BRIEFING PAPER NO. 2

EXECUTIVE BRANCH

TABLE OF CONTENTS

THE EXECUTIVE BRANCH

The executive branch of the Commonwealth government is one of the three basic institutions through which the people of the Northern Mariana Islands will govern themselves under the Covenant and the United States Constitution. An effective executive branch is necessary for the success of the Commonwealth. The powers vested in the executive branch and the organization circumscribing the exercise of those powers will greatly influence the Commonwealth's ability to implement the programs and policies enacted by the legislative branch and to articulate the aspirations and needs of the people of the Northern Marianas. This briefing paper discusses the principal issues facing the Convention with respect to the powers and the organization of the executive branch. The first section of the paper sets forth the relevant provisions of the Covenant, describes briefly the current distribution of executive powers in the Northern Mariana Islands, and identifies the basic policy choices before the Convention in drafting the Constitutional provision creating the executive branch of the Commonwealth government. The second part of this paper discusses the specific alternatives for consideration by the delegates with respect to the powers and organization of the executive branch.

I. BACKGROUND AND GENERAL CONSIDERATIONS

A. Relevant Provisions of the Covenant

Section 203(a) of the Covenant specifies that the Commonwealth Constitution will provide for an executive branch of government "separate" from the legislative and judicial branches. Section 203(b) of the Covenant states that:

> The executive power of the Northern Mariana Islands will be vested in a popularly elected Governor and such other officials as the Constitution or laws of the Northern Mariana Islands may provide.

Section 204 of the Covenant requires that officers and officials of the executive branch of the Commonwealth take an oath or affirmation in a prescribed form.

The United States Constitution does not mandate any particular decisions by the Convention with respect to the executive branch and does not dictate the selection by the delegates of any specific alternatives discussed in this paper with respect to the powers or organization of this branch of government.[1/]

B. Background

Although the Commonwealth government authorized by the Covenant need bear no resemblance whatsoever to the administration of the Northern Mariana Islands under the

---

1/ Here, as elsewhere, the general restrictions flowing from the United States Constitution on actions of the Commonwealth government are applicable. For example, the election of executive branch officials must satisfy the equal protection requirements of the Fourteenth Amendment.

Trusteeship Agreement,[2/] the current situation may provide a familiar context within which the delegates can evaluate the powers and organization of the executive branch of the future Commonwealth. The Northern Marianas are presently governed under the terms of Secretarial Order No. 2989 issued by the Acting Secretary of the Interior on April 15, 1976, which provides for separate administration of the Northern Mariana Islands district of the Trust Territory.

This Order vests executive authority in the Northern Mariana Islands in a resident commissioner appointed by, and responsible to, the Secretary of the Interior. The resident commissioner has the authority to appoint an executive officer of the government of the Northern Mariana Islands who may serve in his place when he is temporarily absent. He also appoints representatives to serve on the islands of Rota and Tinian. The resident commissioner has the authority to hire necessary professional and clerical staff.

2/ The United States administers the Trust Territory of the Pacific Islands under the terms of the Trusteeship Agreement entered into by the United States with the United Nations Security Council. The United States Department of the Interior has primary responsibility for the administration of the Trust Territory. Trusteeship Agreement for the Former Japanese Mandated Islands, July 18, 1947, 61 Stat. 3301; Treaties and Other International Acts Series No. 1665; 48 U.S.C. ch. 14 (1970); Exec. Order No. 11,021, 27 Fed. Reg. p. 4409 (1962).

The resident commissioner is responsible for carrying out the provisions of the Covenant and enforcing the laws and regulations in effect in the Northern Mariana Islands. His powers include the authority to submit legislation to the Northern Mariana Islands District Legislature prior to and during any legislative session for its consideration, the authority to veto legislation passed by the District Legislature,[3/] the power to convene the Legislature in special sessions confined to subjects named in the convening call[4/] and supervisory authority over all district elections.[5/]

C. General Policy Considerations

The basic political and philosophical issues relating to the executive branch are: (1) the extent to which power is vested in the executive branch relative to the other branches of government; and (2) the extent to which the power vested in the executive branch is concentrated in the governor. The type of executive branch created by the Constitution will depend on the Convention's views with respect to these two basic issues.

3/ Sec. Order No. 2989, 41 Fed. Reg., pt. III, § 7, p. 15892, at 15894 (Apr. 15, 1976), grants the resident commissioner a veto power subject to override by the legislature. A bill repassed by the legislature and still disapproved by the resident commissioner is presented to the secretary who has an absolute power to approve or disapprove the bill. The resident commissioner may also veto items in appropriation bills, subject to the same override provisions.

4/ CHARTER OF THE MARIANA ISLANDS DISTRICT LEGISLATURE art. II, § 1.

5/ MARIANA ISLANDS DISTRICT CODE tit. 2, ch. 2.32, § 2.32.040.

The constitutional treatment afforded the office of governor will significantly affect the character of the executive branch. This could vary from "strong" to "weak" depending on the tenure, appointment, budget and veto powers given the governor.[6/] For example, the Convention could create a constitutionally "strong" executive branch with only one elected official, the governor, who serves a term of four years without restriction on reelection, has sole authority to appoint all executive officials and the heads of all major administrative agencies, oversees preparation of the budget, and checks legislative action through a veto power that permits rejection of whole bills or items in bills subject to override only by a vote of an extraordinary majority of the elected members of the legislature.

An executive branch with less extensive powers might have a governor limited to one four-year term of office, who must obtain approval of one house of the legislature for appointments of executive officers and department heads, who shares authority for preparing the budget with the legislature and who has a veto power with respect to

---

6/ An analysis of a "strong," "moderate" or "weak" executive branch is set out in "A Combined Index of Formal Powers of the Governor" that is set out in Schlesinger, A Comparison of the Relative Positions of the Governors, in THE AMERICAN GOVERNOR IN BEHAVIORAL PERSPECTIVE p. 141 (T. Beyle & J. Williams ed. 1972) [hereinafter cited as THE AMERICAN GOVERNOR].

all legislative bills and items in appropriations bills that the legislature can override with a simple majority vote.

A "weak" executive branch might have a governor elected for a two-year term with eligibility for reelection, who has a general veto power that does not extend to appropriations items and who is subject to override by a simple legislative majority, who must obtain approval of both houses of the legislature for executive branch appointments, and who shares executive power with other executive officials and department heads who are popularly elected or appointed by multi-member boards.[7/]

Factors other than the constitutionally mandated attributes of the executive branch obviously influence the actual strength or weakness of that branch, including political conditions, the personality of the governor, and the relative strengths of the other institutions of government.[8/]

7/ Although theoretically power can be diffused within the executive branch without weakening the relative strength of the executive branch as compared to the legislative branch, in most instances taking power from the governor and spreading it among other executive offices or agencies tends to decrease the governor's ability to elicit cooperation from the legislature. Sharkansky, Agency Requests, Gubernatorial Support, and Budget Success in State Legislatures, in THE AMERICAN GOVERNOR p. 170, at 181.

8/ Netsch, The Executive, in CON CON: ISSUES FOR THE ILLINOIS CONSTITUTIONAL CONVENTION p. 148 (S. Gove & V. Ranney ed. 1970) [hereinafter cited as ILLINOIS CON CON].

In addition, the particular needs and circumstances of communities influence the degree to which they concentrate powers in their executive branches and governors. One study found, for example, that industrial, urbanized states in the United States (with the exception of Texas) have consistently authorized strong governors while less populous, rural states have governors with lesser formal powers. The author of this study concludes:

> The fact that the formal strength of the governor is positively associated with the size of the state suggests that, as the complexity of a state increases, the governor's need for explicit means of control over his administration also increases. We have already pointed out that there is not necessarily a relation between the formal devices for administrative control and the influence which the governor wields. Within the context of their own states the governors of Mississippi and North Dakota may have as much, if not more, influence as do the governors of New York and Illinois. A governor trying to oversee the spending of a $6 billion budget has a much harder task than one dealing with a budget of $150 million. The terms "state" and "governor" mask differences in administrative problems not unlike those which separate the small neighborhood dress shop from the larger department store.9/

9/ Schlesinger, A Comparison of the Relative Positions of the Governors, in THE AMERICAN GOVERNOR p. 141, at 148.

This observation has special relevance for the delegates to the Constitutional Convention of the Northern Mariana Islands, who must determine what kind of governor will best serve the interests of a Commonwealth consisting of several small islands in the Pacific Ocean, with a relatively small population, that faces a most complex period of rapid economic and political development.

At the same time, however, within any particular political entity, the formal powers given the executive branch and the governor (e.g., budget, veto, appointment and tenure powers) do vitally affect the strength of that branch and its chief officer relative to the other institutions of government.[10/] In making decisions that affect these governmental relationships, the delegates will wish to heed one authority's reminder that the Constitutional Convention of 1787 did not create a government of "separated powers"; it rather "created a government of separated institutions sharing powers."[11/]

The proponents of a strong executive branch generally point to the benefits of a unified administration led

---

10/ Dye, Executive Power and Public Policy in the United States, in THE AMERICAN GOVERNOR p. 254, at 255; Sharkansky, Agency Requests, Gubernatorial Support, and Budget Success, in THE AMERICAN GOVERNOR p. 170, at 182; Wright, Executive Leadership in State Administration, in THE AMERICAN GOVERNOR p. 275.

11/ R. Neustadt, PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP p. 42 (1960).

by a popularly elected governor: the development and implementation of a coherent overall program; the fixing of responsibilities in one person; increased efficiency in government administration; and selection of agency heads from the largest pool of qualified persons through an appointment system.[12/]

Those who advocate a less powerful executive branch believe that concentrated authority encourages abuse of power and that decentralizing authority furthers responsibility in government and responsiveness to the voters.[13/] Limitations on the governor's term of office

---

12/ B. Rich, STATE CONSTITUTIONS: THE GOVERNOR pp. 30-32 (1960); see Bosworth, Policy Making, in THE 50 STATES AND THEIR LOCAL GOVERNMENTS p. 323-34 (J. Fesler ed. 1967) [hereinafter cited as THE 50 STATES]:

> A governor gets an excellent education if he takes his role as executive and political head of the state seriously. As chief executive he has a special opportunity to tap the expert knowledge in the administrative departments. If he has a staff of his own to multiply his effectiveness, he has an advantage that no legislator can match. And simply because he occupies so conspicuous and influential a position, information flows to him from people who are served, regulated, and taxed by the state and, of course, from high and low participants in the political process.

13/ ILLINOIS CON CON p. 148.

and powers are defended as preventing an accumulation of political powers through incumbency, and elimination of the veto power as leaving the representative legislature free to enact desired laws and policies. These proponents consider the election of agency heads desirable because it enables voters to register their approval or disapproval of each part of the executive branch.

Experience in the United States has produced a trend towards a relatively strong executive branch with executive branch powers concentrated in the governor. Newer state constitutions have moved in the direction of modeling the governor's role after that of the President of the United States by combining in the governor roles as chief administrator, chief policy maker, legislative leader and chief governmental spokesman for the people.[14/] Revisions designed to strengthen the office of governor have focused on: the election of a minimum number of executive officers other than the governor; the consolidation of executive agencies into major departments controlled by the governor; a reduction of the number of independent agencies and administrative boards and commissions; an increase in gubernatorial policy-making powers, such as powers with respect to budget; an increase in gubernatorial authority to appoint and remove

---

14/ McKean, Elections and Political Parties, in THE 50 STATES p. 224.

administrative heads and to initiate reorganization plans; and a longer term of office and greater staff aids for the governor.[15/] In considering the specific issues discussed below, the delegates will wish to evaluate whether this recent United States trend offers any useful guidance for the particular circumstances and aspirations of the new Commonwealth.

II. SPECIFIC ISSUES FOR DECISION

This section examines each of the major alternatives available with respect to the two basic policy issues discussed above. Section A describes the various kinds of powers that the Constitution may vest in the executive branch. Section B describes the alternatives with respect to organization of the executive branch and allocation of powers within it.

A. Powers of the Executive Branch

All 50 state constitutions and the Puerto Rico constitution contain one or both of the following general declarations: "The executive power of the State shall be vested in a governor"; or "The governor shall be responsible

---

15/ Legislative Reference Bureau, HAWAII CONSTITUTIONAL CONVENTION STUDIES, ARTICLE IV: THE EXECUTIVE BRANCH OF GOVERNMENT p. 3 (1968) [hereinafter cited as HAWAII STUDIES].

for the faithful execution of the laws."[16/] In addition, each constitution grants certain specific powers to the executive branch or governor. Although a governor plays many roles not mentioned in the constitution, this constitutional granting of specific powers defines the relative strength or weakness of the governor.[17/] This section of the paper describes five traditional kinds of powers that the Commonwealth Constitution may grant to the executive branch and the governor: (1) the veto power; (2) other powers that directly involve the legislative process; (3) powers that affect the judicial process; (4) administrative powers; and (5) military and emergency powers.

16/ No constitution makes clear whether these broad statements provide an independent source of gubernatorial power or only encompass those specific duties enumerated elsewhere in the constitution. The leading cases on Presidential power do not provide any useful guidance. In Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (the Steel Seizure Case), the Court rejected the President's argument that he had "inherent power" to seize the nation's steel mills to avoid a strike disruptive of the national safety and well-being. Dissenters in that case, however, took a contrary view and emphasized actions taken by Presidents from Washington to Truman in response to emergency situations without specific constitutional or statutory authority. A. Howard, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA, vol. 2, pp. 587-88 (1974).

