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special legislative report

1990 CONSTITUTIONAL AMENDMENT

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1990 CONSTITUTIONAL AMENDMENT

One proposed amendment to the Texas Constitution, concerning nomination and Senate confirmation of gubernatorial appointees, will be submitted for voter approval at the general election on Nov. 6, 1990. The proposed amendment is analyzed in this special legislative report.

Anita Hill
Chairman

Larry Evans
Vice Chairman

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CONSTITUTIONAL AMENDMENT PROCESS

Since its adoption in 1876, the Texas Constitution has been amended 326 times. This year's Nov. 6 general election ballot will include one proposed amendment to the Constitution.

Joint Resolutions

All amendments to the Texas Constitution must be proposed by the Texas Legislature in the form of joint resolutions, which must be submitted for voter approval. For example, SJR 2 on this year's ballot refers to Senate Joint Resolution number 2. Under Art. 17, sec. 1 of the Constitution, a joint resolution proposing a constitutional amendment must be adopted by a two-thirds vote of the membership of each of the two houses of the Legislature (100 votes in the House of Representatives; 21 votes in the Senate). The governor cannot veto a joint resolution.

A 1972 amendment to Art. 17, sec. 1 allows proposed constitutional amendments to be adopted by the Legislature during special sessions. For example, SJR 2 on this year's ballot was adopted in June 1990, during the sixth called session of the 71st Legislature.

Contents of joint resolution

The joint resolution includes the text of the proposed constitutional amendment and specifies the date on which it will be submitted to state voters. A joint resolution may include more than one proposed amendment. If more than one amendment is submitted to the voters at the same election, the Secretary of State's Office conducts a random drawing and assigns a ballot number to each amendment.

Wording of ballot proposition

The joint resolution specifies the wording of the proposition that is to appear on the ballot. The Legislature has broad discretion concerning how the ballot proposition is to be worded. In rejecting challenges to proposed amendments on the basis that the ballot language was vague, incomplete or misleading, the courts generally have ruled that ballot language is sufficient if it identifies the proposed amendment for the voters. The courts have assumed that voters are already familiar with the proposed amendments when they reach their polling place and do not rely on ballot language alone to make their decision.

Date of election

Most proposed amendments are considered during the November general election, but the Legislature may call a special election on any date for voter consideration of proposed amendments. As recently as 1975, two proposed amendments (concerning a legislative pay raise and public employee retirement) were submitted to the voters in a special election held in April. The practice in recent years has been to submit most proposed amendments at the November general election in odd-numbered years, when in most jurisdictions (the city of Houston being a notable exception) there are no other elections on the ballot.

Effective date

Unless a later date is specified, joint resolutions proposing constitutional amendments take effect when the statewide majority vote approving the amendment is canvassed. Statewide election results are tabulated by the secretary of state and must be canvassed by the governor 15 to 30 days following the election.

Publication

Art. 17, sec. 1 of the Constitution requires that a brief explanatory statement of the nature of each proposed constitutional amendment, along with the wording of the ballot proposition for the proposed amendment, be published twice in each newspaper in the state that prints official notices. The first notice must be published no later than 50 days and no sooner than 60 days before the election. The second notice must be published on the same day of the subsequent week. Also, the secretary of state is to send a complete copy of each amendment to each county clerk, who must post it in the courthouse at least 30 days prior to the election.

The Secretary of State's Office prepares the explanatory statement, which must also be approved by the attorney general. The Secretary of State's Office also arranges for the required newspaper publication, often by contracting with the Texas Press Association. The estimated cost of publishing proposed amendments twice in newspapers across the state is $60,000.

Implementing Legislation

Some constitutional amendments, such as SJR 2 on this year's ballot, are self-enacting and require no additional legislation to implement their provisions. Other amendments grant general

authority to the Legislature to enact legislation in a particular area or within certain guidelines. These amendments require implementing legislation to fill in the details of how the amendment will operate. The Legislature frequently adopts implementing legislation in advance, with the effective date of the legislation contingent on voter approval of a particular amendment. If the amendment is rejected by the voters, then the implementing bill, or at least those portions of the bill dependent on the constitutional change, does not take effect.

RESULTS OF THE 1989 CONSTITUTIONAL AMENDMENTS ELECTION

Of 21 proposed constitutional amendments on the Nov. 7, 1989 general-election ballot, the voters approved 19, rejecting amendments that would have allowed an increase in legislative salaries (Amendment No. 1) and that would have raised legislative per diem payments (Amendment No. 11). For additional information on last year's proposed amendments, see House Research Organization Special Legislative Report No. 151, 1989 Constitutional Amendments, Aug. 29, 1989.

