011*, 34 U. ARK. LITTLE ROCK L. REV. 219 (2012).

## II. MERIT SELECTION

The common alternative to popular elections is known as merit selection,<sup>15</sup> or the Missouri Plan, which came into vogue in 1940 with its adoption by the State of Missouri.<sup>16</sup> A nominating commission submits recommended nominees to the governor, then he or she decides who the justice will be.<sup>17</sup> Later, should that justice wish to serve for a full term, he or she must stand for retention in an election where the voters decide whether to retain that justice or not.<sup>18</sup> The justice seeking retention faces no opponent, but the voters merely vote yes or no on retention for that individual.<sup>19</sup>

The fifty states now vary considerably on the mode of selecting justices, but by far the most preferred methods are the popular election and merit selection.<sup>20</sup> Though there are many hybrids, approximately twenty-two states have popular elections, either partisan or nonpartisan, while twenty-two states have a type of merit selection.<sup>21</sup> The remaining six states have selections by the governor or legislature.<sup>22</sup>

The criticisms that have surfaced with merit selection are significant. There is first the lack of transparency that accompanies the final decisions by the nominating committee and ultimately by the governor.<sup>23</sup> Who has their ears and who is influencing them? We do not know, as the final decisions occur behind closed doors.

Similar problems arise with retention elections that surface with popular elections.<sup>24</sup> They are *elections*, which carry with them all the pitfalls of popular elections: campaign contributions, attack ads, unidentified dark money, lack of information about the judicial candidates, and so forth.<sup>25</sup>

Furthermore, retention elections have appeared to render the judicial candidate even more susceptible to false ads mounted by third parties on highly sensitive issues such as the death penalty or same sex marriage.<sup>26</sup>

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15. Jona Goldschmidt, *Merit Selection: Current Status, Procedures, and Issues*, 49 U. MIAMI L. REV. 1, 2 (1994).

16. Bannon, *supra* note 12, at 19.

17. MO. CONST. art. V, §§ 25(a) & (d).

18. *Id.* § 25(c)(1).

19. *Id.*

20. See TASK FORCE ON MAINTAINING A FAIR AND IMPARTIAL JUDICIARY, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON MAINTAINING A FAIR AND IMPARTIAL JUDICIARY 13 (2016) [hereinafter Task Force II].

21. *Id.*

22. *Id.*

23. See *Popular Elections*, *supra* note 9, at 321.

24. *Id.*

25. *Id.* at 317.

26. See Robert Lindsey, *The Elections: The Story in Some Key States; Deukmejian and Cranston Win as 3 Judges Are Ousted*, N.Y. TIMES (Nov. 6, 1986), <http://www.nytimes.com/1986/11/06/us/elections-story-some-key-states-deukmejian-cranston-win-3-judges-are->

This creates a significant problem because there is no identified opponent running the ad against whom the candidate seeking to be retained can mount a counterattack.

Proponents of merit selection often point to what they perceive as a higher caliber of judge and one less political than one who is elected.<sup>27</sup> This is debatable. No doubt, running for a supreme court position is a daunting undertaking and unsavory to many. Yet, over the past fifty years, Arkansas has boasted some of the best supreme court justices in the country.<sup>28</sup> A prime example, in 2009, the Arkansas Supreme Court was ranked second in the country as the best state supreme court based on alacrity of decisions, frequency with which its decisions were cited by other state supreme courts, and absence of potential bias.<sup>29</sup> Only the California Supreme Court was deemed superior.<sup>30</sup>

Not only did Amendment 80 provide for the nonpartisan election of justices, Section 18 also included the option for the Arkansas General Assembly to refer the issue of implementing merit selection to a vote of the people at any general election.<sup>31</sup>

In 2015, at the regular session of the Arkansas General Assembly, Representative Matthew Shepherd filed a Joint Resolution to submit the merit selection issue to a vote of the people.<sup>32</sup> The resolution failed to get out of committee before adjournment.<sup>33</sup>

