

Opinion No. 2011-158

December #, 2011

Jimmy White, Spokesperson
SPORTSMEN2010
Post Office Box 1346
Manila, Arkansas 72442

Dear Mr. White:

This is in response to your request for certification, pursuant to A.C.A. § 7-9-107 (Repl. 2007), of the popular name and ballot title for a proposed constitutional amendment. You have previously submitted similar measures, which this office rejected due to ambiguities in the text of your proposed amendments. *See* Ops. Att’y Gen. Nos. 2011-145 and 2011-129. You have made changes in the text of your proposal since your last submission and have now submitted the following proposed popular name and ballot title for my certification:

Popular Name

A PROPOSED CONSTITUTIONAL AMENDMENT TO AMENDMENT 35
TO REQUIRE THE MEMBERS OF THE ARKANSAS GAME AND FISH COMMISSION
TO BE ELECTED RATHER THAN APPOINTED BY THE GOVERNOR

Ballot Title

TO AMEND THE ARKANSAS CONSTITUTION CONCERNING
THE MEMBERSHIP OF THE ARKANSAS STATE GAME AND
FISH COMMISSION; PROVIDING THAT MEMBERS OF THE
ARKANSAS STATE GAME AND FISH COMMISSION SHALL
NO LONGER BE APPOINTED BY THE GOVERNOR;
PROVIDING THAT THE ARKANSAS STATE GAME AND FISH
COMMISSION SHALL CONSIST OF TWO (2) MEMBERS
FROM EACH CONGRESSIONAL DISTRICT, TO BE CHOSEN

BY THE QUALIFIED ELECTORS OF THE CONGRESSIONAL DISTRICT ON A NON-PARTISAN BASIS; PROVIDING THAT EACH MEMBER OF THE ARKANSAS STATE GAME AND FISH COMMISSION SHALL BE A CITIZEN OF THE UNITED STATES AT THE TIME OF HIS OR HER ELECTION, A RESIDENT OF THE STATE OF ARKANSAS FOR TWO (2) YEARS NEXT PRECEDING HIS OR HER ELECTION, A RESIDENT OF THE CONGRESSIONAL DISTRICT FROM WHICH HE OR SHE MAY BE ELECTED FOR ONE (1) YEAR NEXT PRECEDING HIS OR HER ELECTION, AND AT LEAST TWENTY-ONE (21) YEARS OF AGE AT THE TIME OF HIS OR HER ELECTION; PROVIDING THAT THE MEMBERS OF THE ARKANSAS STATE GAME AND FISH COMMISSION WITHIN EACH CONGRESSIONAL DISTRICT SHALL DIVIDE THEMSELVES INTO TWO (2) CLASSES BY LOT AT THE FIRST COMMISSION MEETING FOLLOWING THE PASSAGE OF THIS AMENDMENT, WITH THE FIRST CLASS SERVING INITIAL TERMS OF TWO (2) YEARS AND THE SECOND CLASS SERVING INITIAL TERMS OF FOUR (4) YEARS; PROVIDING THAT ALL SUBSEQUENT TERMS OF MEMBERS OF THE ARKANSAS STATE GAME AND FISH COMMISSION SHALL BE FOR FOUR (4) YEARS WITH A LIMIT OF TWO (2) FOUR (4) YEAR TERMS WHICH SHALL INCLUDE HIS OR HER INITIAL FOUR-YEAR TERM; PROVIDING THAT IF REDISTRICTING OF THE CONGRESSIONAL DISTRICTS OCCURS OR A MEMBER MOVES AND NO LONGER RESIDES IN THE DISTRICT THAT HE OR SHE WAS ELECTED TO REPRESENT, THE MEMBER SHALL REMAIN ON THE ARKANSAS STATE GAME AND FISH COMMISSION UNTIL HIS OR HER TERM EXPIRES; PROVIDING THAT EACH MEMBER OF THE ARKANSAS STATE GAME AND FISH COMMISSION SHALL BE SWORN INTO OFFICE ON THE SECOND MONDAY IN JANUARY FOLLOWING A GENERAL ELECTION; PROVIDING THAT EACH MEMBER OF THE ARKANSAS STATE GAME AND FISH COMMISSION SHALL RECEIVE AN ANNUAL SALARY EQUAL TO THE ANNUAL SALARY FOR A MEMBER OF THE GENERAL ASSEMBLY