Amendment No. 1 -- Increasing legislative salaries to one-fourth of the governor's salary

For	424,704	(36.7 percent)
Against	732,417	(63.3 percent)

Amendment No. 2 -- $500 million in bonds for water projects, colonias aid

For	686,735	(59.8 percent)
Against	460,742	(40.2 percent)

Amendment No. 3 -- $75 million in bonds for agriculture, new products and small business incubators

For	597,178	(52.3 percent)
Against	543,631	(47.7 percent)

Amendment No. 4 -- Property tax exemption for veterans groups

For	603,333	(52.8 percent)
Against	539,012	(47.2 percent)

Amendment No. 5 -- Tax break for goods in transit ("freeport" exemption)

For	742,405	(64.5 percent)
Against	408,573	(35.5 percent)

Amendment No. 6 -- Four-year term option for hospital district boards

For	710,018	(63.3 percent)
Against	411,778	(36.7 percent)

Amendment No. 7 -- Oath of office for elected and appointed officials

For	796,323	(69.2 percent)
Against	353,661	(30.8 percent)

Amendment No. 8 -- $400 million in bonds for corrections, mental health and law enforcement facilities

For	779,641	(68.6 percent)
Against	357,154	(31.4 percent)

Amendment No. 9 -- Consolidation of criminal justice agencies

For	794,006	(70.7 percent)
Against	328,831	(29.3 percent)

Amendment No. 10 -- Instructions to jury on parole and good conduct laws

For	901,297	(79.0 percent)
Against	239,714	(21.0 percent)

Amendment No. 11 -- Tying legislators' per diem to federal tax deduction

For	531,550	(47.3 percent)
Against	592,412	(52.7 percent)

Amendment No. 12 -- Permanent School Fund guarantee of state school bonds

For	628,812	(55.9 percent)
Against	495,090	(44.1 percent)

Amendment No. 13 -- Constitutional rights for crime victims

For	819,399	(72.1 percent)
Against	317,111	(27.9 percent)

Amendment No. 14 -- Election of Fort Bend County district attorney

For	704,699	(67.5 percent)
Against	338,529	(32.5 percent)

Amendment No. 15 -- Raffles for charity by nonprofit groups

For	704,694	(62.5 percent)
Against	423,699	(37.5 percent)

Amendment No. 16 -- Local creation of hospital districts

For	776,806	(70.0 percent)
Against	332,298	(30.0 percent)

Amendment No. 17 -- State financial aid to local fire departments

For	665,913	(59.0 percent)
Against	462,686	(41.0 percent)

Amendment No. 18 -- Removing time limit on sale of agricultural water conservation bonds

For	537,990	(50.1 percent)
Against	535,724	(49.9 percent)

Amendment No. 19 -- Broader investment of local government funds

For	658,826	(60.4 percent)
Against	431,794	(39.6 percent)

Amendment No. 20 -- Abolishing county surveyor in seven counties

For	736,963	(70.9 percent)
Against	302,617	(29.1 percent)

Amendment No. 21 -- $75 million in bonds for college savings and student loans

For	682,251	(61.1 percent)
Against	435,182	(38.9 percent)

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Constitutional amendment analysis Amendment No. 1 (SJR 2)

SUBJECT: Nomination, confirmation of gubernatorial appointees

BACKGROUND: Under Art. 4, sec. 12(a) of the Texas Constitution, the governor, unless otherwise provided by law, fills vacancies in state or district offices by appointment. (Vacancies in legislative offices are filled by election.) An appointment made while the Senate is in session requires the "advice and consent" of two-thirds of the Senate members present.

If an appointment is made when the Senate is not in session, the Constitution requires that the governor nominate either the appointee or some other person to the Senate "during the first 10 days of its session." If the nomination is rejected, the office immediately becomes vacant, and the governor must, without delay, make other nominations, until one is confirmed. If there is no confirmation "during the session of the Senate," the governor is prohibited from appointing a person who has been "rejected" by the Senate but may appoint someone else to fill the vacancy until the next session of the Senate.

"Recess" appointees -- persons appointed when the Senate is not in session -- generally have assumed office immediately after appointment. If the Senate met for more than 10 days in special session, the governor was expected to submit to the Senate a nomination to fill the vacancy. If the Senate voted to reject the nominee, the governor was expected to nominate someone else. If the Senate adjourned without voting on the nomination, the appointee could continue in office, although at that point the governor also had the option of appointing someone else to fill the vacancy.