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ousted.html (retention elections of Chief Justice Rose Bird and two associate justices for California Supreme Court); Colman McCarthy, *Injustice Claims a Tennessee Judge*, WASH. POST (Nov. 26, 1996), [https://www.washingtonpost.com/archive/lifestyle/1996/11/26/injustice-claims-a-tennessee-judge/f0a28c33-fcb1-4c1b-9471-2d5704d56a88/?utm\\_term=.59934f237f59](https://www.washingtonpost.com/archive/lifestyle/1996/11/26/injustice-claims-a-tennessee-judge/f0a28c33-fcb1-4c1b-9471-2d5704d56a88/?utm_term=.59934f237f59) (Tennessee Supreme Court retention election of Associate Justice Penny White); A. G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. TIMES (Nov. 3, 2010), <http://www.nytimes.com/2010/11/04/us/politics/04judges.html> (Iowa Retention Election for Iowa Chief Justice and two associate justices, 2010). All justices were defeated for retention on issues like the death penalty or same-sex marriage. *Id.*

27. *Popular Elections*, *supra* note 9, at 322.

28. *Id.*

29. Stephen J. Choi, Mitu Gulati, & Eric A. Posner, *Judicial Evaluations and Information Forcing: Ranking State High Courts and Their Judges*, 58 DUKE L. REV. 1313, 1347 (2009).

30. *Id.*

31. ARK. CONST. amend. LXXX, §18.

32. H.R.J. Res. 1005, 90<sup>th</sup> Gen. Assemb., Reg. Sess. (Ark. 2015).

33. *See An Amendment to the Arkansas Constitution Concerning the Process for Selecting a Justice of the Supreme Court; and Amending Provisions Concerning Service on the Supreme Court* ARK. ST. LEGISLATURE, <http://www.arkleg.state.ar.us/assembly/2015/2015R/Pages/BillInformation.aspx?measureno=HJR1005> (last visited Jan. 4, 2018).

## III. TASK FORCE I (2011-2012)

Because of the experience of other states throughout the country with their supreme court elections between 2006 and 2010, a clarion call was sounded in Arkansas about the perverse impact large campaign contributions, as well as unidentified, dark money, were having on judicial elections nationally.<sup>34</sup> This was especially true in the wake of the *Citizens United* decision in 2010, which permitted unlimited campaign contributions by corporations and labor unions as part of their free-speech rights.<sup>35</sup>

Anticipating a similar deluge of outside money and false ads in judicial races in Arkansas, the Board of Governors of the Arkansas Bar Association approved a task force in December 2010 to investigate the money pouring into supreme court races in other states with false attack ads and report back with recommendations.<sup>36</sup> An eighteen-person task force (Task Force I) was next appointed by Bar President Jim Julian in January 2011, chaired by the author of this article.<sup>37</sup> The Arkansas Judicial Council also endorsed this mission.<sup>38</sup>

Over the next year and a half, Task Force I held twelve meetings and heard multiple witnesses on a variety of reforms.<sup>39</sup> Ultimately, a unanimous report was issued by the task force on June 5, 2012, which advocated three principal reforms under the umbrella of a 501(c)(3) corporation:

A. Creation of a website to provide more information about candidates for the Arkansas Supreme Court.<sup>40</sup>

B. A voluntary pledge to be offered to all candidates to sign where each would agree to disavow false ads funded by dark money and aired in their favor.<sup>41</sup>

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34. Robert L. Brown, *Toxic Judicial Elections: A Proposed Remedy*, ARK. LAW., Fall 2009, at 13.

35. *Citizens United v. FEC*, 558 U.S. 310, 371 (2010).

36. *See* TASK FORCE ON JUDICIAL ELECTION CAMPAIGN REFORM, REPORT BY THE TASK FORCE ON JUDICIAL CAMPAIGN REFORM I (2012) [hereinafter Task Force I].

37. *Id.* at 4.

38. *Id.* (members: Former Justice Robert L. Brown (Ret.) (Chair), Elizabeth Andreoli, Chuck Banks, Nate Coulter, Judge David F. Guthrie, Martha Hill, Henry Hodges, Jim Julian, Judge Alice Lightle, Judge Mary Spencer McGowan, H.T. Moore, Mark W. Nichols, Former Judge John F. Stroud, Jr., Former Justice Annabelle Imber Tuck, Judge Larry Vaught, Judge Joyce Williams Warren, Judge Ralph E. Wilson and Judge (now Justice) Shawn Womack).

39. *Id.* at 2.

40. *Id.* at 3.

41. *Id.* at 3-4; *see also* ARK. CODE JUDICIAL CONDUCT r. 4.1 cmt. 8 (2009) (amended 2016) (alluding to unwarranted attacks by independent third parties on a candidate's opponent which the candidate may disavow and request the third party to cease and desist).

