

Sphex

March 5, 2015 — Sept, 17, 2015

Summary for the secretary's minutes

The speaker provided background concerning amending the Constitution of the U S and reviewed the process by which proposed amendments can be put before the states, and the requirements for approval. He also summarized the rationales of the needs for amendments advanced by five constitutional or political system scholars: Rexford Tugwell, Sanford Levinson, John Paul Stevens, Larry Sabato and Brien Hallett.

This was followed by introduction of a sampling of amendments proposed by those named above, with a short time provided after certain ones for comments and questions. The first considered concerned: war powers and declarations, representation in the Congress, gerrymandering, fairness of the electoral college. Other proposals introduced more briefly concerned: campaign finance, balanced budget/social safety net, continuity of government after catastrophe, keeping and bearing arms, the death penalty, discrimination, religion, abortion, education, national service, length and number of presidential terms, and federal judge term limits. The speaker would like to see amendments developed in Congress and sent to state conventions for consideration. Those on government structure and process should be bundled; others could be singular.

In closing the speaker acknowledged that time permitted us only to skim the surface of the issues raised by proposed amendments, saying that any one of them could be - and has been somewhere - a topic for an entire paper or book.

TCT

For SPHEX September 17, 2015: Constitution Day

Originally scheduled for March 5, 2015, but snowed out.

On Amending the Constitution of the United States of America

I have long had interest in the Constitutional Convention of 1787, the various ratifying conventions of the states, the Federalist Papers, the development of the Bill of Rights, correspondence among participants, commentaries, etc. And I have admiration and appreciation for the Constitution and government created, even as neither is without flaws. So it is natural that my interest extends to present-day proposals for amending it. On receipt of news reports of efforts in the 2015 Virginia General Assembly session for the states to call a constitutional convention and of an important case making its way to the U S Supreme Court concerning redistricting by an independent commission in Arizona, I switched from my intended presentation for March 5 to this one on amending the Constitution. By coincidence the new date for my paper turned out to be September 17, a.k.a. Constitution day. So the other paper - the one about the Blackwater Creek trails will have to wait for another time.

I would like this to be more of a colloquy than a lecture, so will pause for comments or questions at selected times during the presentation rather than waiting until the end. As I proceed and as you consider individual proposals, I invite you to think about the following questions. Do you think major constitutional reform is needed? If so would you do it by convention, by piecemeal changes, or by leaving it to Supreme Court rulings? If a concerted effort to reform the Constitution were to be mounted, which perceived flaws to be addressed first might depend on whether one chose to remedy

structural problems concerning fairness in representation and governance or to address other issues. Which would you choose to begin with? And finally what is your opinion concerning each of the proposed changes I will cite?

For many years Rexford Guy Tugwell (1891- 1979) and the Center for the Study of Democratic Institutions issued papers, articles, books and lectures in pursuit of updating the U S Constitution. Of anyone cited in this paper, Tugwell, with a U. of Pennsylvania Wharton School Ph.D. in economics, was the most experienced in actual government administration. He was one of three original members of FDR's "brains trust" and the head of major federal agencies. He proposed the most far reaching changes in the Constitution and the overall governance of the U S. In the introduction of one lengthy book, Professor Tugwell laid out his case for revision. "It is interesting to observe what ... [a constitution] does – what all existing ones do. They establish a government, make a more or less complete statement of purpose (a preamble) and brief but specific indication of its structure; they provide an indication of powers and their distribution among officials, together with rights given to and duties expected of citizens. So a constitution is not only a profession of intention by its people but also a guide for the governing and the governed. This last, in a country with pluralistic inclinations, may well be as important as any other characteristic." (Tugwell)

Over time the Supreme Court has redefined aspects of the Constitution, as a result of the theory of the living constitution. "The situation seems to be this: everyone agrees that changes must be made from time to time, and because they are hard to make in any other way, the Supreme Court is a convenient agency for doing it." {Tugwell} At times

“original intentions [of the Constitution] have been ignored in favor of ones more consonant with contemporary views or, at least, the views of the Court’s majority.”