17/ The enumeration of too many specific powers in the constitution may be construed to limit the governor's exercise of additional powers. See National Municipal League, MODEL STATE CONSTITUTION art. II, § 2.01 and Comment pp. 36-38 (6th rev. ed. 1968) [hereinafter cited as MODEL CONST.].

The decisions the Convention makes with respect to each of these kinds of powers will determine the general character of the executive branch and its power relative to each of the other branches of government.

1. The veto power

The veto power permits the governor to reject a bill passed by the legislature and to prevent it, at least temporarily, from enacting the bill into law. An accepted part of the American political system, the United States Constitution, the Puerto Rico constitution, and every state constitution except that of North Carolina provide for an executive veto power. The extent to which the Commonwealth Constitution provides for a veto power is one of the Convention's most important decisions. In considering this issue, the delegates should focus on the different kinds of veto powers and their purposes, the range of their possible uses, the applicable time limitations, and the vote required for any overriding of the veto by the legislature.

a) Types and purpose

There are four types of veto power currently in use in the United States: the general veto; the pocket veto; the conditional veto; and the partial (or item) veto. These differ as to the scope of the governor's authority, the timing of its exercise and the procedures for communicating the governor's views to the legislature. Each of the constitutions authorizing the veto power includes

provision for the legislature to reaffirm its position and override the governor's veto by a specified vote of its members, typically more than a simple majority.[18/]

The interplay between the executive and legislative branches of government required by these constitutional provisions best reveals the underlying purpose of the veto power. Although traditionally viewed as a means for checking legislative errors or excesses, the veto is even more important as a mechanism for ensuring collaboration between the executive and legislative branches in the legislative process. The availability of the veto power compels the legislature to consider the governor's views when enacting legislation. The threat implicit in the veto power -- rather than its actual exercise -- often enables the governor to persuade the legislature to accomodate executive branch policy. At the same time, the governor must rely on the legislature to enact bills supporting executive branch policies and must therefore exercise some restraint and discretion in the wielding of this significant constitutional power.[19/]

18/ An absolute veto, the effect of which could not be overcome by any legislative action, is theoretically possible. No state or other constitution in the American system provides for such an extraordinary veto power.

19/ Bosworth, Policy Making, in THE 50 STATES p. 333.

b) Use of veto powers

These various types of veto power can be vested in the executive branch singly or in any combination.[20] The Constitution can vest any or all of these veto powers in the executive branch simultaneously for all types of bills; or it can match specific types of veto powers with specific types of bills (for example, an item veto for bills authorizing appropriation of funds). Examination of some of the available alternatives and current practice in the United States may assist the Convention in deciding what is appropriate for the Commonwealth.

---

[20] For example, the Virginia constitution gives the following options to the governor when presented with a bill passed by the general assembly: (1) he may sign the bill; (2) he may return it with his objections, that is, veto it, after which only a two-thirds vote in each house can override the veto; (3) he may veto specific items in an appropriations bill; (4) he may, without vetoing a bill, return it with suggested amendments, upon which the assembly, by ordinary majorities, may either accept or reject the amendments and return the bill once again to the governor; or (5) he may allow a bill to die by pocket veto if the assembly, by final adjournment, has prevented his returning the bill within seven days. In all other cases, if the governor does not return a bill within seven days of its presentation to him, it becomes law as if he had signed it. VA CONST. art. V, § 6.

The Idaho constitution grants the governor a general veto subject to override, and an item veto subject to override for appropriations bills. IDAHO CONST. art. IV, §§ 10-11.

The Puerto Rico constitution grants the governor the same veto powers as Idaho, with the additional power to reduce items in appropriations bills. P.R. CONST. art. III, §§ 19-20.

i) General veto. The general veto requires the governor to consider each bill as a whole and either sign it, even though he may disagree with parts of it, or veto it, even though he may agree with it in large part. The United States Constitution and every state constitution except North Carolina authorize this form of veto power.[21]

ii) Pocket veto. The pocket veto permits the governor to proceed by inaction on a bill passed close enough to the end of the legislative session so that the time limit for signature or veto expires while the legislature is not in session. If the governor leaves the bill unsigned, it does not take effect.

Less common than the general veto, the pocket veto is permitted by the United States Constitution and the constitutions of 17 states.[22] Use of the pocket veto is on the decline because it allows the governor to veto a bill without taking a public stand for or against it.[23]

---

[21] E.g., ALAS. CONST. art. II, § 15; HAWAII CONST. art. III, § 17; P.R. CONST. art. III, § 19

[22] Legislative Drafting Research Fund of Columbia University, INDEX DIGEST OF STATE CONSTITUTIONS p. 612 (2d ed. 1959) and pp. 171-72 (Supp. 1971) [hereinafter cited as INDEX DIGEST]. An example of this type of provision is MICH. CONST. art. IV, § 33.

[23] A possible alternative is to allow a pocket veto but to require the governor to state reasons for each pocket veto.

Some states specifically prohibit use of the pocket veto by specifying that all bills neither signed nor vetoed by the governor within the specified time period automatically become law.[24] Other states use the pocket veto to counteract the legislative tendency to pass many bills just prior to adjournment.[25] In Hawaii, the governor can exercise the pocket veto only when the legislature reconvenes in special session to consider post-adjournment vetoes. If the legislature chooses not to override the initial veto and instead alters the bill, then the bill dies if the governor fails to sign it within the required time.[26] The New Jersey constitution has a similar provision.[27]

iii) Conditional veto. The conditional veto appears in the constitutions of four states.[28] This

---

[24] E.g., ALAS. CONST. art. II, § 17; MONT. CONST. art. VI, § 10 (revised in 1972 to eliminate the pocket veto); MODEL CONST. art. IV, § 4.16. Many states give the governor a shorter time period (e.g., 10 days) when the legislature is in session, and a longer time period (e.g., 30 days) to consider the mass of legislation passed at the close of a legislative session. See § 1(c) below. The Convention's decision on this matter will depend on the type of legislative sessions it creates. See BRIEFING PAPER NO. 3: THE LEGISLATIVE BRANCH OF GOVERNMENT § II(D)(1).

[25] E.g., VA. CONST. art. V, § 6.

[26] HAWAII CONST. art. III, § 17.

[27] N.J. CONST. art. V, § 1, ¶ 14(b)(3).

[28] These states are Alabama, Massachusetts, New Jersey and Virginia. Some states use the conditional veto on an informal basis.

power permits the governor to return a bill to the legislature with a recommendation for changes. The legislature can accept the recommended changes, return the original bill to the governor subject to approval or veto by the governor, or force the original bill into law by the extraordinary majority vote required to override a veto. The conditional veto facilitates negotiation and accomodation between the governor and the legislature. On the other hand, the legislative process, coupled with a general veto power, incorporates a similar give-and-take.[29/]

iv) Partial (or item) veto. The partial or item veto permits selectivity in a different way than the conditional veto. The governor can veto specific sections, items or riders in the legislation and permit the remainder of the bill to become law. During the period that the legislature considers the possibility of overriding the selective veto, the remainder of the bill already operates as law. The advantage of the partial veto is that its use avoids rejection of a whole bill (as under a general veto) when only specific parts are at issue. The principal

---

29/ If the governor has a general veto power, in most cases he will communicate formally or informally to the legislature his views on a prospective bill. This gives the legislature the opportunity to modify a bill before its passage and presentation to the governor. If the governor opposes a bill as passed and exercises the veto power with respect to that bill, constitutions typically require the governor to issue a message stating the reasons for the veto. The legislature then has the option of passing a new bill that conforms with the governor's proposal or of trying to override the veto on the original bill.

disadvantage is the increased authority of the governor armed with a partial veto power to disrupt a legislative consensus that might have resulted from bargaining on a number of issues.[30/]

Most state constitutions include some type of partial or item veto. The most common provisions, found in 42 constitutions, permits the governor to veto items in appropriation bills.[31/] A related and even more powerful type of veto allows the governor to reduce the amounts of specific items in appropriation bills. Seven states and Puerto Rico vest this power in the governor.[32/]

The state of Washington has a unique provision that permits the governor to veto sections in any kind of

---

30/ Some legislators may have voted for a bill containing provisions they opposed as a compromise because it includes specific provisions they favored. If the governor can delete specific provisions, he can defeat the nature of the compromise.

31/ E.g., ILL. CONST. art. IV, § 9; VA. CONST. art. V, § 6.

32/ These states are Alaska, California, Hawaii, Illinois, Massachusetts, New Jersey and Pennsylvania. The Hawaii provision states:

> [The governor] may veto any specific item or items in any bill which appropriates money for specific purposes by striking out or reducing the same; but he shall veto other bills, if at all, only as a whole.

HAWAII CONST. art. III, § 17.

bill.[33/] This type of veto power permits the governor to rid bills of non-germane riders. If, for example, a rider approving a public works project for a particular town is attached to an appropriation bill for public works in the state, the governor can veto the rider without endangering or delaying the main bill.[34/] This type of veto is not limited to non-germane riders, however, and would give the governor the broadest authority to influence legislation for the Commonwealth.

c) Applicable time limitations

The Constitution can allow the governor any length of time to consider bills passed by the legislature. In deciding what length of time to establish, the Convention might consider different provisions for bills given to the governor (1) during the legislative session, (2) during the last days of the legislative session, and (3) after adjournment of the legislative session.

A longer time period gives the governor more time to consider bills and consult with his administrative departments or attorney general. It also facilitates compromise with the legislature on a revised bill and gives members of

---

[33/] The Washington provision permits the governor to object to one or more sections of a bill while approving other portions of the bill. WASH. CONST. art. III, § 12 (amended by initiative in 1976 to eliminate the governor's power to veto items in a section of a bill). The Oregon constitution permits the governor to veto "any provision in new bills declaring an emergency. . . ." ORE. CONST. art. V, § 15a.

[34/] The adoption of a "single subject" rule with respect to legislative bills makes the inclusion of irrelevant material in bills less likely and might reduce the utility of an unrestricted partial veto. This alternative is discussed in BRIEFING PAPER NO. 3: THE LEGISLATIVE BRANCH OF GOVERNMENT § II(D)(3).

the public additional time to express their views. Because the bulk of legislative measures are passed at the end of a legislative session, a sufficient time period for consideration becomes increasingly important toward the end of a legislative session and after adjournment. For bills given to the governor at or after adjournment of the legislature, the Convention's decision as to whether unsigned bills become law or are subject to the "pocket veto" will affect the Convention's decision here.[35/] If unsigned bills become law, it is important that the governor have sufficient time to consider each bill.

The time given the governor for the consideration of bills varies among the states. During the legislative session, the governor has only three days in nine states; five or six days in 25 states; 10 days in 12 states and Puerto Rico (and under the United States Constitution); 14 days in Michigan; and 15 days in Alaska. The recently revised Illinois constitution gives the governor 60 calendar days to consider bills.[36/] After adjournment of the legislative session, about three-fourths of the state constitutions provide for a definite period to act on a bill that ranges from three to 45 days. The governor of Hawaii has 10 days to consider bills presented 10 or more days before the adjournment of the legislature at the end of the session, and 45 days for

---

35/ The alternatives with respect to legislative sessions are discussed in BRIEFING PAPER NO. 3: THE LEGISLATIVE BRANCH OF GOVERNMENT § II(D)(1).

36/ ILL. CONST. art. IV, § 9(b).

bills presented less than 10 days before such adjournment or presented after adjournment.[37]

The Model State Constitution allows 15 days for consideration of bills presented to the governor while the legislature is in session. If the legislature is in recess or adjourns during the 15-day period following presentation of a bill, then the governor has 30 days to consider the bill.[38] The trend in new and revised constitutions is to lengthen the period during which the governor may act on legislative bills, both before and after adjournment of the legislature.[39]

d) Vote required for legislative override

The Constitution should specify the vote required for any legislative override. The alternatives available to the Convention range from a majority of a quorum to an extraordinary majority of all elected members. To override an unconditional veto, all states require a number of favorable votes in excess of the number required to pass the legislation initially; thus the level of the extraordinary majority required to override depends on the number of legislative votes needed to pass a bill in the first place.

The formulae adopted by the states include:

---

[37] HAWAII CONST. art. III, § 17.

[38] MODEL CONST. art. IV, § 4.16.

[39] Council of State Governments, MODERNIZING STATE CONSTITUTIONS: 1966-1972 p. 21 (1973).

- two-thirds of the elected membership (required by 23 states and Puerto Rico);[40]
- two-thirds of the members present and voting (required by 15 states);
- three-fifths majority of the elected members (required by four states);
- three-fifths majority of the members present and voting (required by one state);
- simple majority of the elected members (required by six states).