C. A rapid response team appointed by the nonprofit board to respond to false attack ads.<sup>42</sup>

In October 2012, the Board of Governors of the Arkansas Bar Association adopted a motion complimenting the work of the task force.<sup>43</sup> Two months later, the Board disbanded the task force.<sup>44</sup> No further effort was made by the Bar to implement the reforms.<sup>45</sup> The Judicial Council also approved of the work of the task force, but no additional steps were taken to put the reforms into motion.<sup>46</sup>

#### IV. SUPREME COURT RACES IN 2014 AND 2016

The prediction of a tsunami of dark money and attack ads proved prescient. In the 2014 race for a supreme court seat between Judge Robin Wynne and Tim Cullen, unidentified money estimated by Tim Cullen at over \$360,000 based on buys of television ads, streamed into Arkansas from an unknown group called the Law Enforcement Alliance of America.<sup>47</sup> The television ads funded by this money attacked Tim Cullen for representing a pedophile and arguing that pedophilia was a victimless crime.<sup>48</sup> Judge Wynne professed no knowledge of the source of the ad, but refused to disavow it.<sup>49</sup> He won the election.<sup>50</sup>

At the end of 2015, former Justice Annabelle Tuck, a member of Task Force I, determined to take the reforms recommended by that Task Force in 2012 “off the shelf” and activate them.<sup>51</sup> A board was selected with Tuck as president, and a 501(c)(3) corporation created, dubbed the Arkansas Judicial

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42. Task Force I, *supra* note 36, at 3.

43. *Id.* at 5-6.

44. *Id.* at 6.

45. Task Force II, *supra* note 20, at 2.

46. *Id.*

47. Jacob Kauffman, *Dark Money and Arkansas Judicial Elections*, FM89.1 KUAR (May 15, 2014), <http://ualrpublicradio.org/post/dark-money-and-arkansas-judicial-elections>.

48. Max Brantley, *The Best Justice Money Can Buy; Dark Money TV Ads Do It*, ARK. TIMES (Oct. 29, 2015), <https://www.arktimes.com/ArkansasBlog/archives/2015/10/29/the-best-justice-money-can-buy-dark-money-tv-ads-do-it> [hereinafter *Best Justice*].

49. Max Brantley, *The Stealth Attack in the Supreme Court Race Draws Response*, ARK. TIMES (May 9, 2014), <https://www.arktimes.com/ArkansasBlog/archives/2014/05/09/the-stealth-attack-in-the-supreme-court-race-draws-response> [hereinafter *Stealth Attack*].

50. *Best Justice*, *supra* note 48.

51. Arkansas Judicial Campaign Conduct and Education Committee, Inc., *New Non-Profit to Battle Negative Judicial Campaigns*, ARKANSASJUDGES.ORG (Jan. 20, 2016), <http://www.arkansasjudges.org/announcements/new-non-profit-to-battle-negative-judicial-campaigns>.

Campaign Conduct and Education Committee (AJCCEC).<sup>52</sup> A Rapid Response Team was appointed by the Board.<sup>53</sup>

In 2016, attack ads were run against Justice Courtney Goodson in the amount of \$622,000 by the Judicial Crisis Network and against Clark Mason in the amount of \$400,000 by the Republican State Leadership Committee's Judicial Fairness Initiative.<sup>54</sup> The ad attacking Mason stated he was supporting President Obama, who was killing Arkansas jobs while making trial lawyers rich.<sup>55</sup> The ads attacking Goodson spoke largely about the lavish gifts she had received.<sup>56</sup> Judge Dan Kemp, who defeated Justice Goodson and is now Chief Justice, did not initially disavow the dark money ads that benefitted him on the basis that he believed the ads raised "legitimate questions about [Justice Goodson's] publicly disclosed acceptance of lavish gifts."<sup>57</sup> Judge Shawn Womack, who ran against Clark Mason, did disavow the ads run against him.<sup>58</sup> The Rapid Response Team issued a press release and letter on February 24, 2016, which demanded that the Republican State Leadership Committee cease and desist running ads against Mason on the basis that they were not true.<sup>59</sup> The Committee, in its reply, refused to do

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52. *Id.* (board of directors included: Ret. Justice Annabelle Tuck (President), Ret. Justice Robert Brown, Judge Mary McGowan, Mark Nichols, Nate Coulter, Jim Julian, H.T. Moore, and Beverly Morrow).

