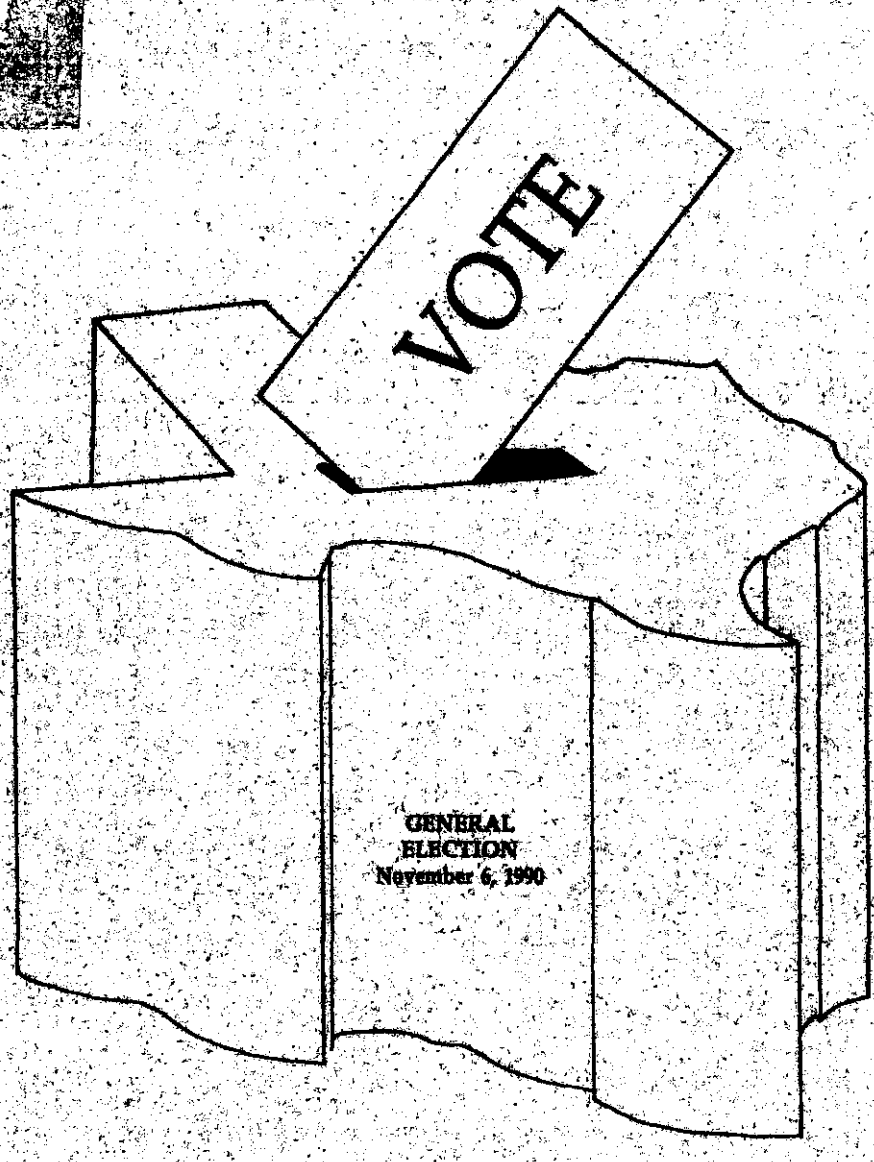
Analysis of a Proposed Constitutional Amendment



GENERAL
ELECTION
November 6, 1990

Texas Legislative Council
Information Report No. 90-3
August 1990

Analysis of Proposed Constitutional Amendment

• November 6, 1990, Election •

Prepared by the Staff
of the
Texas Legislative Council

— Information Report No. 90-3 • August 1990 —

TEXAS LEGISLATIVE COUNCIL

Lieutenant Governor William P. Hobby, Chairman

Speaker Gibson D. (Gib) Lewis, Vice-Chairman

Robert I. Kelly, Executive Director

P.O. Box 12128, Capitol Station

Austin, Texas 78711-2128

TABLE OF CONTENTS

INTRODUCTION

GENERAL INFORMATION

In the 1990 6th Called Session, the 71st Texas Legislature passed one joint resolution proposing a single constitutional amendment. The proposed amendment will be offered for voter ratification on the November 6, 1990, general election ballot.

Prior to this, in the 1989 regular session, the 71st Texas Legislature passed 20 joint resolutions proposing 21 constitutional amendments. Of the 21 total proposed amendments, all of which appeared on the November 7, 1989, general election ballot, Texas voters ratified 19.