AND REPEALING LANGUAGE REQUIRING MEMBERS OF THE ARKANSAS STATE GAME AND FISH COMMISSION TO SERVE WITHOUT COMPENSATION OTHER THAN ACTUAL EXPENSE REIMBURSEMENT; PROVIDING THAT THE INITIAL ELECTION OF THE MEMBERS OF THE ARKANSAS STATE GAME AND FISH COMMISSION UNDER THIS AMENDMENT SHALL OCCUR AT THE 2014 GENERAL ELECTION; PROVIDING THAT MEMBERS SERVING ON THE ARKANSAS STATE GAME AND FISH COMMISSION ON DECEMBER 31, 2014, SHALL REMAIN ON THE COMMISSION WITH THE SAME POWERS AND DUTIES UNTIL NEW MEMBERS ARE SWORN INTO OFFICE ACCORDING TO THIS AMENDMENT; AND PROVIDING THAT THE AMENDMENT SHALL BECOME EFFECTIVE UPON PASSAGE AT THE 2012 GENERAL ELECTION

The Attorney General is required, pursuant to A.C.A. § 7-9-107, to certify the popular name and ballot title of all proposed initiative and referendum acts or amendments before the petitions are circulated for signature. The law provides that the Attorney General may substitute and certify a more suitable and correct popular name and ballot title, if he can do so, or if the proposed popular name and ballot title are sufficiently misleading, may reject the entire petition. **Neither certification nor rejection of a popular name and ballot title reflects my view of the merits of the proposal. This Office has been given no authority to consider the merits of any measure.**

In this regard, A.C.A. § 7-9-107 neither requires nor authorizes this office to make legal determinations concerning the merits of the act or amendment, or concerning the likelihood that it will accomplish its stated objective. In addition, following Arkansas Supreme Court precedent, this office will not address the constitutionality of proposed measures in the context of a ballot title review unless the measure is “clearly contrary to law.” *Kurrus v. Priest*, 342 Ark. 434, 29 S.W.3d 669 (2000); *Donovan v. Priest*, 326 Ark. 353, 931 S.W.2d (1996); *Plugge v. McCuen*, 310 Ark. 654, 841 S.W.2d 139 (1992). Consequently, this review has been limited to a determination, pursuant to the guidelines that have been set forth by the Arkansas Supreme Court, discussed below, of whether the proposed

popular name and ballot title accurately and impartially summarize the provisions of your proposed amendment or act.

The purpose of my review and certification is to ensure that the popular name and ballot title honestly, intelligibly, and fairly set forth the purpose of the proposed amendment or act. See *Arkansas Women's Political Caucus v. Riviere*, 282 Ark. 463, 466, 677 S.W.2d 846 (1984).

The popular name is primarily a useful legislative device. *Pafford v. Hall*, 217 Ark. 734, 233 S.W.2d 72 (1950). It need not contain detailed information or include exceptions that might be required of a ballot title, but it must not be misleading or give partisan coloring to the merit of the proposal. *Chaney v. Bryant*, 259 Ark. 294, 532 S.W.2d 741 (1976); *Moore v. Hall*, 229 Ark. 411, 316 S.W.2d 207 (1958). The popular name is to be considered together with the ballot title in determining the ballot title's sufficiency. *Id.*