53. *Id.*

54. Andrew DeMillo, *Outside Groups' Spending Pays Off in Arkansas Court Races*, WASH. TIMES (Mar. 2, 2016), <https://www.washingtontimes.com/news/2016/mar/2/outside-groups-spending-pays-off-in-arkansas-court/>; Kotch, *supra* note 11.

55. Benjamin Hardy, *Out-of-State Organization Supports Womack, Attacking Mason in Associate Justice Race for Supreme Court*, ARK. TIMES (Feb. 20, 2016), <https://www.arktimes.com/ArkansasBlog/archives/2016/02/20/out-of-state-organization-supporting-womack-attacking-mason-in-associate-justice-race-for-supreme-court>.

56. DeMillo, *supra* note 54.

57. Benjamin Hardy, *Dark Money in State Supreme Court Race Funding Mailers, Website Attacking Goodson*, ARK. TIMES (Feb. 11, 2016), <https://www.arktimes.com/ArkansasBlog/archives/2016/02/11/dark-money-in-state-supreme-court-race-funding-mailers-website-attacking-goodson>.; Benjamin Hardy, *Kemp Condemns Outside Ads Attacking his Opponent on Voter ID Issue in Supreme Court Race*, ARK. TIMES (Feb. 18, 2016), <https://www.arktimes.com/ArkansasBlog/archives/2016/02/18/kemp-condemns-outside-ads-attacking-his-opponent-on-voter-id-issue-in-supreme-court-race>. Kemp later issued a statement rejecting the ads calling them "political gamesmanship." *Id.*

58. Michael Wilkey, *Arkansas Supreme Court Candidates Address Attack Ads, Judicial 'Integrity'*, TALK BUS. & POL. (Feb. 26, 2016), <https://talkbusiness.net/2016/02/arkansas-supreme-court-candidates-address-attack-ads-judicial-integrity/>.

59. Arkansas Judicial Campaign Conduct and Education Committee, Inc., *AJCCEC Issues Cease and Desist Letter to Judicial Fairness Initiative*, ARK.JUDGES.ORG (Feb. 24, 2016), <http://www.arkansasjudges.org/announcements/ajccecc-cess-and-desist-letter-to-judicial-fairness-initiative>.



so.<sup>60</sup> The people or entities backing either the Judicial Crisis Network or the Republican State Leadership Committee were not named.<sup>61</sup>

In short, dark money had a profound impact on the victories of Justice Robin Wynne in 2014 and Chief Justice Kemp and Justice Womack in 2016.<sup>62</sup>

## V. TASK FORCE II (2016)

Realizing that the forecasts of huge sums of money influencing judicial elections had come to pass in Arkansas, the House of Delegates of the Arkansas Bar Association decided to take action.<sup>63</sup> It requested President Eddie Walker to form a task force to explore the issues of merit selection, automatic recusal of judges based on contributions, and dark money and other issues, and then make recommendations.<sup>64</sup>

A seventeen-person task force was formed (Task Force II), headed by Jon Comstock, and a report was made to the House of Delegates on June 1, 2016.<sup>65</sup> By a vote of eleven to six, the appointment process of merit selection was recommended over popular elections.<sup>66</sup> Automatic recusal of judges based on a certain level of campaign contributions was rejected.<sup>67</sup> Legislative reforms related to dark money were also endorsed to enhance transparency, if popular elections were retained.<sup>68</sup>

Other recommendations were made that judicial candidates know who their contributors are and that candidates be required to file their campaign

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60. *Panel Brands Outside Group's Flyer in Arkansas Supreme Court Race False*, Times Record, (Feb. 25, 2016), <http://www.swtimes.com/news/state-news/panel-brands-outside-group-s-flyer-arkansas-supreme-court-race-false>.

61. Benjamin Hardy, *In Supreme Court Race, \$336,000 in Dark Money Advertising Fuels Attack on Goodson's 'Insider' Connections*, ARK. TIMES (Feb. 9, 2016), <https://www.arktimes.com/ArkansasBlog/archives/2016/02/09/in-supreme-court-race-336000-in-dark-money-advertising-fuels-attack-on-goodsons-insider-connections>; *Record TV Spending Nears \$1.3 Million in Arkansas Supreme Court Race*, BRENNAN CTR. FOR JUST. (Feb. 26, 2016), <https://www.brennancenter.org/press-release/record-tv-spending-nears-13-million-arkansas-supreme-court-race>.

