

Dale Alan Diefenbach
December 2002

COMMENTS ON THE PROPOSED CONSTITUTIONAL AMENDMENT

PART ONE: OBJECTIVES AND MAJOR DRAFTING NOTES

General

The Constitution currently does not adequately provide for the **rapid** filling of vacancies of “constitutional officers” in federal and state governments during periods of emergency. The 25th Amendment now covers the Presidency well.* The 17th Amendment would seem to allow for rapid enough replacement of Senators [see chart concerning state laws]. The same can not be said of Representatives, justices of the Supreme Court, or of members of the various branches of state governments in general.

The draft amendment is designed to fill vacancies during an emergency by appointing and/or assigning individuals until the normal processes can be used. Note the use of the word “may” in that it grants ***discretion*** to the President or governor to use a more rapid process, but does not mandate it.

A by-election for a number of representatives may be far too slow for practical reasons and far too hurried for the interests of democracy.

Thrust of the amendment is to ensure that constitutional government continues. It is ***not*** meant to settle the war powers controversy which it leaves unresolved because it is essentially irresolvable in practice. It does obliquely recognize that there are hostilities other than those created by a declaration of war. The United States has not declared war since December, 1941. Although a declaration of war is not quite as passé as “letters of marque and reprisal,” it is close to being so. The phrase “hostilities authorized by Congress” acknowledges a current method recognized by both branches and narrows the scope of the controversy. The language is necessary to address the needs of the amendment but skirts the political thicket.

*See however the discussion in the volume 48 of the Stanford Law Review (November, 1995) which features an argument over the constitutionality of the current law regarding presidential succession. There is a lead article which challenges constitutionality and two responses.

Section 1 notes

The word “or” is used twice in this first sentence to ensure that no one claims that the phrase “hostilities authorized by Congress” is merely a restatement of the phrase “a declaration of war.”

There is nothing to prevent a partisan governor from appointing only members of his party to fill House vacancies except public outrage. The language deliberately skips a more detailed formula which would likely to be unworkable in time of need.

Section 2 notes

The issue of incapacity is by far the thorniest. It is best left to statute. This section provides Congress the necessary power to draft the details. Quorums again are an area which needs to be sorted out after extensive discussion.

Section 3 notes

The President may not want to appoint members of the Supreme Court under Art. II, § 2, cl. 3 because such appointments, even though temporary, tend to give the incumbents an edge on permanent seats that neither the President nor the Senate might want.

The phrase in the draft - “at the end of the next session of the Senate” – parallels that of Art. II, § 2, cl. 3 as it is used to describe a process of appointment, rather than assignment as proposed here.

The amendment deliberately avoids tying the language to current provisions of statute, e.g., number of Supreme Court justices or the highest level of appellate courts below the Supreme Court. Congress may wish to change the number of justices or create a National Court of Appeals as proposed in the early 70s to relieve the burden of the Supreme Court.

Section 5

Art. IV, § 4 provides one way for the United States to ensure that there be a constitutional form of government in each state. Unfortunately it is insufficient should, for example, both a governor and the majority of a branch of the legislature be killed in a terrorist act. The draft amendment allows Congress to step in to ensure the rapid restoration of constitutional state government.

There is no need to spell out whether a congressional resolution dealing the restoration of a state government (requiring a two-thirds vote of each house) be presented to the President. I am sure that the Supreme Court would use its decision of the mid-19th century stating that proposed constitutional amendments need not be presented to the President since the amendment process already

requires a two-thirds vote. So there is no need to clutter the language with the obvious.

Section 6

The final section is designed to allow Congress to end a presidentially declared national emergency. If the President is opposed, then it would require a two-thirds vote of each house so there is no use to add such a majority to the language.

I have deliberately added the phrase “under this article” after “national emergency proclaimed by the President.” That distinguishes national emergencies authorized by statute from those authorized under the amendment. Congress would have to study the network of relationships authorized by statute and how they would mesh with any emergency declared under this amendment. Congress can make congruent any statutory language inconsistent with the amendment. It allows the amendment to go into effect without immediately adversely affecting any statutorily declared state of emergency. There should be no need to hold up this vital change in the constitution on the grounds that it will complicate the existing framework. That can be worked out in due course.

PART TWO: MINOR DRAFTING NOTES

Article I, § 2, cl. 4 allows a state governor to issue writs of election to fill vacancies in the House. The phrase “writ of election” refers to that clause. Note that the word “governor” is never used in the Constitution. Article I, § 2, cl. 4 uses “Executive Authority” while Art. IV, § 4 uses “Executive.” The 17th Amendment uses “executive authority.”

The term “Congress” is used minus the article “the” since that conforms to normal usage. The Constitution on the whole waffles on this from start to finish. Likewise, there is no need to say “President of the United States” rather than just “President.”

The Constitution with one exception always refers to the federal and state governments as bodies politic: United States and States. It avoids using the terms: federal or national. Only in Art. I, § 8, cl. 17 does it use the phrase “Government of the United States.” The proposed amendment would be the first time it would refer to state governments other than obliquely in Art. IV, § 4.

The amendment refers to itself as “this article.” Again, drafters have not used uniform language in drafting amendments. “Amendment” has been used along with “article.”

Art. III, § 1 employs the phrase “Judges, both of the supreme and inferior Courts,” Art. 1, § 3, cl. 6 recognizes the office of Chief Justice. The draft uses the word “justices” of the Supreme Court instead of “judges.”