The larger the extraordinary majority required to override, the stronger the executive veto power becomes.[41]

A second common constitutional provision with respect to the legislative override of vetoes permits post-adjournment legislative sessions to deal with vetoes. If the legislature meets for a limited period and is unable to reconvene in special session after adjournment, then post-adjournment vetoes by the governor are final. Three alternatives might change this: (1) the Constitution can provide for continuous legislative sessions interrupted by recesses, so that legislative leaders can reconvene the recessed legislature at any time to reconsider vetoed bills;[42] (2) the legislature can be provided with the general power to

---

[40] In Alaska, to override vetoes of most bills requires a two-thirds majority, but to override vetoes of revenue and appropriations bills, including item vetoes, requires a vote of three-fourts of the elected members. ALAS. CONST. art. II, § 16.

[41] Different types of veto power can be coupled with different override requirements to balance the strengths and weaknesses of each type of veto power. E.g., ALAS. CONST. art. II, § 16.

[42] The Model State Constitution suggests this alternative. MODEL CONST. art. IV, § 4.08.

reconvene in special session; or (3) the legislature can be authorized (or required) to reconvene itself for the sole purpose of considering post-adjournment vetoes.[43/]

2. Other powers that directly involve the legislative process

Powers other than the veto power that directly affect the legislative branch can be vested in the executive branch. Some of the more important such powers relate to: reapportionment; budget; and an annual address that includes recommended legislation.[44/] This section of the paper sets out the principal considerations with respect to each of these possible executive powers.

a) Reapportionment

If members of the lower house of the Commonwealth legislative branch are elected by district, they must represent districts of approximately equal numbers of residents. As time passes, changing population concentrations in the Northern Marianas may require reapportionment of the lower house. Vesting responsibility for periodic reapportionment in the governor has the advantage of taking the responsibility away from legislators whose personal political careers might

---

43/ The alternatives with respect to legislative sessions are discussed in BRIEFING PAPER NO. 3: THE LEGISLATIVE BRANCH OF GOVERNMENT § II(D)(1).

44/ Governors in many states also play major roles in calling and designating the agendas of special legislative sessions, and in a few states the governor fills legislative vacancies. These subjects are discussed in BRIEFING PAPER NO. 3: THE LEGISLATIVE BRANCH OF GOVERNMENT §§ II(D)(1), II(C)(3).

be affected by reapportionment. A detailed discussion of the considerations with respect to apportionment is set out in Briefing Paper No. 3: The Legislative Branch of Government.

b) Budget

Government cannot survive without the power to raise funds and cannot achieve its maximum usefulness unless it uses these funds efficiently.[45/] Fiscal management, broadly defined, is the process of making and carrying out decisions with respect to the use of these funds.

Fiscal planning has three levels: long-range planning for a period of years; preparation of a budget for each fiscal period; and appropriating funds for specific programs enacted by the legislature. The budget is the financial plan for governmental activities for each fiscal period. It may consist of a concise balance sheet, recording income and expenditures, or may include a lenghty analysis or plan based on needs and anticipated resources.

Seeking to bring order and discipline into financial planning, states throughout the twentieth century have vested increasing control of the budget in the executive branch and especially in the governor.[46/] Because the budget directly

---

45/ BRIEFING PAPER NO. 10: TAXATION AND FINANCE contains a discussion of raising funds through various types of taxes and debt instruments.

46/ Richards, Half of Our Century, in THE 50 STATES pp. 80-81; Bosworth, Policy Making, in THE 50 STATES pp. 324-25; Willbern, Personnel and Money, in THE 50 STATES pp. 391-92; HAWAII STUDIES p. 55; ILLINOIS CON CON pp. 169-70.

reflects public policy priorities and goals, vesting the responsibility for preparation and control of the budget in the governor significantly expands the governor's role as policy leader.[47] One authority writes:

> [A]lmost universal among the states, [the executive budget] has given the governor the opportunity to take the initiative in the most encompassing set of policy decisions that a legislative session makes. Budget decisions are, on a more general level, decisions . . . on the general scale of state activity.[48]

The budget sequence entails the preparation of budget requests, the review of these requests, the formulation of the proposed budget by either the executive or the legislature, and review of the budget -- all leading to the enactment of appropriation bills by the legislature Two types of constitutional provisions shape the governor's role with respect to the budget: those fixing responsibility for preparation of a proposed budget and those vesting control over the final budget. In addition to addressing these two

---

[47] Richards, Half of Our Century, in THE 50 STATES p. 80. Virtually all state constitutions give responsibility for fiscal management to the legislature, either explicitly (e.g., ARK. CONST. art. XVI, § 2; COLO. CONST. art. X, § 2; N.D. CONST. art. XI, §§ 174, 176, 181) or implicitly by silence (e.g., ALAS CONST. art. IX, § 13; FLA. CONST. art. VII, § 1; OHIO CONST. art. XII, § 5 (provisions allowing for taxation or expenditures only "pursuant to law")). Detailed constitutional provisions on budget procedure and organization preempt legislative authority in this area and restrict legislative discretion.

[48] Bosworth, Policy Making, in THE 50 STATES p. 324.

major areas, the Convention may also wish to address certain matters related to the budget calendar.

i) Budget preparation. The Convention has four alternatives with respect to vesting responsibility for preparation of the budget: (1) the governor can be given sole responsibility; (2) the governor can share the responsibility with an executive agency; (3) the governor can share the responsibility with the legislature; or (4) the governor can prepare the budget as a member of a group of other elected officials or members of the legislature.[49/]

As noted above, the modern trend is to assign budget preparation to the governor. The governor formulates the budget in 43 states and Puerto Rico. Executive budget preparation permits the governor to identify state needs and resources systematically and comprehensively. The Model State Constitution[50/] provision exemplifies the trend.

49/ These alternatives derive from an index of governors' budget powers set out in Schlesigner, A Comparison of the Relative Positions of Governors, in THE AMERICAN GOVERNOR pp. 146-47.

50/ MODEL CONST. art. VII, § 7.02 provides:

> The governor shall submit to the legislature, at a time fixed by law, a budget estimate for the next fiscal year setting forth all proposed expenditures and anticipated income of all departments and agencies of the state, as well as a general appropriation bill to authorize the proposed expenditures and a bill or bills covering recommendations in the budget for new or additional revenues.

The second alternative involves an independent agency with expert staff to advise the governor and to have continuing responsibility for preparation of the budget. A governor with sole responsibility for preparation of the budget would appoint his own budget staff.[51] Creating a special staff agency may have the disadvantage of weakening the governor's control over the budget, and thereby strengthening other government agencies and the legislature at his expense. This would be especially likely if the head of this agency were elected.[52] Only in Mississippi and South Carolina does the governor share responsibility for preparation of the budget with another agency.[53]

Legislative preparation of the budget has historical precedent in most states. Departments and agencies would make up their requests for appropriations without consulting one another and submit them to the legislature,

---

[51] Bosworth, Policy Making, in THE 50 STATES p. 325.

[52] Sharkansky, Agency Requests, Gubernatorial Support, and Budget Success in State Legislatures, in THE AMERICAN GOVERNOR pp. 182-83.

[53] Council of State Governments, BOOK OF THE STATES 1976-77 pp. 124-27 (1976) [hereinafter cited as BOOK OF THE STATES].

whose members would also introduce their own special appropriation measures. The legislature would then consider the requests one after another, with little regard for any relationships among the requests.[54] This procedure led to public and legislative confusion in determining the total cost of government and hindered the development of comprehensive fiscal planning.[55] With the federal practice as a guide, most states have shifted budget preparation authority to their governors,[56] and permit the governor great latitude in carrying out that function.

ii) Control of the budget by the executive branch. The Constitution may include provisions that control the use of appropriated money after submission of the budget.[57] One requires the governor to submit a general appropriation bill to authorize the expenditures

---

54/ Richards, Half of Our Century, in THE 50 STATES p. 80; Willbern, Personnel and Money, in THE 50 STATES pp. 391-92.

55/ HAWAII STUDIES p. 55.

56/ Federal Budget and Accounting Act, codified in 31 U.S.C. ch. 1 (1970) as amended (Supp. V, 1975).

57/ The item veto is also a means to increase the governor's control of the budget. See § II(A)(1)(b) above.

proposed by the budget along with a bill or bills covering recommendations in the budget for new or additional revenues.[58] This kind of provision, found in most new and revised state constitutions, including the Puerto Rico constitution, makes the governor responsible not only for preparing a budget but also for preparing a recommendation for financing it.

The Constitution can also prohibit action on appropriation bills originated by the legislature prior to

---

[58] P.R. CONST. art. IV, § 4:

> [The Governor] shall present to the Legislative Assembly, at the beginning of each regular session, . . . a report concerning the state of the Treasury of Puerto Rico and the proposed expenditures for the ensuing fiscal year. Said report shall contain the information necessary for the formulation of a program of legislation.

ALAS. CONST. art. IX, § 12:

> The governor shall submit to the legislature, at a time fixed by law, a budget for the next fiscal year setting forth all proposed expenditures and anticipated income of all departments, offices, and agencies of the State. The governor, at the same time, shall submit a general appropriation bill to authorize the proposed expenditures and a bill or bills covering recommendations in the budget for new or additional revenues.

The Model State Constitution has a similar provision. MODEL CONST. art. VII, § 7.02.

passage of a general appropriations bill either in the form proposed by the governor to implement his executive budget or as amended by the legislature.[59/] This unusual kind of clause encourages the legislature to act promptly on the governor's requests. It also contributes to an integrated financial structure by requiring the legislature to review fiscal matters as a whole before turning to special programs.

iii) Annual vs. biennial budget. The Convention must also consider what term the budget will cover. Two common systems are the annual budget, which requires preparing and enacting a budget for each fiscal year, and the biennial budget, which requires preparing

---

59/ E.g., HAWAII CONST. art. VI, § 5:

> [N]o appropriation bill, except bills recommended by the governor for immediate passage, or to cover the expenses of the legislature, shall be passed on final reading until the bill authorizing operating expenditures for the ensuing fiscal biennium, to be known as the general appropriations bill, shall have been transmitted to the governor.

Eight other state constitutions include similar provisions: Arkansas, California, Maryland, Massachusetts, Michigan, Missouri, New York and West Virginia.

a budget for a two-year period.[60/]

The annual budget increases the flexibility of government to meet its needs. A yearly budget-making process also requires increased interaction between the executive and legislative branches, which may lead to more definite and clearly stated governmental policies. The biennial budget, on the other hand, reduces the time and labor spent in preparing the budget and, more importantly, encourages long-term planning.

The Convention may select a hybrid of the two approaches. A biennial budget can be subject to annual review upon request of the governor, or the Constitution can require the governor to submit a budget covering a two-year fiscal period while restricting the legislature to appropriating funds for one fiscal year at a time. These approaches seek a compromise between the need for long-range planning and the need for flexibility to meet pressing needs.

In all likelihood, the Convention's choice with respect to these alternatives will depend on its

---

60/ Under either approach it is necessary to fix the date the fiscal year begins and the date for submission of the budget for approval. Although a few constitutions specify the dates, most states set them by statute. HAWAII STUDIES pp. 58, 119-21. A newly elected governor who must present a budget to the legislature within a few weeks of taking office faces a serious problem. Allowing the governor-elect to appoint budget advisers who can start work several weeks before the inauguration helps solve the problem, as does allowing the governor-elect to call budget hearings during the same period. Bosworth, Policy Making, in THE 50 STATES p. 325.

decision on the timing of legislative sessions. States with annual legislative sessions typically use an annual budget, and states with biennial legislative sessions typically use a biennial budget.[61/]

c) Annual address

The Constitution can require the governor to speak to the legislature at the beginning of each regular session on the affairs of the Commonwealth and present his recommendations for legislative action. The governor also may be permitted to address the legislature at other times. Such a provision, like the veto power, directly involves the governor in the legislative process.

All 50 state constitutions and the Puerto Rico constitution contain a provision for a governor's annual address to the legislature. In practice, most governors support recommendations for approriate legislative action with drafts of bills embodying proposed policies. The Model State Constitution[62/] and some newer state constitutions

---

61/ Twenty-nine states, Puerto Rico and the federal government presently have an annual budget. E.g., Alaska, Connecticut, New Jersey and New York. BOOK OF THE STATES pp. 124-27; 31 U.S.C. ch. 1, § 11 (1976). Many of the 29 states, following the trend to annual legislative sessions, have adopted the annual budget system since 1950. HAWAII STUDIES p. 56. Twenty-one states use a biennial budget. BOOK OF THE STATES pp. 124-27.

62/ MODEL CONST. art. V, § 5.03.

also provide for delivery of messages by the governor at times other than the opening of the legislative session.[63/]

3. Powers that affect the judicial process

Two types of powers that the Constitution can vest in the executive branch affect the judicial process: the appointment power and the clemency power.

a) Appointment power

Eight state constitutions give the governor the power to make judicial appointments. This is similar to the power of appointment given the President by the United States Constitution. A discussion of alternative methods of selecting of judges is contained in Briefing Paper No. 4: The Judicial Branch of Government.

b) Clemency power

Nearly all state constitutions make provision for pardon of persons convicted of criminal offenses. The principal issue raised by executive clemency is whether this power should be vested in the governor alone,

---

63/ E.g., MICH. CONST. art. V, § 17:

> The governor shall communicate by message to the legislature at the beginning of each session and may at other times present to the legislature information as to the affairs of the state and recommend measures he considers necessary or desirable.