On April 20, 1990 Atty. Gen. Jim Mattox issued Opinion No. JM-1161, reinterpreting the constitutional provision concerning "recess" appointees. Mattox overruled several earlier attorney general opinions holding that recess appointees could remain in office after the Senate had met and failed to act on their nominations. Instead, Mattox ruled, Senate inaction on

a nomination means that it is automatically rejected. Appointees named between legislative sessions cannot continue to hold office once the Senate meets and adjourns without acting on their nominations.

In analyzing the status of two recess appointees to a new Dallas district court, the attorney general held that the office became vacant as of the final day of the special session immediately following the appointment, because the Senate had not actively confirmed or rejected the initial appointee.

Although the governor had not nominated anyone for the judgeship, the attorney general held that since the Senate had met in special session for more than 10 days, the recess appointee's confirmation automatically had come before the Senate, just as if he had been formally nominated. When the special session ended without a Senate vote to either confirm or reject the appointee's nomination, the appointee was thus rejected through inaction, and the office became vacant when the session ended. The governor was free to appoint another person to the office, but the new appointee would be subject to confirmation by the Senate the next time it met.

The most recent of the overruled opinions, MW-303 (1981), had held that the Senate's failure to act on a nomination constituted neither confirmation nor rejection. The 1981 opinion said that in such cases, the initial appointee would continue to serve as a holdover until rejected or replaced.

The attorney general's new "inaction means rejection" interpretation clouded the status of several recess appointees who had not been confirmed by the Senate during the special session immediately following their appointment. Asked to reconsider JM-1161, Mattox on May 24, 1990 issued a new opinion, JM-1179, affirming the earlier opinion but holding that it only applied prospectively, as of May 1, 1990, the date it was released. In the new opinion, the attorney general said recess appointees who had not been confirmed were properly holding office, under two prior attorney general opinions. But if these appointees were not confirmed by the end of the special session then

underway (the 71st Legislature's fifth called session), the offices would become vacant upon final adjournment of the Senate session, the attorney general said.

After the second opinion was issued, the Senate confirmed 70 of the 75 nominees who had not been confirmed in previous sessions. (Three nominees withdrew, and two were rejected through inaction.) Left unclear, however, was the status of those nominees whom the Senate previously had voted to confirm, but not during the session immediately following their appointment.

DIGEST:

Amendment No. 1 would revise Art. 4, sec. 12(a) of the Texas Constitution to specify that an unconfirmed gubernatorial appointee may hold office even if the Senate meets in special session after the person's appointment and fails to take final action on it. An appointee would be entitled to hold office until rejected in a subsequent session, until the governor appointed another person to fill the vacancy or until the end of the next regular session. Recess appointees whose nominations were not acted on by the end of a regular session would be considered rejected.

During the first 10 days of the next session following an appointment to fill a vacancy, the governor would be required to nominate either the appointee or some other person. If no confirmation occurred in a special session, the governor would be required to repeat the process in each subsequent session until a confirmation occurred. If no confirmation occurred during a regular session, the nominee would be considered rejected, and the governor would be required to nominate someone else during the first 10 days of the next session.

If the governor failed to submit a nomination during the first 10 days of a session, the Senate would be permitted to consider the confirmation of the recess appointee, just as if the governor had actually nominated the appointee.

The governor would be prohibited from reappointing a rejected nominee to the same vacancy. Nor could the governor appoint a rejected nominee to fill a different

vacancy in the same office, or on the same board or commission, for the duration of the term of the vacancy for which the nominee had been rejected.

The amendment would specify that the vote margin required for confirmation of recess appointments is the same as that for appointments made during a session: two-thirds of the Senate members present.

The amendment also would validate any acts or decisions of state boards, commissions or other bodies or officers that might be invalidated solely because the Senate had not taken final action on an appointee's nomination during a special session. The validation provision would expire Jan. 1, 1991.

The amendment would extend a provision in Art. 4, sec. 12(b), that "expiration of a term of office or creation of a new office constitutes a vacancy," to make it apply to the amendment's revised provisions on appointment and confirmation. (The definition currently applies only to the section authorizing the Legislature to restrict "lame duck" appointments -- those made by governors who have not been reelected.)

The ballot proposal reads: "The constitutional amendment to clarify the authority of the senate to consider certain nominees to state and district offices and to provide for filling vacancies in those offices."