The ballot title must include an impartial summary of the proposed amendment or act that will give the voter a fair understanding of the issues presented. *Hoban v. Hall*, 229 Ark. 416, 417, 316 S.W.2d 185 (1958); *Becker v. Riviere*, 270 Ark. 219, 223, 226, 604 S.W.2d 555 (1980). According to the court, if information omitted from the ballot title is an "essential fact which would give the voter serious ground for reflection, it must be disclosed." *Bailey v. McCuen*, 318 Ark. 277, 285, 884 S.W.2d 938 (1994), citing *Finn v. McCuen*, 303 Ark. 418, 798 S.W.2d 34 (1990); *Gaines v. McCuen*, 296 Ark. 513, 758 S.W.2d 403 (1988); *Hoban v. Hall, supra*; and *Walton v. McDonald*, 192 Ark. 1155, 97 S.W.2d 81 (1936). At the same time, however, a ballot title must be brief and concise (see A.C.A. § 7-9-107(b)); otherwise voters could run afoul of A.C.A. § 7-5-522's five minute limit in voting booths when other voters are waiting in line. *Bailey v. McCuen, supra*. The ballot title is not required to be perfect, nor is it reasonable to expect the title to cover or anticipate every possible legal argument the proposed measure might evoke. *Plugge v. McCuen, supra*. The title, however, must be free from any misleading tendency, whether by amplification, omission, or fallacy; it must not be tinged with partisan coloring. *Id.* A ballot title must convey an intelligible idea of the scope and significance of a proposed change in the law. *Christian Civic Action Committee v. McCuen*, 318 Ark. 241, 884 S.W.2d 605 (1994). It has been stated that the ballot title must be: 1) intelligible, 2) honest, and 3) impartial. *Becker v.*

McCuen, 303 Ark. 482, 798 S.W.2d 71 (1990), citing *Leigh v. Hall*, 232 Ark. 558, 339 S.W.2d 104 (1960).

Having analyzed your proposed amendment, as well as your proposed popular name and ballot title under the above precepts, it is my conclusion that I must reject your proposed popular name and ballot title due to ambiguities in the *text* of your proposed measure. A number of additions or changes to your ballot title are, in my view, necessary in order to more fully and correctly summarize your proposal. I cannot, however, at this time, fairly or completely summarize the effect of your proposed measure to the electorate in a popular name or ballot title without the resolution of the ambiguities. I am therefore unable to substitute and certify a more suitable and correct popular name and ballot title pursuant to A.C.A. § 7-9-107(b).

I refer to the following ambiguities:

1. Several ambiguities remain under Section 3 of your measure, which proposes to amend Section 3 of Amendment 35 regarding Commissioners' terms of office. First, it remains unclear whether you intend, under proposed Section 3(b) of Amendment 35, to impose a limitation on the total number of four-year terms a commissioner may serve, regardless of whether the commissioner is succeeding himself or herself and regardless of whether the terms are successive. This ambiguity regarding subsequent terms was addressed in Attorney General Opinion 2011-145, issued in response to your previous submission, and I refer you to that opinion for the full explanation of why the proposed language is ambiguous in this respect. Second, while it appears you have attempted to address the ambiguity regarding the terms that are included in the 2-term limitation, I believe an ambiguity remains. You have added the phrase "which shall include his or her *initial four-year term*" (emphasis added). I realize you may intend for the emphasized language to refer to the "initial [4-year] term" served by Commissioners who drew an initial 4-year term by lot pursuant to Section 3(a)(3). But this is not entirely clear and must be clarified for proper reflection in the ballot title.
2. Proposed Section 3(c) states: "If redistricting of the congressional districts occurs *or* a Commissioner moves and no longer resides in the district that

he or she was elected to represent, the Commissioner shall remain on the Commission until his or her term expires.” (Emphasis added.) Because of the disjunctive “**or**,” this provision, read literally, states in part: “If redistricting ... occurs ..., the Commissioner shall remain on the Commission until his or her term expires.” This is confusing because a Commissioner would not become ineligible simply because of redistricting. This provision would thus seem to be unnecessary. It also raises the question whether a Commissioner can succeed himself after redistricting, and whether he can serve another term (if he is not already term-limited). I realize, as an alternative to the literal language, that you may intend to recognize the fact that a Commissioner *may no longer reside in the district* as a result of redistricting. But the provision as written does not say this.

3. Section 4 of your proposal amends Section 4 of Amendment 35 to add a requirement that Commissioners “shall receive an annual salary and expenses reimbursement equal to that received by a member of the General Assembly.” Amendment 70 to the Arkansas Constitution governs legislative salaries, and as I previously explained to you in Attorney General Opinion 2011-129, Section 2 of Amendment 70 provides for the adjustment of General Assembly salaries; and Section 3 of the amendment authorizes annual increases based on the Consumer Price Index. It is unclear whether your proposed amendment allows for these adjustments or increases. I am also uncertain what is meant by requiring that Commissioners “shall receive ... expenses reimbursement equal to that received by a member of the General Assembly.” Amendment 70 provides that to be eligible for reimbursement, expenses of the General Assembly must be “authorized by law, documented, and reasonably related to their official duties.” Ark. Const. amend. 70, § 2. You may intend to impose similar requirements under your proposal, but that is not entirely clear under Section 4, which requires reimbursement “*equal to*” that of General Assembly members. This language is vague and confusing and cannot be summarized in a ballot title without clarification.
4. The last paragraph of your proposed measure appears to be an amended version of existing Section 6 of Amendment 35. However, unlike the other sections of your proposal, there is no introductory language showing that this indeed is another section of your measure that proposes to amend