Twenty-seven states provide for governor's messages from time to time. E.g., HAWAII CONST. art. IV, § 5; N.J. CONST. art. V, § 1, ¶ 12.

shared with other boards or agencies or delegated completely to other boards or agencies. The Convention must also decide what crimes, if any, should be excluded from the clemency power. The Convention has the option of authorizing the legislature to restrict the governor's clemency power. It can also empower the legislature to regulate the manner of applying for executive clemency. Finally, in addition to the traditional clemency powers, the Convention can give the governor the power to remit fines and forfeitures.

Executive clemency provides the governor with the power to alter unduly harsh results in individual cases. The general power to pardon may be exercised so as to grant absolute, limited (such as removal of a legal disability resulting from conviction) or conditional pardons. It may also include a reprieve that postpones the execution of a sentence, and commutation which permits the substitution of a lighter penalty for the one given by the court.

Most state constitutions (including recently revised ones such as those in Michigan and Montana) vest responsibility for the clemency decision solely in the

governor.[64] The Model State Constitution takes another view:

> [I]n addition to legal and political considerations, the granting of pardons involves complex judgments of a correctional and behavioral nature and chief executives are neither trained to exercise such judgment nor can they be expected to have any special interest in doing so. Hence, this Model expresses the view that a state constitution should leave the matter to legislative development. While recognizing clemency powers to be executive in nature, the section permits the governor to delegate them "subject to such procedures as may be prescribed by law." This will leave room for the creation of such expert or professional boards or agencies to deal with matters of clemency as may be appropriate.[65]

---

[64] E.g., MICH. CONST. art. V, § 14; MONT. CONST. art. VI, § 12; ALAS. CONST. art. III, § 21:

> Subject to procedure prescribed by law, the governor may grant pardons, commutations, and reprieves, and may suspend and remit fines and forfeitures. This Power shall not extend to impeachment.

[65] MODEL CONST. art. V, § 5.05 (Comment), p. 70. The Model State Constitution provision on clemency states:

> The Governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses and may delegate such powers, subject to such procedures as may be prescribed by law.

MODEL CONST. art. V, § 5.05.

A middle ground, adopted by about 15 states, is for the governor to share the clemency power with a board of pardons or executive council.[66/]

The Convention can exclude specific crimes from any exercise of executive clemency. For example, a majority of states exclude cases involving impeachment.[67/]

A few states allow the legislature to restrict the governor's clemency power by law. The legislature regulates the manner of applying for clemency in about one-half the states.[68/]

4. Administrative powers

The most important powers that the Constitution can assign to the executive branch, other than those directly affecting the other branches of government, concern the administration of the Commonwealth's business. State constitutions typically distinguish between policy-making employees (the few supervisory officials in each government department) and ministerial employees (the rest of those employed by the department). The principal decisions for the Convention in this area involve the definition of policy-making employees and provisions for

---

66/ E.g., N.D. CONST. art. III, § 76; TEX. CONST. art. IV, § 11.

67/ Such provisions appear at ALAS. CONST. art. III, § 21; MICH. CONST. art. V, § 14; N.J. CONST. art. V, § 2, ¶ 2; TEX. CONST. art. IV, § 11.

68/ E.g., ALAS. CONST. art. III, § 21; CAL. CONST. art. V, § 8; HAWAII CONST. art. IV, § 5.

the appointment and removal of those employees and non-policy-making employees.

a) Appointment and removal of policy-making employees 69/

The Convention has a number of alternatives with respect to the definition of policy-making employees. One possible definition, recommended by simplicity, would include only heads of Commonwealth agencies and departments. Another definition might extend the covered group to include the principal deputy in each agency. A third alternative is to let the legislature apply the definition separately to each agency as individual circumstances warrant. Once this classification is defined, all other government employees are grouped as ministerial employees. This division of executive branch employees permits application of different policies with respect to appointment and removal of the two groups. The advantages and utility of this categorization depend upon the particular appointment and removal powers vested in the governor.

i) Appointment. The alternatives available to the Convention are to: (1) vest in the governor the power to appoint all non-elective policy-making employees without limitation; (2) provide for a power of

---

69/ The extent of this power will vary depending on the Convention's decisions as to which executive offices to make appointive and which to make elective. See § II(B)(2)(b) below.

appointment from specified lists or pools of qualified persons; (3) provide a limited or unlimited power of appointment subject to approval of the legislature or some other body; (4) vest the power of appointment in some person or body other than the governor, either with or without limitations; or (5) leave the enactment of standards with respect to qualifications or eligibility of executive branch officials to the legislature.

Supporters of the first alternative believe that the power of the governor to appoint and remove those persons who will have primary responsibility for carrying out executive policies helps achieve effective control of the executive department.[70] The Model State Constitution chooses this alternative and provides: "The Governor shall appoint and may remove the heads of all administrative departments."[71]

The second alternative arises out of experience with voluntary limitations imposed by governors, usually with respect to judicial appointments. Under this type of system, the governor may appoint without legislative approval from a list of qualified candidates submitted by some

---

[70] Schlesinger, A Comparison of the Relative Positions of Governors, in THE AMERICAN GOVERNOR pp. 144-46; Willbern, Administrative Organization, in THE 50 STATES p. 359.

[71] MODEL CONST. art. V, § 5.07.

professional or other group.[72] Supporters argue that this reduces the number of appointments of unqualified persons and eases the pressure on the governor to make "political" appointments." No state constitutions provide for this type of system.

The third alternative, requiring the advice and consent of one or both houses of the legislature, provides a forum for examination of a candidate's credentials by the public as a safeguard against the appointment of incompetent persons. The principal arguments advanced in opposition to such legislative confirmation are: (1) the governor's political responsibility for his program provides a sufficient incentive to appoint qualified persons; (2) the legislature has other means to guard against the possible harm caused by incompetent appointments; (3) the necessity of confirmation may compel the governor to make undesirable concessions in order to obtain confirmation; (4) the requirement may hamper the governor in attracting able personnel to administer his programs and policies; and (5) the requirement can lead to the appointment on "political acceptability" grounds rather than on merit.[73]

---

[72] A variation of this alternative allows gubernatorial appointment subject to review, but not approval, of the legislature or an expert group. Although the governor retains final appointive control, the review process helps expose any unqualified appointees.

[73] HAWAII STUDIES p. 33. Advice by and with the consent of the legislature raises the problem of whether to vest this power in one or both houses of the Commonwealth legislature. This problem is discussed in BRIEFING PAPER NO. 3: THE LEGISLATIVE BRANCH OF GOVERNMENT § II(A)(2).

Most states follow this alternative, however, and provide for appointment by the governor subject to the advice and consent of one house of the legislature.[74] The recently revised Michigan constitution has a provision on confirmation that requires advice and consent for appointments but defines advice and consent in a way that increases gubernatorial appointment power:

> Appointment by and with the advice and consent of the senate when used in this constitution or laws in effect or hereafter enacted means appointment subject to disapproval by a majority vote of the members elected to and serving in the senate if such action is taken within 60 session days after the date of such appointment. Any appointment not disapproved within such period shall stand confirmed.[75]

This provision has the advantages of promoting economy (assuming the majority of appointments is approved without significant debate) and allowing appointments when the

---

[74] Upper house: HAWAII CONST. art. IV, § 6; MONT. CONST. art. VI, § 8; N.J. CONST. art. V, § 4, ¶ 2. Lower house: ALAS. CONST. art. III, § 25; VA. CONST. art. V, § 10:

> Except as may be otherwise provided in this Constitution, the Governor shall appoint each officer serving as the head of an administrative department or division of the executive branch of the government, subject to such confirmation as the General Assembly may prescribe. Each officer appointed by the Governor pursuant to this section shall have such professional qualifications as may be prescribed by law and shall serve at the pleasure of the Governor.

[75] MICH. CONST. art. V, § 6.

legislature is not in session.[76] On the other hand, it is a relatively untested approach.

The fourth alternative would vest all or some part of the power of appointment in a body other than the governor. The legislature could make the appointments, or a board made up of legislators, judges or respected members of the community could do so. This might promote the non-partisan appointment of qualified persons to key posts within their fields of expertise. On the other hand, it could result in the simultaneous placement of persons with conflicting ideas or personalities in positions of authority, causing clashes with the governor and controversy within the executive branch. Perhaps for this reason, no state appoints high-ranking executive officials in this manner.

ii) Removal. In the United States at the state level, the power to remove officials generally does not inhere in the right to appoint.[77] Therefore,

---

[76] The Puerto Rico constitution has a special provision for appointments made while the legislature is not in session:

> [The governor] shall have the power to make appointments while the Legislative Assembly is not in session. Any such appointments that require the advice and consent of the Senate or of both houses shall expire at the end of the next regular session.

P.R. CONST. art. IV, § 4.

[77] A. Howard, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA, vol. 2, p. 634 (1974).

the Convention should specifically provide for a power of removal in the Constitution.[78] The alternatives for the Convention are to: (1) have all appointed officials serve at the governor's pleasure permitting removal at any time for any reason; (2) make some or all appointive officials subject to removal by the governor with the advice and consent of one or both houses of the legislature; or (3) make removal dependent on some showing of cause.

The first alternative is simple and considered crucial to the governor's role as administrative, program and policy leader. The Model State Constitution supports this approach.[79] Another authority states the case for an extensive removal power as follows:

> The limited removal power of the governor is one of the chief causes of his inability to control state administration. Lacking any effective means of getting rid of inefficient or disloyal subordinates, he must necessarily accept their half-hearted service.[80]

---

[78] Although less than one-half of the state constitutions contain removal provisions, the trend is for new and revised constitutions to deal with removal.

[79] MODEL CONST. art. V, § 5.07.

[80] Public Administration Service, CONSTITUTIONAL STUDIES: THE EXECUTIVE DEPARTMENT, vol. 2, p. 11 (1955) [hereinafter cited as ALASKA STUDIES].

Only a handful of state constitutions, however, most of them recently written or revised constitutions, grant the governor broad removal powers.[81/]

A related policy decision is whether to create exceptions to a broad power of removal. The secretary of state and attorney general are excepted from the New Jersey provision; once appointed they serve for the full term of the governor.[82/] The Hawaii constitution requires the advice and consent of the senate for removal of the attorney general.[83/] This kind of exception can encourage more careful appointments by the governor to certain offices, and can reduce the possibility of the governor pressuring those officials into compliance with what they believe to be bad policies by threatening them with removal from office. This also supplies a check against excessive concentration of power in the governor and increases the independence of the specified officials.

About 15 other states grant the governor a removal power based upon some showing of cause. For example, the Illinois constitution states:

81/ The Missouri constitution provides that "[a]ll appointive officers may be removed by the governor . . . ." MO. CONST. art. IV, § 17. The Virginia constitution states: "Each officer appointed by the Governor pursuant to this section . . . shall serve at the pleasure of the Governor." VA. CONST. art. V, § 10. The constitutions of Alaska, Hawaii, Montana and New Jersey also grant the governor broad removal powers. ALAS. CONST. art. III, § 25; HAWAII CONST. art. IV, § 6; MONT. CONST. art. VI, § 8; N.J. CONST. art. V, § 4, ¶ 2.

82/ N.J. CONST. art. V, § IV, ¶ 3.

83/ HAWAII CONST. art. IV, § 6.

> The Governor may remove for incompetence, neglect of duty, or malfeasance in office any officer who may be appointed by the Governor.84/

Experience has shown that limiting the governor's removal power "for cause only" has made it virtually impossible for the governor to remove a subordinate for policy differences.

The remaining states do not include any removal provision in their constitutions. Authority to remove policy-making employees from office in these states derives from the statutes that establish the various offices and departments, and provisions vary widely from state to state and from department to department. The failure expressly to provide for removal authority can lead to extensive litigation and inevitable uncertainty regarding the governor's authority over the executive branch.

b) Appointment and removal of ministerial employees

The Convention has four alternatives with respect to a constitutional provision with respect to ministerial employees. It can: (1) include basic civil service provisions; (2) require the legislature to create a central personnel system; (3) authorize the legislature to create a central personnel system; or (4) omit any reference to ministerial employees.

84/ ILL. CONST. art. V, § 10.

Experts have traditionally urged the creation of central personnel agencies for government employees.[85] While the legislature clearly has the authority to do so without specific constitutional authorization, approximately one-fourth of the states make some provision for a personnel system in their constitutions. These range from general directives, as in Alaska,[86] to detailed provisions, as in Michigan.[87] Newer constitutions, if they include a provision,[88] tend to include a general one.

A civil service system is a mechanism for organizing and regulating the government's personnel function. It provides rules and procedures for selecting new employees, managing the advancement of existing employees and dismissal or retirement. Called "civil service" because it deals with civilian (not military) employees, a civil service personnel system also excludes popularly elected officials and policy-making (or political) appointees.

Civil service systems are associated with the merit principle in the United States. The merit principle refers to the use of objective, consistent standards to

---

85/ Willbern, Administrative Organization, in THE 50 STATES p. 345.

86/ ALAS. CONST. art. XII, § 6: "The legislature shall establish a system under which the merit principle will govern the employment of persons by the State."

87/ MICH. CONST. art. XI, § 5.

88/ The Puerto Rico constitution, for example, does not contain a provision.