SUPPORTERS SAY:

The proposed amendment would clarify troublesome ambiguities, pointed out in the attorney general's recent reinterpretation of Art. 4, sec. 12(a), concerning Senate confirmation of persons appointed by the governor to fill official vacancies. It also would prevent potential disruption of state government, by removing any doubt about the actions and decisions of appointees whose status in office has been called into question. The proposed amendment has the full backing of the Governor's Office and was approved unanimously by both houses of the Legislature.

The interpretation that Senate inaction on recess appointees constitutes automatic rejection should be reversed because it runs contrary to common sense and long-standing Senate practice. Without the amendment,

the Senate might be faced with the overwhelming task of evaluating 200 or more nominees during a brief special session. During the 71st Legislature's fifth called session, for example, the Senate Nominations Committee had difficulty scheduling confirmation hearings as it rushed to comply with the attorney general's new opinion.

Senators caught in such a rush might either rubberstamp appointments or "bust" them by inaction, without adequate cause. Rather than acting on incomplete information, the Senate has at times delayed consideration of appointees in order to gauge their abilities and performance in office over a longer period. The amendment simply would allow that long-standing practice to continue.

The attorney general's follow-up opinion, clarifying that the new interpretation applies only prospectively, nonetheless left doubts about the validity of hundreds of acts by officials whose status in office remains subject to legal challenge. Since an attorney general's opinion can be superseded by the courts, the Constitution should make clear that these acts are not subject to challenge on the basis that state-agency officials had not been confirmed properly under the attorney general's new interpretation. The narrowly drafted provision would eliminate the possibility that the state could be tied up in court for years fending off legal challenges.

Although the Senate has rarely failed to act on pending nominations during a regular session, it had been generally understood that any nominations not finally acted on during a regular session were rejected. This understanding was based on the reasonable assumption that the 140-day regular session allows sufficient time for evaluation of all nominees. The amendment would allow the state to continue operating on this sound basis.

The proposed change would make clear that a governor could not, by oversight or deliberate inaction, thwart the constitutional authority of the Senate to decide on executive branch appointments. In the case of the Dallas district-court vacancy that led to the attorney

general's opinion, the governor had failed to submit any nomination to the Senate, despite an apparent requirement to do so. The proposed amendment would more clearly state the governor's responsibility to submit nominations for Senate review and would provide a mechanism for the Senate to consider recess appointees if the governor fails to nominate them. The Senate would be allowed to act on a recess appointment in the special session immediately following the appointment if the session lasted longer than 10 days.

Since the proposed amendment would not allow nominees to be considered rejected by inaction during special sessions, it would clarify questions about the status of nominations made in a special session lasting less than 10 days and not acted on by the Senate during that session. Otherwise, the Senate might be forced to choose between rejecting nominees through inaction during a brief session or remaining in session after the House has adjourned in order to consider confirmation.

Another ambiguity that would be clarified concerns reappointment of nominees who have been rejected by the Senate. The current provision prohibits the governor from appointing a rejected nominee to the same position, but it does not specifically prohibit appointment of a rejected nominee to another seat on the same board or commission or to the same office. This type of appointment would thwart the Senate, which would be unable to reject the new appointment until a subsequent session. Yet because lifetime disqualification for a rejected nominee would be unreasonable and unfair, the amendment would limit the disqualification for a rejected nominee to the term of the office for which the nominee was rejected.

The proposed amendment would not expand the power of the governor to remove recess appointees. Under prior interpretations the governor already had the power to replace recess appointees by appointing someone else after the Senate had met and not acted on the appointee's confirmation.

The proposed amendment would restore to both the executive and legislative branches the flexibility

needed to place the right people in the right jobs. Under the attorney general's new interpretation, neither the governor nor the Senate has the option of reviewing the performance of recess appointees during a period in which a special session or two may occur, then replacing them, if necessary. Since inaction now means rejection, the Senate might feel pressure to hastily confirm these appointees, making it difficult to remove them later, except under extraordinary circumstances.

The amendment would merely restore the status quo prior to the attorney general's May opinion; it would not enlarge the power of the governor or the Senate. While there may be hypothetical situations that the revised provision would not cover, the Constitution cannot be so detailed that it anticipates every conceivable situation, no matter how unlikely. Other concerns about the drafting of the amendment are ill-founded and overly imaginative. For example, the provision specifying that expiring and new terms constitute vacancies is not an exclusive definition and would never be interpreted to exclude mid-term vacancies due to resignation or death or other types of vacancies.