Section 6 of Amendment 35. The section must be properly indentified to avoid confusion on this score.

5. The ballot title you have submitted states that “the amendment shall become effective upon passage at the 2012 general election.” However, the text of the measure does not itself include an effective date. This must be clarified for proper reflection in the ballot title.

I cannot certify a ballot title for your proposed amendment in the face of these ambiguities. These confusing and ambiguous points must be remedied before I can perform my statutory duty.

My office, in the certification of ballot titles and popular names, does not concern itself with the merits, philosophy, or ideology of proposed measures. I have no constitutional role in the shaping or drafting of such measures. My statutory mandate is embodied only in A.C.A. § 7-9-107 and my duty is to the electorate. I am not your counsel in this matter and cannot advise you as to the substance of your proposal.

At the same time, however, the Arkansas Supreme Court, through its decisions, has placed a practical duty on the Attorney General, in exercising his statutory duty, to include language in a ballot title about the effects of a proposed measure on current law. *See, e.g., Finn v. McCuen, supra*. Furthermore, the Court has recently confirmed that a proposed amendment cannot be approved if “[t]he text of the proposed amendment itself contribute[s] to the confusion and disconnect between the language in the popular name and the ballot title and the language in the proposed measure.” *Roberts v. Priest*, 341 Ark. 813, 20 S.W.3d 376 (2000). The Court concluded: “[I]nternal inconsistencies would inevitably lead to confusion in drafting a popular name and ballot title and to confusion in the ballot title itself.” *Id.* Where the effects of a proposed measure on current law are unclear or ambiguous, it is impossible for me to perform my statutory duty to the satisfaction of the Arkansas Supreme Court without clarification of the ambiguities.

My statutory duty, under these circumstances, is to reject your proposed ballot title, stating my reasons therefor, and to instruct you to “redesign” the proposed measure and ballot title. *See* A.C.A. § 7-9-107(c). You may, after clarification of

Jimmy White, Spokesperson
SPORTSMEN2010
Opinion No. 2011-158
Page 8

the matters discussed above, resubmit your proposed amendment, along with a proposed popular name and ballot title, at your convenience. I anticipate, as noted above, that some changes or additions to your submitted popular name and ballot title may be necessary. I will be pleased to perform my statutory duties in this regard in a timely manner after resubmission.

Sincerely,

DUSTIN MCDANIEL
Attorney General

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Enclosures

1 POPULAR NAME

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3 A PROPOSED CONSTITUTIONAL AMENDMENT TO AMENDMENT 35 TO REQUIRE
4 THE MEMBERS OF THE ARKANSAS GAME AND FISH COMMISSION TO BE
5 ELECTED RATHER THAN APPOINTED BY THE GOVERNOR.