The Texas Constitution provides that the legislature, by a two-thirds vote of all members of each house, may propose amendments revising the constitution and that proposed amendments must then be submitted for approval to the qualified voters of the state. An amendment becomes a part of the constitution if a majority of the votes cast for it in an election are cast in its favor. An amendment approved by voters is effective on the date of the official canvass of returns showing adoption. The date of canvass, by law, is not earlier than the 15th nor later than the 30th day after election day. An amendment may provide for a later effective date.

Since adoption in 1876 and through 1989, the state's constitution has been amended 326 times, from a total of 486 amendments submitted to the voters for their approval. The single amendment on the 1990 general election ballot brings the total number of amendments submitted to 487. The following table lists the years in which constitutional amendments have been proposed by the Texas Legislature, the number of amendments proposed, and the number of those adopted. The year of the vote is not reflected in the table.

TABLE

1876 CONSTITUTION

AMENDMENTS PROPOSED AND ADOPTED

year proposed	number proposed	number adopted	year proposed	number proposed	number adopted
1879	1	1	1939	4	3
1881	2	0	1941	5	1
1883	5	5	1942	3**	3
1887	6	0	1945	8**	7
1889	2	2	1947	9	9
1891	5	5	1949	10	2
1893	2	2	1951	7	3
1895	2	1	1953	11	11
1897	5	1	1955	9	9
1899	1	0	1957	12	10
1901	1	1	1959	4	4
1903	3	3	1961	14	10
1905	3	2	1963	7	4
1907	9	1	1965	27	20
1909	4	4	1967	20	13
1911	5	4	1969	16	9
1913	8*	0	1971	18	12
1915	7	0	1973	9	6
1917	3	3	1975	12††	3
1919	13	3	1977	15	11
1921	5**	1	1978	1	1
1923	2†	1	1979	12	9
1925	4	4	1981	10	8
1927	8**	4	1982	3	3
1929	7**	5	1983	19	16
1931	9	9	1985	17**	17
1933	12	4	1986	1	1
1935	13	10	1987	28**	20
1937	7	6	1989	21**	19
			1990	1	(a)
TOTAL PROPOSED 487			TOTAL ADOPTED 326		

NOTES

* Eight resolutions were approved by the legislature, but only six were actually submitted on the ballot; one proposal that included two amendments was not submitted to the voters.

** Total reflects two amendments that were included in one joint resolution.

† Two resolutions were approved by the legislature, but only one was actually submitted on the ballot.

†† Total reflects eight amendments that would have provided for an entire new Texas Constitution and that were included in one joint resolution.

(a) The amendment will appear on the 1990 general election ballot.

WORDING OF THE BALLOT PROPOSITION

The ballot wording of a proposal to amend the state constitution is prescribed in the joint resolution adopted by the legislature that authorizes the submission of the proposed amendment to the voters for ratification. The wording of the single ballot proposition offered at the 1990 general election is provided below.

AMENDMENT NO. 1

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.

ANALYSIS
OF
PROPOSED AMENDMENT

AMENDMENT NO. 1

Senate Joint Resolution 2, proposing a constitutional amendment relating to the procedures for filling vacancies in certain state and district offices. (SENATE AUTHOR: Chet Edwards; HOUSE SPONSOR: Hugo Berlanga)

The proposed amendment to Article IV, Section 12, of the Texas Constitution clarifies the procedure by which the senate may give its advice and consent on proposed gubernatorial appointees to certain state and district offices if the appointees are initially appointed when the senate is not in session. The proposed amendment details the procedure by which a recess appointee may be nominated to, and considered by, the senate and specifies the differing results of the senate's failure to take action on the nomination at a special session and at a regular session. The proposed amendment also validates acts or decisions of state boards, commissions, or other bodies or officers that might be invalid because of the participation of one or more appointees whose right to hold office is in doubt because the senate did not confirm each appointment at the first special session after the appointment.

BACKGROUND

Unless otherwise provided by law, vacancies in state and district offices are filled by gubernatorial appointment with the advice and consent of two-thirds of the senate. If a vacancy occurs during the recess of the senate, the governor may appoint a person to fill the vacancy, but under Article IV, Section 12, of the Texas Constitution, the governor is required to submit the appointment to the senate for its confirmation or rejection during the first 10 days of the next session. Although the constitution does not address the status of a recess appointee whose nomination is not submitted to the senate as constitutionally required or whose nomination, once submitted, is neither confirmed nor rejected by the senate, the historically accepted practice had been to permit the appointee to serve until the senate confirmed or rejected the appointee at a later session.