62. Justin Miller, *Judicial Spending Blitz in Arkansas Spurs Calls for Reform*, AM. PROSPECT (Mar. 7, 2016), <http://prospect.org/blog/checks/judicial-spending-blitz-arkansas-spurs-calls-reform>.

63. *See* Task Force II, *supra* note 20, at 2-3.

64. *Id.*

65. *Id.* (members: Jon Comstock (Chair), Associate Dean Theresa Beiner, Robert Cearley, Bob Estes, Judge David Guthrie, Scott Hardin, Paul Keith, Professor Mark Killenbeck, Marie-Bernarde Miller, Brant Perkins, Troy Price, Brian Ratcliff, Representative Matthew Shepherd, Judge Mary Spencer McGowan, Justin Tate, Guy Wade and David H. Williams.)

66. *Id.* at 6.

67. *Id.* at 4.

68. *Id.* at 11-12.

finance reports online.<sup>69</sup> Further, should a judge or justice not recuse following a motion to do so, it was recommended that an accelerated appeal to the Arkansas Supreme Court be available for the unsuccessful movant.<sup>70</sup>

Task Force II, in its report, noted that the Arkansas Supreme Court itself, under the leadership of Justice Karen Baker, was conducting a review of the Judicial Code of Conduct and the rules of the Supreme Court Civil Practice Committee relating to recusal.<sup>71</sup> A report following that review was issued on December 15, 2016.<sup>72</sup>

## II. DRAFTING TASK FORCE

After the report of Task Force II on June 1, 2016, and vote by the House of Delegates, a Drafting Task Force was appointed by the President of the Arkansas Bar Association, Denise Hoggard, to produce a proposed Arkansas Constitutional Amendment for a single fourteen-year term for each justice after nomination by a nominating commission and appointment by the governor.<sup>73</sup> That proposal was presented to the House of Delegates on December 16, 2016, but failed to get the necessary three-fourths vote for approval to be filed as a bar measure.<sup>74</sup>

## VII. LEGISLATION ON DARK MONEY TRANSPARENCY

Arkansas House Representative Clarke Tucker filed his bill (H.B. 1005) for the 2017 legislative session to require reporting and disclosure of the sources of dark money.<sup>75</sup> While his previous efforts in 2015 were unsuccessful, he believes he has done the necessary work with his fellow legislators to make the bill more understandable and palatable.<sup>76</sup>

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69. Task Force II, *supra* note 20, at 11-12.

70. *Id.*

71. *Id.* at 17.

72. See *In re Arkansas Code of Judicial Conduct*, 2016 Ark. 470 (2016) (per curiam).

73. John Moritz, *Vote Rejects Draft on Justice Selection: Bar Proposal Falls Short of Threshold*, ARK. DEMOCRAT-GAZETTE (Dec. 17, 2016), <http://www.arkansasonline.com/news/2016/dec/17/vote-rejects-draft-on-justice-selection?f=news>.

74. *Id.*

75. H.R. 1005, 91<sup>st</sup> Gen. Assemb., Reg. Sess. (Ark. 2017).

76. Email exchange between Rep. Tucker and the author (Jan. 3, 2017) (on file with author). The bill has failed since the writing of this essay. See Max Brantley, *Effort to Open Dark Money to Sunlight Defeated in Committee*, ARK. TIMES (Mar. 8, 2017), <https://www.arktimes.com/ArkansasBlog/archives/2017/03/08/effort-to-open-dark-money-to-sunlight-defeated-in-committee>.