(Tugwell)

Tugwell continued, “[The Constitution] has, to put it plainly, become in many respects obsolete. The succeeding generations still living within its directives are confronted with conditions radically different from those known to the original framers. Does anyone believe that if the Constitution in its entirety should be submitted to referendum now, and relieved somehow of its traditional sanctity, it would be ratified. It would not, and if constitutional government is desirable, then it follows that an acceptable one ought to be devised. This simple logic seems irrefutable, [but] actually it is universally evaded. It is even widely regarded as reprehensible to make such a suggestion.” (Tugwell)

While Tugwell and the Center for the Study of Democratic Institutions “had no illusions about the likelihood of a new [constitutional] convention or of complete revision” nonetheless they proposed a model for restructuring the constitution – and to some extent the nation - to stimulate action “looking toward amendment.” (Tugwell) The proposals included an unusual emphasis on responsibilities as well as rights of citizens, fiscal planning, and the electoral process. Even if the extent of restructuring proposed was unrealistically broad, their document contains a multitude of well argued proposals. And the influence of his ideas on today’s would-be reformers is clear to be seen. In this paper I will present a selected few of changes contained in that model, along with changes proposed by others.

Larry Sabato, founder and director of the Center for the Study of Politics at the University of Virginia, says he grew up revering the Constitution and only bit by bit came to favor substantial amendments. He proposes consideration of changes needed via a constitutional convention – one limited in advance in what topics it can take up. Sabato thinks certain hot-button social and cultural issues – e.g. abortion, gay rights, the death penalty, gun control - would have to be off limits in a constitutional convention lest no progress could be made on needed structural reforms. He says, “Our forefathers designed the best possible system that could be achieved at that moment in time. The wiser heads in Philadelphia understood that some of the necessary compromises in the Constitution were flawed, and that some aspects of the new nation – especially the evil institution of slavery – contradicted the very notion of human equality expressed in the text. The framers left it to us, and expected of us, that we would continue at regular intervals to perfect their work.” Before publication of his book, A More Perfect Constitution, in 2007, Dr. Sabato engaged Rasmussen Reports to conduct a survey of Americans concerning potential changes to the Constitution. At the time he said, “The United States’ economy, government, and society are relatively strong, so proposed change is often viewed with a jaundiced eye.” “Unsurprisingly, then, our survey found that proposals that would most radically alter America’s constitutional machinery were met with more skepticism from the public.” (Sabato)

Constitutional scholar Sanford Levinson is another who was slow to come to favor a new convention. However he now writes, “If I am correct that the Constitution is both

insufficiently democratic, ... *and* significantly dysfunctional, in terms of quality of government that we receive, then it follows that we should no longer express our blind devotion to it.” He thinks the requirement of two senators from each state – ignoring as it does population differences - “should appall most Americans and lead them to support a new convention.” Professor Levinson’s call for reforms is not limited to the allocation of representation and power in the Senate. Others address: the Electoral College, the hiatus between repudiation of a sitting president and the inauguration of his successor, life tenure of Supreme Court justices, continuity in government following catastrophe, and the creation of second-class citizens. (Levinson,)

As a reminder of how difficult it is to get approval of an amendment, former Supreme Court Justice John Paul Stevens, in his book Six Amendments, noted that although thousands of amendments have been proposed, the Constitution has been amended only 18 times – ten amendments at once the first time and 17 since. He proposes six needed amendments, four of which address what he calls judge made rules rather than errors in the original Constitution itself. More about his proposals later. (Stevens)

We all know that there are two ways of proposing amendments – by approval of two-thirds of both the House and the Senate or by a convention called by the legislatures of two-thirds of the states. Proposed amendments “shall be valid to all Intents and Purposes, as part of the constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress....” The first ten amendments were proposed by Congress after James Madison reversed his previous position and became

their insistent patron to fulfill a campaign promise and quiet opposition to the constitution. (Madison – the man we know as the father of the Constitution – had been denied appointment to the U S Senate and put in a bind concerning winning election to the first House of Representatives by the gerrymandering of his congressional district by Patrick Henry led Anti-federalists. So partisan manipulation of districting could have been named Henrymandering! At the urging of Henry James Monroe vied with Madison– the only time that two future presidents have run against each other for a seat in the House.) Congress sent the ten amendments we know as the Bill of Rights- and two others which did not get ratified at the time - to state legislatures rather than to state conventions as had been done with the Constitution.