(1) classify jobs according to their duties and responsibilities, (2) determine the abilities of individual employees, and (3) assign individual employees to jobs commensurate with their abilities. The system requires similar training and experience for similar jobs and a single salary for employees who are similarly situated. Advancement to higher level positions is based on ability and performance. Under a civil service system, employees can typically be removed only upon a showing that they are unable to perform their duties or that other specific grounds for removal exist; the process of removal is frequently complex, lenghty and unsuccessful.

A civil service system devoted to merit and based on objective standards strengthens the executive branch in theory by ensuring that capable people will hold government jobs and that the best qualified employees will advance through the ranks. Sometimes in practice, however, civil service appointees can become entrenched (because of the difficulty of finding adequate grounds for their removal) and may resist changes in executive branch policy-making, thus weakening the governor's control of the executive branch.

The Model States Constitution has a separate article entitled "Civil Service" that provides:

> The legislature shall provide for the establishment and administration of a system of personnel administration in the civil service of the state and its civil divisions. Appointments and promotions shall be based on merit and fitness, demonstrated by examination or by other evidence of competence.89/

While the Convention might consider a similar constitutional provision, unique circumstances in the Northern Mariana Islands might argue against a constitutional provision mandating strict adherence to the merit principle. A provision that allows the legislature to provide by law for the appointment and removal of executive employees not otherwise provided for in the Constitution would permit greater flexibility in this area. Such a provision might also define the goal of creating a fair and objective personnel system without impeding flexibility.

5. Military and emergency powers

Every state except Connecticut makes the governor commander-in-chief of the armed forces of the state. For example, the Virginia constitution provides:

> The Governor shall be commander-in-chief of the armed forces of the Commonwealth and shall have power to

---

89/ MODEL CONST. art. X, § 10.01. The Model also contains alternative provisions for a detailed civil service system. It includes these as a guide for "jurisdictions where the merit system tradition is not strong or where the establishment of a civil service system is relatively recent. . . ." MODEL CONST. art. X, § 10.01 (Comment), pp. 102-03.

> embody such forces to repel invasion, suppress insurrection, and enforce the execution of the laws.90/

Designating the governor as commander-in-chief subordinates the military to civil power, assuring the ultimate accountability to the people of the user of military force. These powers also provide the governor with the means to respond quickly to emergencies, disasters and riots.91/

If the governor is given military powers, the Convention should consider the possibility of limiting those powers. Because of their emergency nature, however, only a few state constitutions attach specific procedural and functional restrictions to the governor's use of the powers. The Alaska constitution allows the governor to proclaim martial law but provides that martial law shall not continue for longer than twenty days without the approval of a majority of the members of the legislature.92/ Three states -- Alabama, Kentucky and Vermont -- restrict the right of the governor to command the state's military forces in person. Thirty states qualify the governor's power to command their armed forces with the clause,

---

90/ VA. CONST. art. V, § 7.

91/ The Puerto Rico constitution, for example, allows the governor to call out the militia in response to "any serious disturbance of the public peace." P.R. CONST. art. IV, § 4.

92/ ALAS. CONST. art. III, § 20.

"except when they shall be called into the service of the United States."[93]

The Constitution might give the governor the authority to provide for the continuity of government in the case of emergency. For example, the Puerto Rico constitution states:

> In case of invasion, rebellion, epidemic or any other event giving rise to a state of emergency, the Governor may call the Legislative Assembly to meet in a place other than the Capitol of Puerto Rico, subject to the approval or disapproval of the Legislative Assembly. Under the same conditions, the Governor may, during the period of emergency, order the government, its agencies and instrumentalities to be moved temporarily to a place other than the seat of the government.[94]

The Montana constitution authorizes the legislature to enact laws to ensure the continuity of government during a period of emergency.[95]

B. Organization of the Executive Branch

After the Convention has considered what powers to vest in the executive branch, it must design the executive branch in a way that allows effective utilization

---

[93] E.g., UTAH CONST. art. VII, § 4; WASH. CONST. art. III, § 8. See also IDAHO CONST. art. IV, § 4.

[94] P.R. CONST. art. VI, § 17.

[95] MONT. CONST. art. III, § 2.

of those powers. This section of the briefing paper examines the organizational alternatives available for the office of governor and the rest of the executive branch.

1. The governor

The basic constitutional issues with respect to the governor are:

- Qualifications;
- Term of office;
- Provision for vacancy, absence and disability;
- Compensation;
- Impeachment.

The factors affecting each of these decisions are summarized in this section. In addition, a number of matters that affect the powers of the governor are considered in the context of the alternatives for the rest of the executive branch discussed in section II(B)(2) below.

a) Title

All 50 states and Puerto Rico use the title of governor for the chief executive officer. Section 203(b) of the Covenant states that, "The executive power of the Northern Mariana Islands will be vested in a popularly elected Governor."

b) Qualifications

The qualifications for the office of governor might specify requirements relating to age, citizenship and residency. The alternatives and state experience in each of these areas are set out below.

i) Age. The basic alternatives are: (1) to specify a minimum age beyond the minimum age to qualify as a voter; (2) to make the age requirement the same as that necessary to vote in local elections; (3) to authorize the legislature specifically to set a minimum age requirement; or (4) to set, or authorize the legislature to set, a maximum age limit for eligibility.

The first alternative finds support among those who believe that a governor benefits from the experience and seasoning of judgment gained in the years beyond the minimum required for voting. Supporters of the second alternative trust the voters' judgment to evaluate any difference in the ages of candidates. The third alternative permits consideration of this issue when the legislature works out the details of government organization. The fourth alternative permits a mandatory retirement system applicable to the governor and reflects the same values that lead many large corporations to place age limits on their chief executive officers.

Most states have adopted the first alternative. A majority of the states requires the governor to be at least 30 years of age.[96/] Other states specify 25 years, 31 years and 35 years.[97/] The United States Constitution requires the President of the United States to be at least 35 years of age.[98/] Another alternative is to require only that the governor be a qualified voter. The Model State Constitution suggests the establishment of a minimum age but makes no specific recommendation as to what that age should be.[99/]

ii) Citizenship. Three alternatives are available: first, to require United States citizenship for some number of years; second, to require either United States citizenship or "national" status for some number of years; or third, to have no requirement with respect to citizenship.

96/ E.g., HAWAII CONST. art. IV, § 1; VA. CONST. art. V, § 3.

97/ Twenty-five years: Arizona, Minnesota, Nevada; 31 years: Oklahoma, 35 years: Puerto Rico.

98/ U.S. CONST. art. II, § 1.

99/ MODEL CONST. art. V, § 5.02.

The citizenship requirement is usually imposed because it ensures fundamental identification with and loyalty to the nation. It prevents election of a candidate with obvious foreign ties. Those who favor no citizenship requirement consider it essentially duplicative of the protection accorded by a residency requirement and relatively unimportant when balanced against the possibility of excluding an otherwise qualified candidate.

At the date of termination of the Trusteeship, some people may choose to remain "nationals" instead of becoming United States citizens.[100/] The Convention may have the option of distinguishing between nationals and United States citizens, but that distinction does not appear to have any particular utility. Further, that distinction may cause legal challenges and would seem to conflict with a goal of promoting Commonwealth unity.

A large majority of states imposes a citizenship requirement for the office of governor. Many of the states specify that citizenship is required without specifying any number of years.[101/] Over one-third have requirements varying from two to 15 years.[102/] Nine states have

---

100/ See BRIEFING PAPER NO. 8: ELIGIBILITY TO VOTE AND ELECTION PROCEDURES for a discussion of the issues raised by this option.

101/ E.g., COLO. CONST. art. IV, § 4; CONN. CONST. art. VI, §§ 1, 10.

102/ E.g., Alaska (seven years); Iowa (two years); Delaware (12 years); and Georgia (15 years).

no constitutional citizenship requirements. The states with the largest number of resident aliens choose different alternatives with respect to citizenship: Texas (no citizenship requirement at all); New York and Hawaii (no minimum); California (five-year minimum); and Florida (10-year minimum).

iii) Residency. Three options are available with respect to residency: first, to require residency in the Northern Mariana Islands for some number of years; second, to have no residency requirement; or third, to prohibit a residency requirement.

To some extent, a residency requirement for the governor looks to the same values of loyalty and identification as the citizenship requirement. In addition, a residency requirement rests on the belief that candidates should have a knowledge of local affairs and culture and an "investment" in the local community. Those who favor no residency requirement prefer to let the voters appraise the candidates' familiarity with and attachment to local matters.

About one-third of the states currently have residency requirements. The most common requirement is

a five-year residency.[103] Other requirements vary from one to seven years.[104]

c) Term of office

The Convention must make two decisions with respect to the governor's term of office: length of the term and eligibility for reelection. These matters are closely related, in the sense that a restriction on eligibility for reelection may offset a longer term.[105]

i) Length of term. The governor may serve a term of any length. A term of one, two or three years would generally be regarded as short; a term of four years as average; and a term of five, six or more years as long. Increasingly states provide for a four-year term of office for the governor. Only four states still elect a governor for a two-year term;[106] no state currently has a six-year term.

Proponents of average or long terms cite the following advantages: the governor has greater independence

---

[103] Five-year residence is required by, for example, Hawaii, Nebraska and New York.

[104] Nevada (two years); Illinois (three years); and Alabama (seven years).

[105] The availability of a recall provision also might offset a longer term or the lack of a restriction on reelection. Recall is described in BRIEFING PAPER NO. 8: ELIGIBILITY TO VOTE AND ELECTION PROCEDURES § II(C)(3).

[106] These states are Arkansas, New Hampshire, Rhode Island and Vermont.

in his relations with the legislature, administrative officials, pressure groups, and political parties; a longer term provides time to develop and implement a coherent program; it reduces the spending of excessive energies on campaigning for reelection; the voters need an adequate period in which to evaluate the governor and his programs before considering his reelection; and expense associated with frequent changes in administration is reduced.[107/]

Proponents of a shorter term believe that it makes the governor more responsive to the electorate, prevents the governor from becoming too powerful and provides the electorate with a ready means to remove a bad governor.[108/]

ii) Reeligibility. Several kinds of reeligibility provisions are possible:

- One term only with no eligibility for future terms;
- A maximum of two consecutive terms;
- An unlimited number of terms but no two in succession;
- A maximum of two terms, successive or not.

[107/] ILLINOIS CON CON p. 130; HAWAII STUDIES p. 71.

[108/] HAWAII STUDIES p. 71.

Those who favor restrictions on reeligibility do so for one or more of the following reasons: unlimited reelection creates the possibility of a governor building a political machine; restricting reeligibility makes the governor's office available to new candidates with new ideas; the governor can concentrate on the affairs of the Commonwealth better if not faced with the prospect of a reelection campaign; and, although not necessarily the best candidate on the merits, an incumbent governor has important advantages in election campaigns.[109/]

Proponents of no limits on reeligibility assert that: reeligibility limitations express a lack of faith in the voters' ability to judge the incumbent candidate's record; an incumbent who faces the prospect of reelection will be more responsible and more responsive to the voters' needs and wishes; a reeligibility limitation reduces the governor's ability to develop and implement long-range plans; and legislators, executive officials and other participants in policy-making and politics are less likely to follow the leadership of a governor unable to run for reelection.[110/]

Practice in the states is divided. While about half the states prohibit a governor from self-succession,[111/]

109/ HAWAII STUDIES p. 73.

110/ Bosworth & Fesler, Legislators and Governors, in THE 50 STATES pp. 292-94.

111/ E.g., VA. CONST. art. V, § 1.

an increasing number choose to limit the governor to two successive terms.[112] The other states place no limit on the number of terms a governor may serve.[113] The Model State Constitution places no limit, arguing that "[f]rom a program policy point of view, a restriction on service in office affects the governor's ability to develop and implement a long range plan."[114]

d) Vacancy, absence and disability

Vacancy, absence and disability all involve the line of succession to the office of governor if the elected incumbent is unavailable. The line of succession is generally established in a constitutional provision dealing with the problem of the governor's office becoming permanently vacant in the midst of a term. Absence and disability provisions define when a temporary vacancy exists and provide for the filling of that vacancy.

i) Vacancy. There are three general decisions to be made with respect to filling a vacancy caused by death, resignation, impeachment or other cause: first, should the Constitution establish the line of

---

112/ E.g., ALAS. CONST. art. III, § 5; N.J. CONST. art. V, § 1, ¶ 5. Limiting the governor to two successive terms was required by amendments in nine states during the period 1966-72. Council of State Governments, MODERNIZING STATE CONSTITUTIONS: 1966-1972 p. 21 (1973).

113/ E.g., Hawaii and Montana.

114/ MODEL CONST. art. V, § 5.02 (Comment), p. 66.

succession; second, who should be in the line of succession; and third, should the successor act temporarily or permanently.

The line of succession can be established by the Constitution, left to the legislature or left to the governor. If the Constitution deals with succession, it can provide for the entire line of succession or an initial successor can be named with the designation of further successors left to be established by law.

The primary advantage of a constitutionally established line of succession is the immediate availability of a successor. The office of governor should not be left vacant while politicians debate the choice of a successor. All 50 state constitutions provide for an initial successor should the office of governor become vacant. Some state constitutions name further successors, while others state that arrangements for further successors shall be provided by law. The advantage of leaving the line of succession to be established by law is increased flexibility, especially if few executive officers are specifically provided for in the Constitution: the legislature, when it provides for executive officers, might include them in the line of succession.