OPPONENTS SAY:

The recent attorney general's opinion established that the confirmation of those appointed to vacancies in state and district offices should not be allowed to linger unresolved in the Senate from session to session. This sound public policy should not be overturned by an unnecessary constitutional amendment. Persons appointed to state or district office, especially to judicial vacancies, need to be able to exercise their judgment independently, without being subject to arbitrary removal by the governor or rejection by the Senate months or years after their appointment.

Under the proposed amendment, persons appointed to public office during the period between legislative sessions might not know for months, even years, whether their appointment was final. For example, under terms of this amendment, an appointment made in June of 1989, just after the regular session adjourned, could have been carried over from special session to special session, with no final action on confirmation required

until the next regular session ends in May 1991. This lack of certainty concerning an appointee's status in office could inhibit independent judgment. During the "probationary" period before their final confirmation, appointees would tend to base their decisions on how the Senate or the governor might react, or they might postpone action on controversial matters until their confirmation was secure. Also, the loss of any job security might make potential appointees for state office less willing to serve.

A Senate confirmation vote taken relatively soon after an appointment sounds a note of finality and helps insulate appointed officials from sudden shifts in political fortunes. Delayed Senate action, which the proposed amendment would permit, would allow a new governor to attempt to replace all the unconfirmed appointees of the previous governor, creating instability in the government.

Now that the attorney general has clarified the rules on nomination and confirmation, there is no reason to amend the Constitution. The attorney general has declared that the interpretation applies only after May 1, 1990, the day the opinion was made public, and the Senate has acted on those unconfirmed appointees affected by the new interpretation, thereby eliminating any question about the validity of their decisions. With these issues settled, no further action is needed.

While pressure for the Senate to act on appointments during a short special session might inundate the Nominations Committee with scores of appointments to consider, a constitutional amendment is not the solution to this potential problem. The names of most of the appointees will be known far in advance, and the Nominations Committee is not precluded during the interim between sessions from gathering background information or taking testimony in preparation for the next session. The Governor's Office would have an incentive to cooperate with any advance preparation by the Senate for the next session in order to avoid having appointees rejected through Senate inaction due to lack of information.

OTHER OPPONENTS SAY:

The proposed amendment is so imprecise and ambiguous that it would only compound problems caused by the existing provision and invite unintended consequences. If the Constitution is to be amended in the name of clarity, then the amendment at least should not create new ambiguities. The proposed amendment is subject to a variety of interpretations. It can even be read to suggest that the provision allowing an appointee to stay in office after a special session ends without Senate confirmation applies only to a new appointee named by the governor after the session ends.

The proposed amendment would broaden the governor's power to remove appointees from office. According to the attorney general's interpretation of the current provision, once a special session has ended without a final vote on confirmation, a nominee is considered rejected through inaction, and the governor has no choice but to appoint someone else to fill the vacancy. Under the proposed amendment, Senate inaction on a nominee would give the governor two options: to allow the nominee to remain in office or to remove that appointee from office by naming someone else to the post. Also, after the session has ended, the governor would be subject to no time limit on when a replacement appointee could be named. This would allow the governor to circumvent another constitutional provision, Art. 15, sec. 9, which prohibits the governor from removing their appointees when the Senate is not in session; the consent of two-thirds of the Senate in a special session called solely for that purpose is required.

The proposed amendment does not clearly answer questions raised about the status of appointees when a special session following their appointment lasts less than 10 days. Could the governor replace a nominee if the Senate met for less than 10 days and took no action on the nominee? What if no formal nomination were made?

One source of confusion in the proposed amendment is the requirement that if the Senate "does not confirm" a recess appointee, the governor must nominate "the recess appointee or another person" during subsequent sessions. The phrase "does not confirm," if it

includes rejected appointees, would appear to allow renomination of such persons, in conflict with another provision of the proposed amendment.

Another example of ambiguous language in the proposed amendment is found in two references to "previously unconfirmed" persons. It is not clear whether this term would apply only to those persons whose nominations have not been acted upon. Would it also include recess appointees the governor had failed to nominate, especially if during the previous, brief special session the Senate had not exercised its option to consider such persons as nominees? Are persons who have served a term and been reappointed to be considered "previously unconfirmed?"

The provision in the 1987 "lame duck" amendment stating that "expiration of a term of office or creation of a new office constitutes a vacancy" is problematic because it leaves out many other types of vacancies -- those that occur in mid-term through resignation, death, etc. The change proposed by Amendment No. 1 would just spread the problems with the "vacancy" definition into another section concerning vacancies.