The method of a constitutional Convention called by the states has never been successfully used, but two efforts each fell short by just two states. One was a reaction against “one person, one vote” rulings in the 1960’s (equal number of citizens in each congressional district and both houses of state legislatures have to be apportioned by population); the other was an effort in the late 1980s to early 1990’s to require balanced federal budgets. Such efforts are not dead.

The January 28 and February 5, 2015, the News and Advance carried articles about new efforts in the Virginia legislature to get its approval of a call for a constitutional convention. The Rules Committees of both the House of Delegates and the Senate advanced such measures, with one proposing a convention specifically limited to seeking a balanced budget amendment and another proposing a convention “to propose amendments to impose fiscal restraints on the federal government, limit its power and

limit the term of office of its officials and members of Congress.” A third article, on February 6, reported that sponsors withdrew the proposals for lack of enough votes to pass them. Larry Sabato, seemingly always available to media, “said chances for the resolutions to make it through both houses of the state legislature were slim from the start even with a GOP majority.”

Many fear that a constitutional convention would exceed any limits set on it, with unexpected and unwanted results. Perhaps the 1787 Constitutional Convention gives credence to that thought. After all, as we all know, that convention was charged with “the sole and express purpose of revising the Articles of Confederation” but instead proposed a new constitution and different form of government.

Now, we can move to consideration of a sampling of proposed amendments. Without objection from you, I will pause at three points among the proposals for your comments or questions rather than waiting until after the entire presentation.

War powers, declarations and authorizations for use of military force:

The 1787 Constitutional Convention and the adopted Constitution gave the Congress the entire power to declare war, even rejecting James Madison’s suggested change to make clear that a president could respond to a sudden attack without Congress’s declaration. In remarks in the Convention a distinction was made between *declaring* war – a responsibility assigned to the Congress – and making war – recognized as a function of the executive (at that time not yet referred to as the president) to carry out the declaration by Congress. Of course designating the President as commander in chief, giving him

power to make treaties and in general have sway in foreign policy, and having him pledge to preserve, protect and defend the Constitution blurs the lines of authority and responsibility. So one of the ongoing debates about the intent of our constitution is about the relative powers and responsibilities of the President and the Congress.

Taylor Reveley, III, our annual meeting speaker for 2007 examined the issue of congressional and presidential war making powers, without resolving the issue. A frustrated guest queried him with something like, "You've been studying this for 30 years, can't you tell us the answer?." As a basis for military action abroad, the U S has used either *declarations of war* creating a state of war and conferring special powers on the president, or *authorizations for the [possible] use of military force*. (Congressional Research Service) As early as 1787-89 before the ratification of the Constitution, Alexander Hamilton wrote in Federalist Paper #25 that declarations of war had as of late fallen into disuse! Without a declaration of war President Truman justified military action in Korea as a treaty (with the U.N.) obligation. As we know President Obama – apparently in part at the urging of Senator Tim Kaine from Virginia- last winter submitted to Congress a request for authorization to use military force against ISIS. That request remains in limbo.

Brien Hallett served as a Marine Corps platoon leader in Vietnam and later did a doctoral dissertation on the war clause of the U S Constitution. He examined war powers of the president and congress under the Constitution and declarations of war as practiced - or as avoided. Dr. Hallett sees congress as a domestic policy body incapable of making

foreign policy, absent a constitutional amendment and structural reform. He proposes a decision-making council and a model for declarations of war. Professor Hallett sets out three standards for a proper declaration of war. It must articulate the purpose of the war, guide and direct military operations and establish a boundary between justified combat and unjustified devastation.