6
7 BALLOT TITLE

8
9 TO AMEND THE ARKANSAS CONSTITUTION CONCERNING THE MEMBERSHIP OF
10 THE ARKANSAS STATE GAME AND FISH COMMISSION;
11 PROVIDING THAT MEMBERS OF THE ARKANSAS STATE GAME AND FISH
12 COMMISSION SHALL NO LONGER BE APPOINTED BY THE GOVERNOR;
13 PROVIDING THAT THE ARKANSAS STATE GAME AND FISH COMMISSION SHALL
14 CONSIST OF TWO (2) MEMBERS FROM EACH CONGRESSIONAL DISTRICT, TO
15 BE CHOSEN BY THE QUALIFIED ELECTORS OF THE CONGRESSIONAL DISTRICT
16 ON A NON-PARTISAN BASIS;
17 PROVIDING THAT EACH MEMBER OF THE ARKANSAS STATE GAME AND FISH
18 COMMISSION SHALL BE A CITIZEN OF THE UNITED STATES AT THE TIME OF HIS
19 OR HER ELECTION,
20 A RESIDENT OF THE STATE OF ARKANSAS FOR TWO (2) YEARS NEXT
21 PRECEDING HIS OR HER ELECTION,
22 A RESIDENT OF THE CONGRESSIONAL DISTRICT FROM WHICH HE OR SHE MAY
23 BE ELECTED FOR ONE (1) YEAR NEXT PRECEDING HIS OR HER ELECTION, AND
24 AT LEAST TWENTY-ONE (21) YEARS OF AGE AT THE TIME OF HIS OR HER
25 ELECTION;
26 PROVIDING THAT THE MEMBERS OF THE ARKANSAS STATE GAME AND FISH
27 COMMISSION WITHIN EACH CONGRESSIONAL DISTRICT SHALL DIVIDE
28 THEMSELVES INTO TWO (2) CLASSES BY LOT AT THE FIRST
29 COMMISSION MEETING FOLLOWING THE PASSAGE OF THIS AMENDMENT, WITH
30 THE FIRST CLASS SERVING INITIAL TERMS OF TWO (2) YEARS AND THE
31 SECOND CLASS SERVING INITIAL TERMS OF FOUR (4) YEARS;
32 PROVIDING THAT ALL SUBSEQUENT TERMS OF MEMBERS OF THE ARKANSAS
33 STATE GAME AND FISH COMMISSION SHALL BE FOR FOUR (4) YEARS WITH A
34 LIMIT OF TWO (2) FOUR (4) YEAR TERMS WHICH SHALL INCLUDE HIS OR HER
35 INITIAL FOUR-YEAR TERM;
36 PROVIDING THAT IF REDISTRICTING OF THE CONGRESSIONAL DISTRICTS
37 OCCURS OR A MEMBER MOVES AND NO LONGER RESIDES IN THE DISTRICT

1 THAT HE OR SHE WAS ELECTED TO REPRESENT, THE MEMBER SHALL REMAIN
2 ON THE ARKANSAS STATE GAME AND FISH COMMISSION UNTIL HIS OR HER
3 TERM EXPIRES;

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5 PROVIDING THAT EACH MEMBER OF THE ARKANSAS STATE GAME AND FISH
6 COMMISSION SHALL BE SWORN INTO OFFICE ON THE SECOND MONDAY IN
7 JANUARY FOLLOWING A GENERAL ELECTION;

8 PROVIDING THAT EACH MEMBER OF THE ARKANSAS STATE GAME AND FISH
9 COMMISSION SHALL RECEIVE AN ANNUAL SALARY EQUAL TO THE ANNUAL
10 SALARY FOR A MEMBER OF THE GENERAL ASSEMBLY AND REPEALING
11 LANGUAGE REQUIRING MEMBERS OF THE ARKANSAS STATE GAME AND FISH
12 COMMISSION TO SERVE WITHOUT COMPENSATION OTHER THAN ACTUAL
13 EXPENSE REIMBURSEMENT;

14 PROVIDING THAT THE INITIAL ELECTION OF THE MEMBERS OF THE ARKANSAS
15 STATE GAME AND FISH COMMISSION UNDER THIS AMENDMENT SHALL OCCUR
16 AT THE 2014 GENERAL ELECTION;

17 PROVIDING THAT MEMBERS SERVING ON THE ARKANSAS STATE GAME AND
18 FISH COMMISSION ON DECEMBER 31, 2014, SHALL REMAIN ON THE
19 COMMISSION WITH THE SAME POWERS AND DUTIES UNTIL NEW MEMBERS
20 ARE SWORN INTO OFFICE ACCORDING TO THIS AMENDMENT; AND PROVIDING
21 THAT THE AMENDMENT SHALL BECOME EFFECTIVE UPON PASSAGE AT THE
22 2012 GENERAL ELECTION.

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Subtitle
To Amend the Arkansas Constitution
Concerning the Membership of the
Arkansas State Game and Fish Commission

SECTION 1. Section 1 of Amendment 35 to the Arkansas Constitution is amended to read as follows:

§ 1. Commission created — Members — Powers.

