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Electoral Tension

America, Is It Time for a Divorce?

By Larry G. Johnson

As this article was being written, literally on the eve of the 2016 presidential election, after much mud and manure had been slung by both parties for months, one thing was already clear: The aftermath will be ugly. Things are not going to get better.

Expectations were that half the country would loathe the winner, with claims the election was rigged; or rant that a corrupt crook or an oafish groper was elected; or see Russian hackers or dirty Arab money behind the outcome; or that George Soros or the Koch brothers bought the election; or all of the above, *ad nauseum*.

We are guaranteed to have four more years of recriminations, hearings, lawsuits, investigations, partisan bickering and much worse. With maybe just a week's respite, the politicians will gear up all over again to start campaigning for the next election.



Ugh!

So, no wonder many battle-fatigued citizens such as I are now seriously asking the question: America, do we need a divorce? How about we just agree to split ways now and wish each other well? Is the only way out of gridlock to change the grid?

These questions are not academic. A growing group of Californians, for example, planned to meet in Sacramento the day after the elections to discuss pursuing a statewide referendum that proposes secession from the Union. Calling itself "YesCalifornia,"¹ it seeks to accomplish a "Calexit" by 2019. Its rallying cry is that California could do so much more to promote progressive causes if it could keep the money that it has to contribute to subsidize all the other states. As the group states on its website:

In our view, the United States of America represents so many things that conflict with Californian values, and our continued statehood means California will continue subsidizing the other states to our own detriment, and to the detriment of our children.

Of course, the last time there were serious arguments about states having the right to secede from the Union, we had the bloodiest war in our history, and the arguments were settled only by force of arms.

But a number of scholars today argue that the "might makes right" solution from the Civil War did not intellectually

address the question whether there indeed may be a legal, constitutional basis for renewing the debate. One such historian is Robert F. Hawes Jr., whose well-written *One Nation, Indivisible?: A Study of Secession and the Constitution* makes cogent, persuasive arguments for how, at a minimum, the framers of the Constitution had avoided resolving conclusively whether the states, existing prior to the *federal* (and not "national") government, having *acceded* to the Constitution, did not thereby relinquish their right to *secede* from it in the future.²

Hawes marshals a lot of evidence to support the conclusion that secession, not expressly prohibited by the Constitution, remained an implied right of the states. I think his most compelling argument is that at one time four states were neither part of the defunct Articles of Confederation nor signed on to the new Constitution.

Article 7 of the Constitution set out the ratification requirements:

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the states so ratifying the Same.

The ninth state to ratify was New Hampshire, on June 21, 1788. On that date, the current constitutional republic of the United States of America came into existence, even though Virginia (June 25, 1788), New York (June 26, 1788), North Carolina (November 21, 1789) and Rhode

Island (May 29, 1790) joined later. The Founding Fathers would have been thus content, if need be, had these four states remained completely separate, sovereign entities outside the Union.

But rather than sorting through old arguments about what sort of Union Jefferson, Madison and others had envisioned centuries ago, or limiting the discussion to just Calexit, maybe the cleanest, honest way to go is simply to invoke the amendment process provided by the Constitution itself.

Proposed amendments to the Constitution tend to be pithy, so here is my candidate:

Each State has the right to secede from the United States by vote through convention or referendum.

Of course, a state's secession would in all likelihood lead to several more required steps; it could hardly be a one-step, clean divorce. No doubt it would take a long process to figure out such issues as a state's share of the national

debt; whether the remaining federal government would still provide a national defense and foreign policy; whether a state would develop its own currency and monetary policies; whether there would be unfettered free movement into and out of the state; whether states would form new kinds of smaller unions; and a whole host of other thorny problems.

No doubt many lessons could be learned and models developed by looking at how the EU deals with Brexit and avoiding some of the negatives that came from the breakup of the Soviet Union and Yugoslavia.

Whatever comes from [as it has turned out] a Trump administration, it should now be fairly clear that for better or worse, the United States has become too diverse and divisive for "one size fits all" policies to work well across a country as big and hopelessly divided as ours. In time, "less may be more," as the typically trend-setting Californians may be the first to find out. ■

Larry G. Johnson is a lawyer in Newcastle, and has been a member of the Washington bar since 1974. He recently served on the E-Discovery Subcommittee of the WSBA Escalating Cost of Civil Litigation (ECCL) Task Force. Besides being a litigator, for the past 20 years he has served as a consultant and expert witness in e-discovery matters. He does business as Electronic Data Evidence (www.e-dataevidence.com).

¹ <http://www.yescalifornia.org/>

² It is not widely known that the first states to seriously consider secession from the Union were the New England states that met secretly in 1814 in what is known as the Hartford Convention. "New Englanders were unhappy over political concerns that they were being badly treated by the Union. Since Thomas Jefferson's election in 1800, the president had been a Southerner chosen by an electoral system that allowed the slave-holding Southern states to count each slave as 60 percent of a free person for their allocation of congressional seats and the number of presidential electors. Indeed, the New Englander John Adams would have won a second term as president in 1800 if slaves, prohibited from voting, did not boost Southern electoral votes." See <http://www.courant.com/opinion/op-ed/bc-op-janis-hartford-convention-secession-1213-20141212-story.html>.