Under Hallett's proposal "A Council on War and Peace [would have] the undivided and unshared power to decide the question of public war, both domestic and foreign, on behalf of the nation, by majority vote. The aforesaid power to decide and declare war ... shall include the imposition of diplomatic, economic, or military sanctions ... [and] shall be exercised in accordance with Hague Convention III of 1907." In advance of going to war, the complaint against a potential adversary must be stated along with a statement of what action the adversary must take to satisfy our claim. Then, if the requirement is not met, a formal declaration of war must be made.

"In cases where either imminent danger or novel circumstances [require an emergency action] ... a fully reasoned, absolute, public declaration is still required as soon as time and circumstances permit to ensure that the President as Commander in Chief has not exceeded his command authority to employ diplomatic, economic, or military sanctions when not called for." (Hallett)

Tugwell proposed: "Except in declared emergency, the deployment of forces in far waters or in other nations without their consent shall be notified in advance to a national security committee of the senate hereinafter provided."

“In time of present or prospective danger caused by cataclysm, by attack, or by insurrection, the Senate may declare a national emergency and may authorize the President to take appropriate action. If the Senate be dispersed and no quorum available, the President may proclaim the emergency” (Tugwell)

Sabato prefers to limit some presidential war-making powers and expand Congress’s oversight of war making, particularly through extending, toughening, and incorporating into the Constitution the kind of regime envisaged by the War Powers Resolution of 1973, requiring renewed congressional assent to ongoing war at regular intervals.
(Sabato)

*****Pause for comments

Congress and Gerrymandering

The original Constitutional Convention considered lengths of congressional terms ranging from three to seven years and considered limiting the number of terms one could serve, before settling on the arrangements we still have today. When the current incumbent of a congressional district that ^{includes} ~~represents part of~~ Lynchburg ran in his first campaign, he favored term limits and promised prior to election to serve no more than ten years. He is now in his twenty-second year and is chair of the Judiciary Committee in the House of Representatives.

In the 1st Congress each member of the House of Representatives represented approximately 60,000 persons. From then until 1913 the number of Congressmen – which, by the way, can be changed by majority vote in the House – was gradually increased to 435 members, with each representing 200,000 citizens. Adjustments

following censuses were then interrupted by WWI, the Great Depression and WWII and have not been resumed since then, resulting in the current ratio of 1 to more than 700,000.

Sabato proposes to lengthen House terms to three years, with the entire House elected anytime the presidency is contested on the ballot, and to increase the number of representatives to perhaps 1,000, with no increase in the total number of staff. (Sabato) He also proposes to build a more representative Senate by granting the ten states with the greatest population two additional senators and the next fifteen states one additional senator each.

He would set Senate terms to coincide with each presidential election and appoint all former presidents and vice presidents to the new office of national senator. (Sabato)

Gerrymandering

There are ongoing efforts in several states to remedy gerrymandering. In our state a project called “OneVirginia2021 Virginians for Fair Redistricting” is aiming for reform of the “historical practice of redistricting [of state and congressional districts] by the majority party ... that stifles political competition, discourages compromise and ensures continued control by the party in power.” According to the project’s web site, eleven local governing bodies have voted in favor of a resolution to depoliticize the redrawing of legislative district lines. It may be that the Lynchburg City Council has not yet been approached concerning this petition. Progress on this project was made in the 2015 Virginia General Assembly – four favorable bills passed in the Senate with bipartisan support. Efforts in the House of Delegates were unable to get any of the bills out of the Privileges and Elections Committee, although one - by a 3-4 bipartisan vote - almost

escaped to the full House. At the same session though the Assembly did what looks like more partisan redistricting by passing a bill to the benefit of an incumbent Republican, Bryce Reeves, by realigning the 17th State Senatorial district - exporting Democratic leaning voters and importing Republican leaning voters. **The bill was vetoed by Gov. McAuliffe on 3-15-2015.** In June 2015 a federal circuit court of appeals rejected for a second time certain redistricting drawn by the Virginia legislature in 2012. Consequently the governor called the legislature to meet in special session in August to redraw district lines. **Embroided in partisan wrangling, the legislature quickly adjourned without doing any redistricting.** So now the Court will implement its own redistricting. It has scheduled September 18 to receive a proposal.