The line of succession can include the incumbents in specific executive branch offices, incumbents in certain executive and legislative offices, or persons named by the governor without regard to office.

Because many states elect the governor and lieutenant governor as a team, the lieutenant governor is a logical choice to succeed the governor. Even if elected independently, the lieutenant governor has the advantage of being able to claim a popular mandate and usually an affiliation with the governor's political party and its program and policies. Because the voters elect a governor on the basis of particular programs and policies, it is often contended that a succession provision should seek to continue those programs and policies where possible.

Those who favor a line of succession including legislative leaders believe that such an arrangement is more likely to provide capable leadership. A legislative leader might be very knowledgeable about the affairs of the Commonwealth. On the other hand, legislators are not elected on a statewide basis although the leader of the lower house will have been chosen by representatives of the whole Commonwealth; nor are they elected by the voters with the governor's office in mind.

Allowing the governor to choose his own successors offers the advantages of flexibility and the potential of designating the best qualified person available. It also opens the door to favoritism, political bargaining and instability. No state fills a vacancy in the governor's office this way.

The lieutenant governor is designated as the successor to the governor in all 39 states that have a lieutenant governor.[115/] Of the 11 states without a lieutenant governor, the president of the senate is named as the successor in six states; the secretary of state in four states and Puerto Rico; and a successor is elected by the legislature in Maryland, where the president of the senate discharges the duties of the governor until such election.

115/ E.g., HAWAII CONST. art. IV, § 4; ILL. CONST. art. V, § 6; VA. CONST. art. V, § 16. The Colorado provision states:

> In case of the death, impeachment or conviction of felony or infamous misdemeanor, failure to qualify, resignation, absence from the state or other disability of the governor, the powers, duties and emoluments of the office, for the residue of the term, or until the disability be removed, shall devolve upon the lieutenant governor.

COLO. CONST. art. IV, § 13.

The Model State Constitution does not provide for any executive officer aside from the governor. Therefore, its succession provision fills a vacancy in the office of governor with the president of the senate until a special election can be held to replace the governor.[116/]

Approximately one-half of the states with a lieutenant governor provide for the president of the senate and the speaker of the house of representatives to be next in line of succession after the lieutenant governor.[117/] In Virginia, the elected attorney general succeeds the lieutenant governor.[118/] Other executive officials also follow the lieutenant governor in Michigan and Washington.[119/] Other states provide that the line

---

116/ MODEL CONST. art. V, § 5.08.

117/ E.g., COLO. CONST. art. IV, § 15; IDAHO CONST. art. IV, § 14.

118/ VA. CONST. art. V, § 16. See ILL. CONST. art. V, § 6.

119/ WASH. CONST. art. III, § 10. The Michigan constitution provides:

> In case of the conviction of the governor on impeachment, his removal from office, his resignation or his death, the lieutenant governor, the elected secretary of state, the elected attorney general and such other persons designated by law shall in that order be governor for the remainder of the governor's term.

MICH. CONST. art. V, § 26.

of succession after the lieutenant governor be specified by law.[120/]

Under the federal system, the President and Vice President of the United States are elected on a joint ballot and by tradition the President selects his Vice President. If the President dies, or is unable to continue in office, the Vice President succeeds him. Whenever the office of Vice President becomes vacant, the President is authorized to select a new Vice President subject to Congressional approval.[121/] Several state constitutions follow this model.[122/]

120/ E.g., ALAS. CONST. art. III, § 13; HAWAII CONST. art. IV, § 4. FLA. CONST. art. IV, § 3 provides:

> Upon vacancy in the office of governor, the lieutenant governor shall become governor. Further succession to the office of governor shall be prescribed by law. A successor shall serve for the remainder of the term.

The Hawaiian legislature has provided for succession by the president of the senate, the speaker of the house of representatives, and then the governor's cabinet officers in a specified order. HAWAII STUDIES p. 77.

The New York constitution has an emergency provision in case of disaster causing vacancies in all executive offices. N.Y. CONST. art. III, § 25.

121/ U.S. CONST. amend. XXV.

122/ E.g., MONT. CONST. art. VI, §§ 6, 14. The proposed Maryland constitution chose a similar line of succession. After the lieutenant governor, the president of the state

A successor can act temporarily until another special election is held, or permanently until the end of the term of the governor who was succeeded. The advantage of a special election is that it leaves selection of the governor to the voters. The disadvantages are the cost of special elections and the probability of lower voter turnout than at a regular election. The advantage of permanent succession is stability. 123/

[Footnote 122 continued]

senate was next in line, serving as acting governor only until the next general election should vacancies occur in both the offices of governor and lieutenant governor during the first year of the term, and serving the whole remaining term should such vacancies occur after the first year of the term. The president of the senate was the last named person in the line of succession because the senate could always fill this position. J. Wheeler & M. Kinsey, MAGNIFICENT FAILURE p. 83 (1970).

123/ It would be possible to draft a provision that calls for a special election where a large part of the vacated governor's term remains, and for permanent succession where the remaining term is small. For example, in the Model State Constitution, if the unexpired term is less than one year, then the president of the senate succeeds to the office of governor for the remainder of the term. MODEL CONST. art. V, § 5.08. If the unexpired term is longer than one year, the president of the senate serves as acting governor in the interim period between occurrence of the vacancy and the holding of a special election. This approach was also followed in the proposed Maryland constitution, as discussed above.

Most states provide for permanent succession by the lieutenant governor in case of a vacancy caused by the death, resignation or impeachment of the governor.[124/] New Jersey requires the election of a new governor.[125/]

ii) Absence. The absence of the governor from the Commonwealth may require a temporary successor to exercise certain executive powers. The central problem is defining what constitutes an absence sufficient to require temporary replacement. The alternatives are: (1) to consider the governor absent any time he physically leaves the Commonwealth for any purpose or any period of time; (2) to set a time limit after which the absence will require temporary replacement; or (3) to leave temporary replacement with respect to absence to the discretion of the governor.

Those who favor the first definition of absence believe that such a definition discourages long and frequent absences by the governor and that the presence of

---

124/ E.g., ALAS. CONST. art. III, § 11; HAWAII CONST. art. IV, § 4; ILL. CONST. art. V, § 6; MONT. CONST. art. VI, § 14; VA. CONST. art. V, § 16.

125/ N.J. CONST. art. V, § 1, ¶ 9.

a governor is necessary to carry out the day-to-day requirements of the office and to handle emergencies where a few hours delay might be critical. A set time limit is a consistent and objective standard. It may be difficult, however, to choose a limit that deals efficiently with real-life situations. Leaving temporary replacement to the discretion of the governor allows for response to day-to-day situations without inflexible standards. The governor is probably best situated to know when a temporary successor is needed.

Most state constitutions provide for temporary succession every time the governor is absent from the state.[126/] Montana provides for temporary succession only when the governor is absent from the state for more than 45 consecutive days.[127/] In a few states, the office of governor is declared vacant when the governor is absent for over six months.[128/] The Virginia constitution does

---

126/ E.g., ALAS. CONST. art. III, § 9; HAWAII CONST. art. IV, § 4.

127/ MONT. CONST. art. VI, § 14(2).

128/ E.g., ALAS. CONST. art. III, § 12; N.J. CONST. art. V, § 1, ¶ 8.

not provide for temporary succession when the governor is absent from the state.[129/]

The Model State Constitution provision assumes that modern transportation and communication will eliminate the need for a definition of absence. It provides that an acting governor will serve only "when the duties of the office are not being discharged by reason of [the Governor's]

129/ VA. CONST. art. V, § 16.

One commentator has observed:

> Omitted from section 16 is a provision that, in earlier Virginia Constitutions, spoke of the Governor's office devolving upon the Lieutenant Governor in case of the Governor's "removal from the State." Whether this meant that the Lieutenant Governor became Acting Governor in the case of a short, temporary absence of the Governor from the State was never judicially settled in Virginia, although an informal opinion rendered in 1913 by the Attorney General theorized that a temporary absence did not actuate this clause. Practice has followed this opinion since, and under the 1971 Constitution the question does not even arise. An extenuated and apparently permanent absence of the Governor from the State might or might not be grounds for a section 16 charge that the Governor is "unable to discharge the power and duties of his office," but it would certainly raise a question under Article V, section 4, which requires that the Governor "shall reside at the seat of the government."

A. Howard, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA, vol. 2, p. 678 (1974) (footnote omitted).

continuous absence."[130/] The Puerto Rico constitutional provision is similar: "When for any reason the Governor is temporarily unable to perform his functions, the Secretary of State shall substitute for him during the period he is unable to serve."[131/]

iii) Disability. Like absence, disability is essentially a problem of defining when a vacancy exists so that the line of succession can operate. The circumstances under which disability can occur are so diverse that a comprehensive definition is difficult to draft. Such a provision would need to cover three areas:

130/ MODEL CONST. art. V, § 5.08(b). The comment to this provision explains:

> Under modern conditions, mere absence from the state should no longer require a transfer of executive authority. A governor can quite effectively control the affairs of the executive department by telegraph and telephone -- even the president of the United States continues to exercise his powers while on a visit of state or other foreign mission. Only when continuous absence results in failure to discharge the duties of the office, whether such absence be from the state or not, in the view of the Model, should temporary succession be required. This need not change the practice which has developed in many states, whereby the governor calls upon his successor to assume the executive power when he expects his absence to interfere with the orderly transaction of executive business.

Id. (Comment), p. 75.

131/ P.R. CONST. art. IV, § 7. This provision also covers disability.

(1) specification of the grounds for disability; (2) designation of the person authorized to initiate disability proceedings; and (3) designation of the person responsible for making the final determination.132/

The United States Constitution deals with disability in the Twenty-fifth Amendment. The Vice President becomes acting President whenever the President transmits to the Senate and to the House a declaration that he is unable to discharge his duties, or the Vice President and a majority of the principal officers of the Executive Department or of another body named by Congress transmit to the two Houses a similar declaration. A resumption of powers by the President follows the same procedure. A two-thirds vote of Congress resolves a dispute over the President's recovery.

The Model State Constitution does not define disability, and leaves open the question of standing to initiate disability proceedings. It gives the state supreme court original, exclusive and final jurisdiction concerning disability of the governor or governor-elect.133/

132/ HAWAII STUDIES p. 86.

133/ MODEL CONST. art. V, § 5.08(b),(e). The comments explain:

> The intention has been to treat as disability any condition or circumstance that renders the governor "unable to discharge the duties of his office." The determination of disability in anv

While many state constitutions provide for temporary succession when the governor becomes disabled,[134] 11 states have constitutional provisions

---

[Footnote 133 continued]

> specific instance thus become primarily a factual and only secondarily a legal one.
>
> . . . .
>
> In leaving the determination of issues relating to succession to the supreme court, the Model avoids any limitations on the court's power to proceed. . . . The provision is silent, too, on the issue as to who has "standing to sue," i.e., who would be a proper party to bring before the court issues concerning a governor's disability or the succession to his office. It is clear, as a matter of established law, that the officer next in line of succession would be a proper person to bring such an action.
>
> Since the officer next in line might well be unwilling, for political reasons -- be it out of a sense of loyalty to the governor or a fear of retaliation or other reasons -- to make the first move, other state officers with a duty to protect the public interest should be in a position to get the judicial machinery moving.

MODEL CONST. art. V, §§ 5.08(b),(e) (Comments), pp. 75, 76-77.

134/ E.g., HAWAII CONST. art. IV, § 4; ILL. CONST. art. V, § 6.

for determining disability.[135] The trend in new and revised constitutions is to include procedural provisions for determining the inability of the governor to perform his functions.[136]

The principal alternatives available to the delegates are to place the power of determination in the legislature, the lieutenant governor, the Commonwealth supreme court, a group of executive branch department heads, or to empower the legislature to establish a procedure.[137]

e) Compensation

The Convention might consider specific limitations on the office of governor with respect to salary or concurrent employment.

i) Salary. The governor's salary (and those of other executive officers) may be fixed or protected

---

135/ ALA. CONST. art. V, §§ 127-28; ALAS. CONST. art. III, § 12; CAL. CONST. art. V, § 10; ILL. CONST. art. V, § 6; MICH. CONST. art. V, § 26; MISS. CONST. art. V, § 131; MONT. CONST. art. VI, § 14; N.J. CONST. art. V, § 1, pt. 8; N.C. CONST. art. III, § 2(3), (4); TEX. CONST. art. IV, § 3(a); VA. CONST. art. V, § 16.

136/ Council of State Governments, MODERNIZING STATE CONSTITUTIONS: 1966-1972 p. 21 (1973).

137/ Montana and North Carolina rely on the legislature. Alabama, Michigan, Mississippi and New Jersey rely on the state supreme court. Nebraska and Oregon provide for review boards but not in the constitution. Alaska and California permit the legislature to establish a procedure.

by a constitutional provision, or the entire matter of executive branch salaries, including that of the governor, may be left to the legislature. Leaving this matter to the legislature provides more flexibility. If the Constitution addresses compensation, there are four primary methods available: (1) a fixed minimum or maximum salary may be set; (2) the actual amount, or minimum or maximum limits, of the salary may be tied to some other measure such as legislators' salaries, or some cost-of-living index; (3) the Constitution may provide for determination of the governor's salary by the legislature, with a general protective clause that states that the salary cannot be raised or lowered while the incumbent is in office; or (4) the Constitution may name a specific salary.