The control, management, restoration, conservation and regulation of birds, fish, game and wildlife resources of the State, including hatcheries, sanctuaries, refuges, reservations and all property now owned, or used for said purposes and the acquisition and establishment of same, the administration of the laws now and/or hereafter pertaining thereto, shall be vested in a Commission to be known as the Arkansas State Game and Fish Commission. ~~to consist of eight members. Seven of whom shall be active and one an associate member who shall be the Head of the Department of Zoology at the University of Arkansas, without voting power.~~ The Commission shall consist of two (2) members from each congressional district, to be chosen by the qualified electors of the congressional district on a non-partisan basis.

SECTION 2. Section 2 of Amendment 35 to the Arkansas Constitution is amended to read as follows:

§ 2. Qualifications and appointment election of members — Terms of office of first commission.

Commissioners shall have knowledge of and interest in wildlife conservation. All ~~shall be appointed by the Governor. The first members of the Commission shall be appointed by the Governor for terms as follows: One for one year, one for two years, one for three years, one for four years, one for five years, one for six years, and one for seven years. Each Congressional District must be represented on the Commission.~~

Each member of the Arkansas State Game and Fish Commission shall be:

1 (1) A citizen of the United States at the time of his or her election;

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4 (2) A resident of the State of Arkansas for two (2) years next preceding his or her
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6 election;

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8 (3) A resident of the congressional district from which he or she may be elected
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10 for one (1) year next preceding his or her election; and

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12 (4) At least twenty-one (21) years of age at the time of his or her election.

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15 SECTION 3. Section 3 of Amendment 35 to the Arkansas Constitution is
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17 amended to read as follows:

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19 § 3. Term of office of members.

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21 ~~Upon the expiration of the foregoing terms of the said Commission, a successor shall be~~
22
23 ~~appointed by the Governor for a term of seven years, which term of seven years shall~~
24
25 ~~thereafter be for each member of the Commission. No Commissioner can serve more~~
26
27 ~~than one term and none can succeed himself~~

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29 (a)(1) At the first meeting of the members elected after the passage of this
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31 amendment, the Commissioners within each congressional district shall divide
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33 themselves into two (2) classes by lot.

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35 (2) Each Commissioner of the first class shall serve an initial term on the
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37 Arkansas State Game and Fish Commission for two (2) years only.

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39 (3) Each Commissioner of the second class shall serve an initial term on
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41 the Commission of four (4) years.

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43 (b) For all subsequent terms, each Commissioner shall serve a term of four
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45 (4) years and can succeed himself or herself with a limit of two four-year terms which
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47 shall include his or her initial four-year term.

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49 (c) If redistricting of the congressional districts occurs or a
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51 Commissioner moves and no longer resides in the district that he or she was
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53 elected to represent, the Commissioner shall remain on the Commission until his
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55 or her term expires.

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4 (d) Each Commissioner shall be sworn into office on the second Monday in
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6 January following a General Election.

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8 (e) The initial election of Commissioners under this amendment shall occur
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10 at the 2014 General Election.

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12 (f) Commissioners serving on the Arkansas State Game and Fish
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14 Commission on December 31, 2014, shall remain on the Commission with the
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16 same powers and duties until new Commissioners are elected and sworn into
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18 office according to this amendment.

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22 SECTION 4. Section 4 of Amendment 35 to the Arkansas Constitution is
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24 amended to read as follows:

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26 §4. Oath of office — ~~Members serve without compensation~~ — Expenses —
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28 Payment Compensation

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30 Each Commissioner shall take the regular oath of office provided in the
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32 Constitution ~~and serve without compensation other than actual expenses while away~~
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34 ~~from home engaged entirely on the work of the Commission~~ and shall receive an
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36 annual salary and expenses reimbursement equal to that received by a member of the
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38 General Assembly.

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41 § 6. Vacancies — Filling — Chairman of ~~commission~~ Commission.

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43 Vacancies on the Commission due to resignation or death shall be filled by
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45 appointment of the Governor for the unexpired term within thirty days from date of such
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47 vacancy; upon failure of the Governor to fill the vacancy within thirty days, the remaining
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49 Commissioners shall make the appointment for the unexpired term. A ~~chairman~~ chair
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51 shall be elected annually from the ~~seven~~ members of the Commission to serve one year
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53 and can vote only in the event of a tie vote.