On March 2, 2015, the U S Supreme Court heard oral arguments in the case of the Arizona State Legislature v. Arizona Independent Redistricting Commission in which Republican legislators sought to negate a voter-approved independent redistricting commission. That Commission had produced four safe districts for Republicans , two for Democrats, and three which were competitive. **On June 29 the Court in a 5-4 vote upheld the legitimacy of the independent redistricting commission.**

Justice Stevens proposes to eliminate gerrymandering of voting districts for the sole purpose of benefit of one Party. "Districts represented by members of Congress, or by members of any state legislative body, shall be compact and composed of contiguous territory. The state shall have the burden of justifying any departures from this requirement by reference to neutral criteria such as the natural, political, or historic

boundaries or demographic changes. **The interest in enhancing or preserving the political power of the party in control of the state government is not such a neutral criterion.**” (Stevens) As an example of how complex decisions about redistricting can be, does it seem that the Reeves District 17 bill referred to above might pass the Justice Stevens test because it might be argued that, because one of its purposes is to unify a previously split district, it is not for the sole purpose of benefitting one party?

Tugwell proposed that in the reorganized “Newstates of America” the Electoral Branch shall “designate one hundred districts, each with a similar number of eligible voters, redrawing districts after each election.” Three to be elected from each district.

(Tugwell)

Sabato proposes to “Mandate nonpartisan redistricting for House elections [to] ... enhance electoral competition.” (Sabato)

Electoral College

It is useful to remember that in the Constitutional Convention of 1787 there were proponents of direct election of “the executive,” of electoral votes proportionate to the varying population of the states, and even of electoral votes proportionate to financial share from each state.

Larry Sabato says keep the electoral college, but enlarge it by adding 74 electoral votes distributed among the more heavily populated states. (Sabato)

Sanford Levinson says replace it with direct election of the president or change rules so that electoral votes must reflect the popular vote. (Levinson)

Campaign finance

Dr. Tugwell proposed to provide public funding for campaign expenses - with campaigning limited to a short specified time - and to prohibit contributions from private sources. (Tugwell)

Sabato proposes to cap personal and family donations to the campaigns of wealthy candidates and provide free or heavily discounted TV advertising to candidates. (Sabato)

Justice Stevens proposes an amendment to prevent the Supreme Court from interference with those states which wish to impose campaign finance limits: “Neither the First Amendment nor any other provision of this Constitution shall be construed to prohibit the congress or any state from imposing reasonable limits on the amount of money that candidates for public office, or their supporters may spend in election campaigns.” (Stevens)

*****_Pause for comments

Balanced budget, taxes and social safety net

Larry Sabato says a new constitutional convention should devise a balanced budget amendment with escape clauses for such emergencies as natural disasters, wars, recessions, etc. (Sabato)

Tugwell proposed: “Each shall pay whatever share of governmental costs is consistent with fairness for all.” “Those who cannot contribute to productivity shall be entitled to a share of the national product; but distribution shall be fair and the total may not exceed

the amount for this purpose held in the National Sharing Fund [funded by a 1% tax beyond what ones tax would have been].” (Tugwell)

Continuity of government after catastrophe

Both Sanford Levinson and Sabato, writing after 9/11, note the insufficiency of constitutional and rules arrangements for timely replacement of a large number of dead or disabled members of the House of Representatives following a catastrophe. At present the only constitutional way is by elections, which could take months, rendering our bicameral congress unable to pass any laws during that emergency. Among other things that could leave the president, or his successor, with total responsibility and power – or even lead to an unconstitutional military takeover, worries Levinson. Existing arrangements for timely replacement of the president and senators are more adequate, but you might be surprised to know that Penny Pritzker (9th - Commerce)or Anthony Foxx (13 – Transportation) could become your president.