On April 20, 1990, the attorney general issued an opinion overruling a number of earlier attorney general opinions and interpreting Article IV, Section 12, of the Texas Constitution in a manner contrary to the long-standing practice. (Op. Tex. Att'y Gen. No. JM-1161.) Under the opinion, a recess appointee is automatically considered nominated to the senate for confirmation or rejection after the 10th day of the first regular or special session following the appointment, even if the governor does not actually make a nomination. If the senate does not confirm the nomination during that session, the nominee is considered to have been rejected. Although the opinion does not have the force of law, it is viewed as a legal guideline for state

officers and agencies and could be used to challenge the status and actions of a number of recess appointees who are currently serving on state boards and commissions.

On May 24, 1990, the attorney general issued a follow-up opinion affirming JM-1161, adding that it would apply only on and after May 1, 1990, the date it was publicly released. (Op. Tex. Att'y Gen. No. JM-1179.) According to the attorney general, unconfirmed recess appointees who under JM-1161 would be considered rejected were, at least until May 1, 1990, properly holding office in reliance on earlier attorney general opinions that supported the traditional practice. The attorney general stated that these appointees could be considered by the senate in the special session of the legislature that began on that date and that any appointees left unconfirmed at the end of that session would be considered rejected. During the 5th Called Session of the 71st Legislature, the senate confirmed 70 interim appointees who had not been confirmed in previous sessions, but no action was taken with regard to other appointees who had been previously confirmed in sessions other than the sessions immediately following their appointment.

The proposed constitutional amendment would largely reinstate the traditional appointment and confirmation practice, with a few clarifications. Under the proposed amendment:

(1) a recess appointee is considered nominated if the governor has not submitted a nomination for that vacancy during the first 10 days of the next legislative session following the appointment and during the 10 days of each subsequent legislative session if there has been no confirmation of an appointee for that vacancy;

(2) the senate may, but is not required to, act on the nomination;

(3) if the senate does not act to confirm or reject the appointee or another person nominated to fill the vacancy during a special session, the appointee may continue to serve until the governor appoints another person or until the appointee is rejected by the senate at a later session; and

(4) if the senate does not act to confirm or reject the appointee or another person nominated to fill the vacancy during a regular session, the appointee is considered rejected when the session ends.

The proposed amendment would also clarify the meaning of "vacancy." Under current law, an appointee who has been rejected by the senate might be eligible for immediate reappointment to another position on the same board or commission or to the same office. Such an action subverts the senate's power to approve or reject

gubernatorial appointees. The proposed amendment would prohibit reappointment to the same board or commission during the term of the vacancy for which the appointee was rejected.

Finally, the proposed amendment would validate the actions and decisions of each appointee who was not confirmed by final action of the senate at the legislative session immediately following his or her appointment, but who was considered to have been validly holding office under the historically accepted interpretation of Article IV, Section 12.

ARGUMENTS

FOR:

1. Article IV, Section 12, of the Texas Constitution contains a number of troublesome ambiguities related to the procedure for filling vacancies. For example, while that section requires the advice and consent of two-thirds of the senate present for a session appointee, it does not state whether recess appointees must be confirmed by two-thirds of the senate. That section is unclear about whether a new office or the expiration of a term of office constitutes a vacancy. The proposed amendment clarifies these ambiguities by spelling out the two-thirds requirement for confirmation of recess appointees and by making clear the definition of vacancy for purposes of the entire section.

2. Under the current wording of Article IV, Section 12, the governor is required to nominate a recess appointee or another person to the senate during the first 10 days of the session following the appointment. However, neither that section nor any other law contains a provision to enforce this responsibility. The proposed amendment would clarify the governor's responsibility and would provide a means for the senate to consider recess appointees if the governor fails to nominate them.

3. The attorney general's opinions could be interpreted to jeopardize many gubernatorial appointees and, possibly, policies and rulings made by the state boards and commissions they serve. The validation provision in the proposed amendment would protect otherwise valid state actions from legal challenge based on the attorney general's opinions.

4. Under the attorney general's opinions, the senate would be required to act on all recess appointments during the session immediately following the appointment. If a number of appointments are made when the senate is not in session, the senate, during a subsequent short special session, would be unable to carefully consider each appointee, resulting in either an uninformed rubber stamp or rejection of appointees or automatic rejection through inaction.

5. Arguably, current law permits the governor to reappoint a person rejected by the senate when nominated to another position of the same board or commission. This is an obvious opportunity for subversion of the senate's constitutional power of advice and consent. The proposed amendment would prohibit reappointment to the same board or commission during the term of the vacancy for which the nominee was rejected.

AGAINST:

1. The framers of Article IV, Section 12 intended a two-step appointment process, involving both the governor's selection of an appointee and the senate's confirmation or rejection of the appointee. It is not consistent with this intention or with sound public policy to allow unconfirmed gubernatorial appointees to serve from session to session without senate approval or rejection. The traditional interpretation of this section was a departure from the originally intended appointment process and permitted the senate to neglect its responsibilities in this regard. The attorney general's opinions have reinstated the dual appointment process.