In a large majority of states, the legislature sets the governor's salary.[138/] Only a few state constitutions contain a provision for a specific minimum or maximum salary.[139/] Other state constitutions that fix a salary precede or follow the specification with the clause "until otherwise provided by law," which renders the specific salary obsolete. Few states have set the actual amount of the salary in constitutional provisions. About two-thirds of the states prohibit the legislature from raising or lowering an incumbent governor's salary

---

138/ E.g., MONT. CONST. art. VI, § 5: "Officers of the executive branch shall receive salaries provided by law."

139/ E.g., HAWAII CONST. art. IV, § 3.

to protect against any effort to influence the governor's decisions.140/

ii) Concurrent office or employment. Another concern with respect to the compensation of the governor is whether there should be a prohibition as to his holding any concurrent office or employment. If no constitutional prohibition is included, the matter would be left to the legislature. If the legislature elected not to act, the governor could continue to participate in a business or the practice of a profession while holding office. Further, the governor would not be barred from simultaneously holding another elective or appointive office on any governmental level.

No state has included in its constitution a prohibition against simultaneous employment, professional work or business ties in the private sector during a term in office as governor. About one-half of the states

---

140/ E.g., N.J. CONST. art. V, § 1, ¶ 10:

> The Governor shall receive for his services a salary, which shall be neither increased nor diminished during the period for which he shall have been elected.

prohibit the governor from simultaneously holding any office or employment with the state or United States.141/

f) Impeachment

Impeachment provisions authorize removal of officers from office because of misconduct. The Convention must decide initially whether or not to include an impeachment provision in the Constitution. If a provision is included, the Convention must make decisions about who can be impeached, the grounds for impeachment, the method of impeachment and trial, the number of votes necessary to bring charges, and the number of votes necessary to convict.142/

Impeachment provisions act as a check on abuse of power by a governor or other executive official. Because of this function, power to impeach is often created.

141/ E.g., MONT. CONST. art. VI, § 5:

> During his term, no elected officer of the executive branch may hold another public office or receive compensation for services from any other governmental agency. He may be a candidate for any public office during his term.

142/ The Virginia constitution also permits one who has been impeached and punished to be prosecuted under any other laws he may have violated, and authorizes the senate to sit during legislative recess to try an impeachment. VA. CONST. art. IV, § 17.

Such power is vested in a separate branch of government, almost always the legislature.[143] The disadvantage of an impeachment provision is its deterrent effect on the executive's initiative. All state constitutions except Oregon's contain impeachment provisions.[144]

i) Application of impeachment provision. Impeachment provisions can apply to the governor, to the governor and lieutenant governor, or to all civil officers of the Commonwealth, including judges.

Impeachment provisions applying to many officers have the advantage of policing all levels of executive authority. A disadvantage might be the undermining of the governor's authority, especially if all other executive officers and department heads are appointed by the governor.[145]

Most states provide for impeachment of all civil officers of the state.[146] A few states limit impeachment

---

143/ Executive officials might also be subject to popular recall as is described in BRIEFING PAPER NO. 8: ELIGIBILITY TO VOTE AND ELECTION PROCEDURES § II(C)(3).

144/ ORE. CONST. art. VII, § 6 forbids the impeachment of any state official.

145/ If impeachment provisions apply to all officials, and not just to elected officials, then impeachment could be used to challenge the governor's appointment and removal powers. See § II(A)(4) above.

146/ E.g., ALAS. CONST. art. II, § 20 ("All civil officers of the State are subject to impeachment by the legislature."); COLO. CONST. art. XIII, § 2; N.J. CONST. art. VII, § 3, ¶ 1; VT. CONST. art. II, § 54; WASH. CONST. art. V, § 2.

to the governor, lieutenant governor and a variety of other executive officials.147/

ii) Grounds for impeachment. Grounds for impeachment can be stated specifically in the Constitution or left to determination by the legislature. Explicitly stating the grounds of impeachment in the Constitution prevents the legislature from arbitrarily creating and using such grounds against an incumbent governor. On the other hand, constitutional specifications decrease flexibility and may not be needed if the governor is protected by constitutional provisions requiring an extraordinary majority to initiate impeachment proceedings.

Most state constitutions contain general definitions of the grounds for impeachment (such as high crimes, misdemeanors, misconduct, malfeasance, treason, corruption or neglect of duty).148/ No constitution specifically states what constitutes an impeachable offense. Only five states -- Alabama, Indiana, Louisiana, Oklahoma and West Virginia -- explicitly include incompetence or incapacity as causes for impeachment. Some constitutions leave the causes for impeachment to be provided by

---

147/ FLA. CONST. art. III, § 17 ("members of the cabinet"); HAWAII CONST. art. III, § 20 ("any appointive officer for whose removal the consent of the senate is required . . .." i.e., the attorney general).

148/ E.g., CAL. CONST. art. IV, § 18; COLO. CONST. art. XIII, § 2; FLA. CONST. art. III, § 17; LA. CONST. art. X, § 24(A); WIS. CONST. art. VII, § 1.

statute.[149] Other constitutions are silent with respect to grounds for impeachment.[150]

iii) Method for impeachment and trial. Of the 49 states that provide for impeachment, 47 empower the lower house of the legislature to initiate impeachment proceedings. Alaska provides for the upper house to initiate proceedings, and Nebraska provides for initiation of proceedings against the governor by the unicameral legislature. The Hawaii constitution is typical: "[T]he house of representatives shall have the sole power of impeachment of the governor and lieutenant governor and the senate the sole power to try impeachments."[151]

In 46 states the court of impeachment is the senate.[152] In Nebraska the state supreme court sits as the court of impeachment.[153] The Missouri constitution provides that the governor be tried by a special commission

---

149/ HAWAII CONST. art. III, § 20; MONT. CONST. art. V, § 13.

150/ MODEL CONST. art. IV, § 4.18; ALAS. CONST. art. II, § 20.

151/ HAWAII CONST. art. III, § 20.

152/ Citizens Conference on State Legislatures, STATE CONSTITUTIONAL PROVISIONS AFFECTING LEGISLATURES p. 15 (1967).

153/ NEB. CONST. art. III, § 17.

of eminent jurists to be elected by the senate.[154] New York requires that the senate and court of appeals jointly vote for impeachment.[155]

iv) Number of votes required to impeach and convict. The number of votes required to impeach can be a majority or a specified extraordinary majority. The same alternatives exist for conviction. The lower the number of votes required, the stronger the legislature's check on the executive branch. Those who favor an independent executive favor the provision for an extraordinary majority in order to protect the governor from legislative harassment. The mere presence of an impeachment provision is seen as a deterrent to flagrant abuse of office.

One survey found that 23 state constitutions do not specify the vote required from the lower house of the legislature to initiate impeachment proceedings. Fifteen states require a vote by a majority of the elected members. Ten states require a vote by two-thirds of the elected members. Alaska requires a vote by two-thirds of the members of the upper house. Nearly all states require a two-thirds vote by the upper house of the legislature to

---

154/ MO. CONST. art. VII, § 2.

155/ N.Y. CONST. art. VI, § 24.

convict. Forty-three states require the vote to be either two-thirds of the members present at the time of the vote or two-thirds of the members elected. Alaska requires a two-thirds vote of the members of the lower house.[156/]

2. Executive branch departments

The executive branch administers the government's policies and programs. In structuring the Commonwealth executive branch beyond the office of governor, the Convention should concentrate on the goals of administrative coordination and efficiency.

Experience in the United States has prompted a nationwide movement to simplify the structure of the executive branch in state government. In the past, state governments tended to create new offices, agencies, boards and commissions whenever they assumed new functions and responsibilities. This led to fragmentation of responsibility, administrative confusion and overlap, and costly and inefficient government.[157/]

156/ Legislative Drafting Research Fund of Columbia University, INDEX DIGEST OF STATE CONSTITUTIONS pp. 536-39 (2d ed. 1959), and p. 154 (Supp. 1971).

157/ In 1967 the states had an average of seven elective executive offices, while Oklahoma had 14 elective executive offices, including a commissioner of insurance and a chief mine inspector. HAWAII STUDIES pp. 8, 102-09. In the same year the states had an average of 85 separate agencies. Committee for Economic Development, MODERNIZING STATE GOVERNMENT p. 50. (1967). One authority has described the problem of fragmentation in government as follows:

The most basic principle of the state "reorganization" movement is that of unifying the executive branch under the governor.[158] Adherence to this principle has fostered a reduction in the number of state elective executive offices and the grouping of related state

---

[Footnote 157 continued]

> It bred chaos; agencies pursued contradictory policies in related fields. It fomented conflict; agencies engaged in bitter bureaucratic warfare to establish their spheres of jurisdiction. It opened gaps in the provisions of service or of regulation; clienteles were sometimes denied benefits or escaped supervision because they fell between agencies. It was costly; many agencies maintained overhead organizations that could have been replaced more cheaply and effectively by a common organization, and citizens had to make their own way through bureaucratic labyrinths. And, most important of all, it led to irresponsibility; no one quite knew how the pattern of organization and program came into existence or what could be done to alter it; each segment of the fragmented governments became a self-directing unit, the impact of elections on the conduct of government was minimized, and special interest groups often succeeded in virtually capturing control of individual agencies. Kaufman, Emerging Conflicts in the Doctrines of Public Administration, 50 AM. POL. SCI. REV. pp. 1057, 1063 (1956), quoted in HAWAII STUDIES pp. 38-39.

158/ Willbern, Administrative Organization, in THE 50 STATES p. 344.

agencies into a limited number of major departments headed by single administrators.[159/]

These considerations pinpoint the four principal issues to be addressed by the Convention with respect to the organization of the executive branch:

- should any executive offices other than the governor have constitutional stature;
- if the Constitution names other executive offices, should those offices be elective or appointive;
- should any constitutional provisions limit the structure of the executive branch;
- do any special needs require other constitutional provisions with respect to the executive branch.

Each of these issues is discussed below.

a) Constitutional designation of executive branch offices

Although the Constitution may designate any number of executive offices, a good constitution should create only those considered necessary for efficient government functioning. Each constitutional office costs

---

159/ The states that have reorganized since 1965 include Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Kentucky, Louisiana, Maine, North Carolina, South Dakota, Virginia and Wisconsin. Broad activity of a less comprehensive nature has taken place in several other states, including Arizona, Kansas, Oregon and Vermont. A constitutional amendment in Oklahoma in 1975 reduced the number of elective executive offices in that state from 13 to eight. Council of State Governments, BOOK OF THE STATES: 1976-77 pp. 105, 109 (1976).

the taxpayers additional money. States that have named executive offices in their constitutions and later found them extraneous have had difficulty abolishing them. Further, the creation of a number of executive offices can cause diffusion of responsibility within the executive branch and a dilution of the governor's power.

Of the traditional executive branch offices named in state constitutions, the Convention should consider for possible designation in the Constitution the offices of lieutenant governor, attorney general, secretary of state, treasurer and administrative director. The Convention might decide to include all, any or none of these in the Constitution; it might create new offices that incorporate several traditional functions under one office; or it might provide for the designation of necessary executive branch officers by the governor or the legislature.

i) Lieutenant governor. Patterned after the federal Vice Presidency, this office finds its most important justification in the provision of a successor to the office of governor. A lieutenant governor can also have specific duties such as presiding over the legislature, serving on executive branch boards and commissions,[160/] and performing tasks delegated by the governor. Most states

---

160/ At least 10 states assign the lieutenant governor membership on various boards and commissions. HAWAII STUDIES pp. 8-9.

follow the Vice Presidential model for the lieutenant governor and assign the office the duties of presiding over the senate and serving as immediate successor to the governor.[161] An increasing number of states, however, are making the lieutenant governor purely an executive officer with duties assigned by the governor.[162]

One authority has written regarding this recent development:

> There is a noteworthy trend toward giving . . . the lieutenant governor official duties in the executive branch. There is need for careful reconsideration of the place these officers should have in the governmental scheme. Since a . . . lieutenant governor may at any time be called upon to fill the post of chief executive, he should be elected along with the chief executive as a member of his administrative team. He should be shorn of his traditional ex officio function of serving as the presiding officer of the Senate -- a post carrying with it comparatively little power . . . and freed to participate in the executive councils and to accept such administrative and representational duties as the chief executive might choose to assign him . . . The character of his duties should be kept flexible. He should become a sort of "minister without portfolio" . . . This would not only insure that he would function in a subordinate administrative capacity to the . . . governor . . . and not be tempted to become a rival. It would

---

161/ E.g., VA. CONST. art. V, §§ 14, 16.

162/ BOOK OF THE STATES p. 109; HAWAII STUDIES pp. 13-14.

> also make possible an adjustment of his duties to his particular talents. A series of different assignments over a period of time would enable him to acquire a wider knowledge of the operations of the government as a whole. In this way he could be given a better opportunity than at present to prepare himself for the responsibility of serving as chief executive in case fate should thrust that role upon him.163/

163/ J. Kallenbach, THE AMERICAN CHIEF EXECUTIVE: THE PRESIDENCY AND THE GOVERNORSHIP pp. 234-35 (1966). Colorado, Illinois and Montana recently adopted constitutional provisions along this line. The Illinois provision states:

> The Lieutenant Governor shall perform the duties and exercise the powers in the Executive Branch that may be delegated to him by the Governor and that may be prescribed by law.