Gun Control proposals

A 2014 book on the second amendment by Michael Waldman, president of the non-partisan Brennan Center for Justice at NYU, offers a comprehensive review of the history of gun rights and limitations. He and Justice Stevens write that for over two hundred years following the adoption of the second amendment federal judges understood that it applied only to bearing and keeping arms for military purposes and that it did not place any limit on the power of states or local governments to regulate the ownership or use of firearms. There were at least four Supreme Court cases reflecting that interpretation. (The judgments in those cases were consonant with James Madison’s clear intent when he wrote the draft of what became the Second Amendment. Madison

was responding to concerns of some states about a standing national army and wished to assure them that armed state militias would be used instead to secure the country. Thus in his formulation the Constitutional right to bear arms was dependent on service in the militia.) Then, in two decisions by five – four votes, the Supreme Court in 2008 (*D. C. v. Heller*) and 2010 (*McDonald v. Chicago*) ruled otherwise. In writing the *Heller* ruling for the majority, Justice Antonin Scalia – who usually claims to rely on the “text” and on “original intent” ignored the original intent of the text written by James Madison.

Therefore, Justice Stevens proposes an amendment.

“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms *when serving in the Militia* shall not be infringed.”

(Stevens)

Tugwell proposed, “There shall be a responsibility to avoid violence and to keep peace; for this reason the bearing of arms or the possession of lethal weapons shall be confined to the police, members of the armed forces, and those licensed under law.” (Tugwell)

The death penalty

Formerly a supporter of the right of states to impose the death penalty, Justice Stevens notes that most states now have available the alternative of life sentence without parole. Thus, he says, the death penalty is no longer needed to protect the public. But mainly for Stevens the fact that the justice system is not infallible and that the death penalty – once carried out - leaves no chance to correct mistakes is a more compelling reason for a change. So he proposes the following amendment.

“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments *such as the death penalty* be inflicted.” (Stevens)

On June 29, 2015, the U S Supreme Court ruled that the sedative midazolam can be used in executions without violating the Eight Amendment prohibition on cruel and unusual punishment. Among other reasoning Justice Samuel Alito said for the majority that to prevail opponents would have to propose a less painful method. At least two losing dissenters to the majority opinion in the case raised questions about the constitutionality of the death penalty.

Discrimination:

Tugwell’s model included, “There shall be no discrimination because of race, creed, color, origin, or sex.” (Tugwell)

Sabato advises to avoid gay rights as too controversial. (Sabato)

In June of 2015 a U S Supreme Court made the right to marry for gays the law of the land.

Religion:

Tugwell’s model included: “The practice of religion shall be privileged; but no religion shall be imposed by some on others, and none shall have public support.” (Tugwell)

Education

Professor Tugwell proposed that “Education shall be provided at public expense for those who meet appropriate tests of eligibility.” (Tugwell)

National service

Both Guy Tugwell and Larry Sabato proposed universal national service. Tugwell's was: "Each shall render such service to the nation as may be required by law...." (Tugwell)

Sabato's is: "All citizens of the United States, who are of sound mind and body, shall be required to give two years of service to their country, in a manner prescribed by law."

Examples of a very wide range of suitable service include: military, Peace Corps, Teach for America, Big Brothers/Sisters, Red Cross, Meals on Wheels, Save the Children, etc.

(Sabato)

Presidential term limit

A four-year term was not the only option considered in the Constitutional Convention of 1787. A provisional vote taken early in that Convention, meeting as a committee of the whole, approved a seven-year term. Obviously, as with many other items, the first vote wasn't the last word. No vote was taken that same day on another proposal which was for three-year terms, triennial election and ineligibility after nine years.

Tugwell proposed one life-time term of nine years, unless rejected by 60% of the electorate after three years. (Tugwell)

Sabato proposes one life-time six- or possibly eight-year term. Five years after election the president decides whether to pursue extension. If he decides not the term ends at six years. If she decides so the nation votes on a two-year extension referendum. If extension is disapproved by the referendum vote, the term ends at six years. If approved the term ends at eight years. (Sabato)

Federal judge term limit and number of justices

Congress first set the number of Supreme Court Justices at six; at various times it has been seven, nine, ten, seven and nine again. FDR proposed to raise it possibly as high as fifteen by adding one Justice for each sitting justice over seventy years of age who would not retire.