2. Now that the rules on confirmation are clear, there is no reason to change them, especially since the attorney general has announced that his interpretation will apply only after May 1, 1990. During the special session beginning on May 1, the senate took action on many appointments affected by the interpretation, thereby preventing disruption of decisions made by appointees whose tenure had been considered valid under previous interpretations of the law.

3. The proposed amendment would permit the senate to withhold action on more questionable nominations in order to make the nominees accountable to the senate. While this strategy might elicit "good behavior" from the nominees, the state agencies they serve could be left in limbo if the nominees try to postpone controversial decisions until after confirmation.

APPENDIX
Text of Resolution Proposing Amendment

AMENDMENT NO. 1

SENATE AUTHOR: Chet Edwards S.J.R. No. 2
HOUSE SPONSOR: Hugo Berlanga (71st Leg., 6th C.S.)

SENATE JOINT RESOLUTION

proposing a constitutional amendment relating to the procedures for filling vacancies in certain state and district offices.

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Article IV, Section 12, of the Texas Constitution is amended to read as follows:

Sec. 12. (a) All vacancies in State or district offices, except members of the Legislature, shall be filled unless otherwise provided by law by appointment of the Governor.

(b) An[~~, which~~] appointment of the Governor[~~, if~~] made during a [~~its~~] session of the Senate[,] shall be with the advice and consent of two-thirds of the Senate present.

(c) In accordance with this section, the Senate may give its advice and consent on an appointment of the Governor made during a recess of the Senate. To be confirmed, the appointment must be with the advice and consent of two-thirds of the Senate present. If an appointment of the Governor is made during the recess of the Senate, the Governor shall nominate the [~~said~~] appointee, or some other person to fill the [~~such~~] vacancy, [~~shall be nominated~~] to the Senate during the first ten days of its next session following the appointment. If the Senate does not confirm a person under this subsection, the Governor shall nominate in accordance with this section the recess appointee or another person to fill the vacancy during the first ten days of each subsequent session of the Senate until a confirmation occurs. If the Governor does not nominate a person to the Senate during the first ten days of a session of the Senate as required by this subsection, the Senate at that session may consider the recess appointee as if the Governor had nominated the appointee.

(d) If the Senate, at any special session, does not take final action to confirm or reject a previously unconfirmed recess appointee or another person nominated to fill the vacancy for which the appointment was made:

(1) the Governor after the session may appoint another person to fill the vacancy; and

(2) the appointee, if otherwise qualified and if not removed as provided by law, is entitled to continue in office until the earlier of the following occurs:

(A) the Senate rejects the appointee at a subsequent session; or

(B) the Governor appoints another person to fill the vacancy under Subdivision (1) of this subsection.

(e) If the Senate, at a regular session, does not take final action to confirm or reject a previously unconfirmed recess appointee or another person nominated to fill the vacancy for which the appointment was made, the appointee or other person, as appropriate, is considered to be rejected by the Senate when the Senate session ends.

(f) If an appointee is rejected, the [~~said~~] office shall immediately become vacant, and the Governor shall, without delay, make further nominations, until a confirmation takes place. If a person has been rejected by the Senate to fill a vacancy [~~But should there be no confirmation during the session of the Senate~~], the Governor may [~~shall~~] not [~~thereafter~~] appoint the [~~any~~] person to fill the [~~such~~] vacancy or, during the term of the vacancy for which the person was rejected, to fill another vacancy in the same office or on the same board, commission, or other body.

(g) [~~who has been rejected by the Senate, but may appoint some other person to fill the vacancy until the next session of the Senate or until the regular election to said office, should it sooner occur.~~] Appointments to vacancies in offices elective by the people shall only continue until the next general election.

(h) [~~(b)~~] The Legislature by general law may limit the term to be served by a person appointed by the Governor to fill a vacancy in a state or district office to a period that ends before the vacant term otherwise expires or, for an elective office, before the next election at which the vacancy is to be filled, if the appointment is made on or after November 1 preceding the general election for the succeeding term of the office of Governor and the Governor is not elected at that election to the succeeding term.

(i) For purposes of this section [~~subsection~~], the expiration of a term of office or the creation of a new office constitutes a vacancy.

(j) An action or decision of a state board, commission, or other body or officer that would be invalid if one or more recess appointees of the Governor are considered to be invalidly holding office solely because an appointee's nomination was not confirmed or rejected by final action of the Senate at a special session is validated from the date of the action or decision if the action or decision is not invalid for any other reason. This subsection expires January 1, 1991.

SECTION 2. This proposed constitutional amendment shall be submitted to the voters at an election to be held November 6, 1990. The ballot shall be printed to provide for voting for or against the proposition: "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."