## VIII. CLOSING THOUGHTS

To paraphrase Winston Churchill in a different context: The solution of popular elections may not be perfect but it is better than the alternatives.<sup>77</sup> The critical importance of the Arkansas people having a voice in who will judge them at the highest level cannot be minimized. Compare that to the very limited number of people who would participate in merit selection or selection of justices for a fixed term of years.<sup>78</sup> Furthermore, even assuming the General Assembly voted to submit merit selection to a vote of the people, it is highly unlikely that the voters would relinquish their right to choose their supreme court justices.<sup>79</sup>

Popular elections, on the other hand, are still haunted by big money and its influence. There is, first, the ordinary contributions that flow into a judicial candidate's campaign from supporters.<sup>80</sup> These are identified by the candidate's filings in the Secretary of State's Office.<sup>81</sup> Beyond that, you have the relatively new reality of unknown money or dark money which poses a major challenge to the legitimacy of popular elections.<sup>82</sup> Disguised money in unlimited amounts electing our supreme court justices should offend everyone and needs to be corrected. Passage of legislation, like Representative Tucker's bill, that requires disclosure of these unknown contributions and contributors is of paramount importance.<sup>83</sup>

Other reforms are also necessary. The reforms endorsed by Task Force I and II, which include voluntary pledges of judicial candidates to disavow false ads that could benefit them and rapid response teams to respond to those false ads, are in the early stages of implementation in Arkansas under the umbrella of a 501(c)(3) corporation.<sup>84</sup> They need to have the full support of the Bar and every voter in this state.

Further, reforms that the supreme court should entertain surround recusal. Kudos to the Arkansas Supreme Court for eliminating the Rule 3.3 comment, for justices to not know their contributors, in the Per Curiam Order handed down on December 16, 2016.<sup>85</sup> Eliminating that charade is long overdue. But, the court should require all judicial candidates to publish their campaign contributions on a website close in time to their receipt, in addi-

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77. RICHARD M. LANGWORTH, *CHURCHILL BY HIMSELF: THE DEFINITIVE COLLECTION OF QUOTATIONS* 583 (2011).

78. See, e.g., H.R.J. Res. 1005, *supra* note 32.

79. *How Should Judges Be Selected?*, FRONTLINE, <https://www.pbs.org/wgbh/pages/frontline/shows/justice/howshould/> (last visited Dec. 10, 2017),

80. See Ark. Code Ann. § 7-6-207 (Supp. 2017).

81. *Id.*

82. See discussion *supra* Part IV.

83. See *supra* note 75.

84. See Task Force I, *supra* note 36; see also Task Force II, *supra* note 20.

85. See *supra* note 72.

tion to their filings with the Secretary of State's Office. This could lead to legitimate motions to recuse based on those contributions where appropriate. An immediate appeal to the Arkansas Supreme Court, should a judge not recuse, is also desirable.<sup>86</sup>

As a final point, merit selection is not the panacea that its proponents claim it is for the reasons already stated in this article.<sup>87</sup> Additionally, witness appointments to the United States Supreme Court which most often reflect the political philosophy of the nominating President.<sup>88</sup> Exceptions like Chief Justice Earl Warren and Justice David Souter are very few indeed.<sup>89</sup> Similarly, merit selection more than likely will reflect the political philosophy of the selecting governor.<sup>90</sup> The same would be true of appointment by a governor of a justice for a fixed term of years.

There are other disadvantages to appointing a justice for a fixed term. The single fourteen-year term, endorsed by the Comstock Drafting Committee, would be a first in this country if enacted and approved by a vote of the people.<sup>91</sup> The fact that Arkansas would be first should not necessarily be an inhibitor by itself, but it highlights the fact that Arkansas does not have the experience from other states to guide it.

It is obvious, though, that a single, fourteen-year stint would term-limit that justice and divest the Court of the institutional knowledge gained after only fourteen years of service. It would seem preferable to hold on to that experience and provide a future check, like re-election, that could lead to an additional term of service.

Nonpartisan popular elections should govern Supreme Court selection in Arkansas. To discard this process because of dark money and dissatisfaction with certain elections would be shortsighted. Reforms to popular elections are in the process of being implemented as well as curbs on the influence of dark money. The people should continue to determine who will decide their cases at the highest level.

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86. See Robert L. Brown, *Judicial Recusal: It's Time to Take Another Look Post-Caperton*, 38 U. Ark. Little Rock L. Rev. 63 (2015).

87. See discussion *supra* Part II.

88. Norman Dorsen, *The Selection of U.S. Supreme Court Justices*, 4 INT'L J. OF CONST. L. 652, 655 (2006)

89. *The Judgment on Justice Souter*, N.Y. TIMES: ROOM FOR DEBATE (May 1, 2009), <https://roomfordebate.blogs.nytimes.com/2009/05/01/the-judgment-on-justice-souter>.

90. See *Popular Elections*, *supra* note 9, at 322.

91. See Task Force II, *supra* note 20.