Tugwell proposed a term of eleven years for *the 13* judges of the top court. (Tugwell)

Sabato proposed one term of fifteen years, with possible five-year extension below Supreme Court, and mandatory retirement at age 75 or 80. One *life-time* term of fifteen years and mandatory retirement at age 75 or 80 *for the 12* Supreme Court justices.

(Sabato)

***** Pause for comments or questions

The founders would be surprised that their Constitution has lasted so long, especially provisions for representation in the House. I think reforms in representation and governance are needed and that they could lead to a more functional Congress and successful resolution of many other big issues. I would like to see amendments proposed in congress and sent to the states for consideration. Those on government structure and process should be bundled; others could be singular.

Due to our time limitation here tonight this presentation of proposed amendments only samples the full range of proposals and then only skims the surface about them. A full consideration of any one of the proposals could easily be a paper, a book or a full

discussion unto itself. More amendments are proposed in the various sources I consulted and more sources with still more proposed amendments are available for those interested in further consideration of amendments.

----- Time for final comments or questions

Sources:

A More Perfect Constitution: Why The Constitution Must Be Revised by Larry Sabato.

Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications by Jennifer K. Elsea and Matthew C. Weed of the Congressional Research Service.

Declaring War: Congress, the President, and What The Constitution Does Not Say by Brien Hallett.

Notes of Debates in the Federal Convention of 1787 reported by James Madison.

Our Undemocratic Constitution by Sanford Levinson.

Six Amendments: How and Why We Should Change The Constitution by John Paul Stevens.

The Emerging Constitution by Rexford G. Tugwell.

The Federalist by Alexander Hamilton, James Madison, and John Jay. Edited by Benjamin Fletcher Wright.

The News and Advance

The Second Amendment: a Biography by Michael Waldman

The U S Constitution

Submitted by Thomas C. Tiller for SPHEX

For SPHEX ^{Sept. 17,} ~~March 5,~~ 2015

On Amending the U S Constitution

A sampling of proposed amendments

War powers and declarations

Brien Hallett proposes "A Council on War and Peace [to have] the undivided and unshared power to decide the question of public war, both domestic and foreign, on behalf of the nation, by majority vote. The aforesaid power to decide and declare war ... shall include the imposition of diplomatic, economic, or military sanctions. The aforesaid power ... shall be exercised in accordance with Hague Convention III of 1907." In advance of going to war, the complaint against a potential adversary must be stated along with a statement of what action the adversary must take to satisfy our claim. Then, if the requirement is not met, a formal declaration of war must be made.

"In cases where either imminent danger or novel circumstances [require an emergency action] ... a fully reasoned, absolute, public declaration is still required as soon as time and circumstances permit to ensure that the President as Commander in Chief has not exceeded his command authority to employ diplomatic, economic, or military sanctions when not called for." (Hallett)

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"In time of present or prospective danger caused by cataclysm, by attack, or by insurrection, the Senate may declare a national emergency and may authorize the President to take appropriate action. If the Senate be dispersed and no quorum available, the President may proclaim the emergency" (Tugwell)

Limit some presidential war-making powers and expand Congress's oversight of war making, particularly through extending, toughening, and incorporating into the Constitution the kind of regime envisaged by the War Powers Resolution of 1973, requiring renewed congressional assent to ongoing war at regular intervals. (Sabato)

Congress and Gerrymandering

In the "Newstates of America" the Electoral Branch shall "designate one hundred districts, each with a similar number of eligible voters, redrawing districts after each election." Three to be elected from each district. (Tugwell)

"Mandate nonpartisan redistricting for House elections [to] ... enhance electoral competition." Lengthen House terms to three years, the entire House elected anytime the presidency is contested on the ballot.

Increase the number of representatives to perhaps 1,000, with no increase in the total number of staff. (In the first U S House each member represented approximately 60,000; today each represents more than 700,000.) (Sabato)

Build a more representative Senate by granting the ten states with the greatest population two additional senators and the next fifteen states one additional senator each.
 Appoint all former presidents and vice presidents to the new office of 'national senator.'
 Set Senate terms to coincide with each presidential election. (Sabato)

Eliminate gerrymandering of voting districts for the sole purpose of benefit of one Party.
 "Districts represented by members of Congress, or by members of any state legislative body, shall be compact and composed of contiguous territory. The state shall have the burden of justifying any departures from this requirement by reference to neutral criteria such as the natural, political, or historic boundaries or demographic changes. The interest in enhancing or preserving the political power of the party in control of the state government is not such a neutral criterion." (Stevens)

Electoral College

Keep it, but enlarge it by adding 74 electoral votes distributed among the more populated states. (Sabato)

Eliminate it or reform it with states votes more proportionate to population. (Levinson)

Campaign finance

Provide public funding for campaign expenses - with campaigning limited to a short specified time - and prohibit contributions from private sources. (Tugwell)

Cap personal and family donations to the campaigns of wealthy candidates and provide free or heavily discounted TV advertising to candidates. (Sabato)

"Neither the First Amendment nor any other provision of this Constitution shall be construed to prohibit the congress or any state from imposing reasonable limits on the amount of money that candidates for public office, or their supporters may spend in election campaigns." (Stevens)

Balanced budget, taxes and social safety net

"Each shall pay whatever share of governmental costs is consistent with fairness for all."

"Those who cannot contribute to productivity shall be entitled to a share of the national product; but distribution shall be fair and the total may not exceed the amount for this purpose held in the National Sharing Fund." 1% added for sharing fund. (Tugwell)

A new constitutional convention should devise a balanced budget amendment with escape clauses for such emergencies as natural disasters, wars, recessions, etc. (Sabato)

Continuity of government after catastrophe

Both Levinson and Sabato propose changes to overcome existing Constitutional questions and roadblocks to timely replacement of a large number of members of the House of Representatives killed or disabled by a catastrophic event. Existing procedures for timely replacement of president and senators are better defined.

Keeping and bearing arms

“There shall be a responsibility to avoid violence and to keep peace; for this reason the bearing of arms or the possession of lethal weapons shall be confined to the police, members of the armed forces, and those licensed under law.” (Tugwell)

Avoid this issue because it is so controversial it will side track a constitutional convention from dealing with needed structural changes. (Sabato)

“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms *when serving in the Militia* shall not be infringed.” (Stevens)

The death penalty

“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments *such as the death penalty* be inflicted.” (Stevens)

Avoid – too controversial. (Sabato)

Discrimination Avoid gay rights – too controversial. (Sabato)

“There shall be no discrimination because of race, creed, color, origin, or sex.” (Tugwell)

Religion

“The practice of religion shall be privileged; but no religion shall be imposed by some on others, and none shall have public support.” (Tugwell)

Abortion Avoid; too controversial (Sabato)

Education

“Education shall be provided at public expense for those who meet appropriate tests of eligibility.” (Tugwell)

National service

“Each shall render such service to the nation as may be required by law....” (Tugwell)

“All citizens of the United States, who are of sound mind and body, shall be required to give two years of service to their country, in a manner prescribed by law.” Examples of a

very wide range of suitable service include: military, Peace Corps, Teach for America, Big Brothers/Sisters, Red Cross, Meals on Wheels, Save the Children, etc. (Sabato)

A new constitutional convention should devise a balanced budget amendment with escape clauses for such emergencies as natural disasters, wars, recessions, etc. (Sabato)

Presidential term limit

One life-time term of nine years, unless rejected by 60% of the electorate after three years. (Tugwell)

One life-time six- or possibly eight-year term. Five years after election the president decides whether to pursue extension. If he decides not the term ends at six years. If she decides so the nation votes on a two-year extension referendum. If extension is disapproved by the referendum vote, the term ends at six years. If approved the term ends at eight years. (Sabato)

Federal judge term limit and number of Supreme Court justices

A term of eleven years for *the 13* judges of the top court. (Tugwell)

One term of fifteen years, with possible five-year extension below Supreme Court, and mandatory retirement at age 75 or 80. One *life-time* term of fifteen years and mandatory retirement at age 75 or 80 *for the 12* Supreme Court justices. (Sabato)

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