ILL. CONST. art. V, § 14. Montana adopted a similar provision, with one additional clause:

> The lieutenant governor shall perform the duties provided by law and those delegated to him by the governor. No power specifically vested in the governor by this constitution may be delegated to the lieutenant governor.

MONT. CONST. art. VI, § 4. The added clause eliminates the problem of the governor assigning the lieutenant governor the powers to sign or veto bills or to call a special session of the legislature. It also prevents a legislature hostile the governor from granting conflict-inciting powers or duties to the lieutenant governor.

The recent Michigan constitution assigns the lieutenant governor specific duties (following the Vice Presidential model) and allows delegation of duties by the governor by providing:

> The lieutenant governor shall be president of the senate, but shall have no vote, unless they be equally divided. He may perform duties requested of him by the governor, but no power vested in the governor shall be delegated.

MICH. CONST. art. V, § 25.

ii) Attorney general. The attorney general usually serves as the legal adviser to the governor and all departments of government and as the representative of the government in all actions in which any government officer or agency is a party. He sometimes also exercises direct or supervisory responsibility for the enforcement of the criminal laws in the state or commonwealth.

iii) Secretary of state. This office has traditionally been responsible for a number of largely unrelated activities. One authority describes the office as follows:

> The Secretary of state is generally the official custodian of state records and archives. He is keeper of the state seal, by use of which he is required to authenticate gubernatorial proclamations, commissions of appointment, and certain other public documents. He is charged with the publication and distribution of the state session laws. He usually has important duties in connection with election administration; issues certificates of incorporation; and registers trademarks. In many states he is charged with the compilation and publication of a state manual or register, and of election statistics. In some states he issues automobile licenses and administers state laws regulating the issuance and sale of corporate securities. Other duties of a miscellaneous nature are imposed upon him in different states.164/

iv) Treasurer/auditor/comptroller. States often vest a number of functions with respect to fiscal affairs

---

164/ C. Snider, AMERICAN STATE AND LOCAL GOVERNMENT p. 277 (1965), quoted in HAWAII STUDIES p. 15.

in constitutional offices. These include the functions of receipt and custody of funds, authorization and payment of warrants drawn on the treasury, maintaining the accounting system and performing periodic audits. In the federal system, these functions are separated into two offices. The treasurer receives and maintains custody of federal funds, maintains an over-all accounting system, and authorizes and pays warrants drawn on federal funds by those departments and agencies authorized by Congress to do so. The comptroller general, who is responsible to the legislative branch rather than to the executive branch, performs financial and program performance audits.[165/]

Some states separate these functions into three offices. The treasurer becomes largely a ceremonial officer responsible only for the receipt and custody of state funds and the payment of warrants drawn on the state. The comptroller (or auditor in some states) maintains the accounting records and authorizes disbursements from the state treasury.[166/] The auditor performs post-expenditure

---

165/ 31 U.S.C. §§ 41-134 (1970).

166/ When the legislature has passed an appropriation act, the comptroller sets up an account for each individual appropriation. Before any expenditure can actually be made pursuant to an appropriation, the comptroller must verify that the purpose of the expenditure is the one for which the appropriation was made, and that a sufficient unexpended balance exists to cover the proposed payment. Once satisfied that these requirements have been met, the comptroller signs an order or warrant upon the treasury and only then can the treasurer make the necessary disbursement. This process is called the pre-audit because it occurs before expenditure.

audits to determine if the governmental agencies have actually expended the state's funds in accordance with the legislature's appropriation.[167]

v) Administrative director. Some authorities have suggested a constitutional provision for an administrative director (or "general manager") to serve at the governor's pleasure and assume responsibility for day-to-day management of the entire executive branch establishment on the ground that a governor needs sound long range program planning for effective control over program execution.

Most states designate these executive offices and describe their functions, at least in broad outline, in their constitutions.[169] This approach creates a stable executive branch framework. On the other hand, it adds cost, decreases flexibility and diffuses responsibility within the executive branch.

---

[167] Since the post-auditor serves as a watchdog for the legislature, it is reasonable that the legislature should select the person for the office.

[168] Committee for Economic Development, MODERNIZING STATE GOVERNMENT pp. 59-60 (1967); Willbern, Administrative Organization, in THE 50 STATES p. 345. The availability of a central staff agency at the governor's disposal mitigates this concern.

[169] As an exception to this rule, the Puerto Rico constitution names only the governor and secretary of state. Alaska and Hawaii also name only two officials each, the governor and lieutenant governor.

The second alternative, vesting power in the governor to shape the executive branch, maximizes flexibility, efficiency and centralization of power in the governor. No state yet gives the governor the authority to create executive offices and agencies.

The third alternative, leaving the shaping of the executive branch to the legislature to accomplish by statute, is adopted by many of the newer state constitutions. These constitutions designate only offices necessary to the constitutional plan itself, and all other offices are created by the legislature at the time and in the form that appears most appropriate.[170/] This approach serves the need for flexibility and provides a check on the power of the executive branch. Its principal disadvantage may be an impetus to the proliferation of government offices and a diffusion of executive branch responsibility. To counteract this impetus, some new and revised constitutions limit the number of major departments that the legislature may create.[171/]

b) Method of filling designated offices

With respect to any offices specified in the Constitution, the next important issue is the method of

---

170/ E.g., N.J. CONST. art. V, § IV, ¶ 1.

171/ This method is discussed in § II(B)(2)(c) below.

filling these offices. Executive officers can be popularly elected, appointed by the governor or elected by the legislature.172/

Constitutional experts since the turn of the century have supported appointment rather than popular election for a number of reasons. First, they emphasize the need for unity and control in the executive branch. Elected officers and department heads whose spheres of authority and political ambitions compete with the governor's may threaten his authority. This is especially true if the officials are elected for terms of office different than the governor's, and if there is no restriction on the reeligibility of the officials while there is a restriction on the governor's reeligibility for office. Such officials are likely to build bases of power independent of, and often conflicting with, those of the governor. Second, executive branch offices other than governor are essentially administrative and often technical in character; voters cannot realistically judge whether candidates possess the qualifications for these offices. Third, selection of administrative officials by the governor brings highly qualified individuals into the public service who might not be willing to seek election to office.

172/ Election or appointment may be used exclusively or in tandem. Many states provide for popular election of some officers (most commonly attorney general and secretary of state); election by the legislature of other officers (such as treasurer or auditor); and appointment by the governor of the remaining officers.

Fourth, government is more responsive to the people if the governor takes full responsibility for his policies and actions. Voters can express approval or disapproval of the governor's programs at each election. Fixing responsibility is impossible when many officials are elected. Fifth, there is no need for this particular check on power within the executive branch because of the existence of more effective external checks: the legislature; the judiciary; the press; and a variety of special interest groups.[173/]

Arguments in favor of popular election of executive branch officers are as follows: First, the election of more officers makes government more responsive to the public will; second, checks and balances are needed within the executive branch to impede an overreaching or corrupt governor; third, this system provides a training ground for prospective candidates for governor, and also provides opportunities for political exposure of potential candidates; fourth, the availability of important offices provides an outlet for different factions within the governor's party to obtain exposure, and it provides similar opportunities for the opposing party to promote, and in some cases elect, promising candidates.[174/]

[173/] ILLINOIS CON CON pp. 156-67; HAWAII STUDIES pp. 7-31.

[174/] HAWAII STUDIES pp. 7-31.

The two most recently admitted states, Hawaii and Alaska, provide for the election of only two executive officials on a joint ballot: the governor and lieutenant governor. All other executive branch officers in these states are appointed by the governor. New Jersey and Puerto Rico elect only the governor, who appoints the rest of the major executive officials. Other states provide for popular election of the lieutenant governor (41 states),[175] the attorney general (41 states),[176] the secretary of state (38 states),[177] the treasurer (41 states),[178] other minor officers, and even members of boards, commissions and councils.[179]

The Convention might decide to elect an attorney general despite a general policy decision against election of executive branch officers. This will depend on the attorney general's role in the Commonwealth government. If the attorney general advises the governor on the legality of executive policies and develops arguments to support these policies,

---

175/ The lieutenant governor is popularly elected in all of the states where the office exists. The states that do not elect a lieutenant governor are: Arizona; Maine; New Hampshire; New Jersey; Oregon; Tennessee; West Virginia; and Wyoming.

176/ All states except Alaska, Hawaii, Indiana, Maine, New Hampshire, New Jersey, Pennsylvania, Tennessee and Wyoming.

177/ All states except Alaska, Delaware, Hawaii, Maine, Maryland, New Hampshire, New Jersey, New York, Pennsylvania, Tennessee, Texas and Virginia.

178/ All states except Alaska, Hawaii, Maine, Maryland, Michigan, New Hampshire, New Jersey, Tennessee and Virginia.

179/ For example, eight states elect the secretary of agriculture.

that role supports appointment of the attorney general by the governor. If, however, the attorney general is responsible to the whole government for impartial legal opinions, a role that could include the prosecution of other executive officers for violations of Commonwealth law, then an elected attorney general might make the office more independent and vigorous.

If the Convention selects popular election as the method of filling one or more executive branch offices aside from that of the governor, the Convention must decide whether to select these officers on a joint ballot with the governor or on an independent ballot.[180/]

The modern trend is to elect the governor and lieutenant governor on a joint ballot.[181/] Arguments favoring the joint or team election are that it assures that the lieutenant governor and the governor are members of the same political party, and it provides a logical successor in case of a vacancy in the office of governor. Arguments favoring separate election point out that this method maximizes popular input into the executive branch, allows for nonpartisan candidates for governor or lieutenant governor, and encourages stronger candidates for lieutenant governor.

180/ As with the general methods of selection, these methods of balloting can be combined. A joint ballot can be required for some offices (such as lieutenant governor) and an independent ballot can be required for others (such as attorney general).

181/ Council of State Governments, MODERNIZING STATE CONSTITUTIONS: 1966-1972 p. 21 (1973). Team election was approved by amendment in a fifth of the states during the 1966-1972 period.

The lieutenant governor is elected on a joint ballot with the governor in 20 states,[182] and elected separately in 21 states.[183] No state elects any other executive official on a joint ballot with the governor.

c) Constitutional limitations on the structure of the executive branch

The Constitution may include limitations on the organization of the executive branch in lieu of (or in conjunction with) specific provisions setting out that organization. The most practical of such measures are limitations on multi-member boards or multi-head departments, and a ceiling on the number of executive branch departments that the legislature may create.

Authorities agree that multi-member boards or multi-head departments divide authority and generally lack initiative.[184] The Convention might decide to include in the Constitution a limitation on multi-member boards or multi-head departments. The constitutions of Alaska, Hawaii and Montana contain provisions of this kind.[185] The Hawaii provision states:

182/ E.g., ALAS. CONST. art. III, § 8; FLA. CONST. art. IV, § 5; ILL. CONST. art. V, § 4; MONT. CONST. art. VI, § 2.

183/ E.g., VA. CONST. art. V, § 13. The Virginia constitution limits the governor to one term, but places no limit on the number of successive terms the lieutenant governor can serve.

184/ Willbern, Administrative Organization, in THE 50 STATES p. 344; HAWAII STUDIES pp. 44-46.

185/ ALAS. CONST. art. III, §§ 24, 25; HAWAII CONST. art. IV, § 6; MONT. CONST. art. VI, § 8.

> Each principal department shall be under the supervision of the governor and, unless otherwise provided in this constitution or by law, shall be headed by a single executive.186/

A ceiling on executive branch departments would limit the number of bodies to which the governor or the legislature could delegate authority. This limitation would not affect advisory boards or investigative commissions.

The arguments in favor of a ceiling are: (1) a ceiling prompts the legislature to exercise greater care in the establishment of new agencies and to consider more seriously where each new function belongs in the executive branch organization; (2) it compels a continuing or periodic review of the administrative structure; (3) it protects the legislature from undue pressure to create new departments; and (4) it helps ensure that the governor has a manageable "span of control" over departments, thereby increasing government efficiency and accountability of officials.187/

Arguments against a ceiling include: (1) the limit on the number of departments may result in an inefficient grouping of unrelated activities; (2) it may lead to a broad definition by the legislature of regulatory and temporary agencies, thereby contributing to their proliferation;

186/ HAWAII CONST. art. IV, § 6.

187/ HAWAII STUDIES pp. 41-42; ILLINOIS CON CON p. 174.

(3) any numerical limitation is totally arbitrary; and (4) a constitutional limitation is unnecessary since the same objective could be achieved by a statute that has the advantage of greater flexibility.[188/]

The Model State Constitution requires that all executive and administrative offices and agencies be allocated among not more than 20 principal departments, with exceptions allowed for regulatory and temporary agencies.[189/] The Florida constitution establishes the maximum number at 25; the constitutions of Alaska, Hawaii, Massachusetts, Montana, New Jersey and New York establish the maximum number at 20; the Missouri limitation is 14.[190/] Any number

---

188/ ILLINOIS CON CON p. 174.

189/ MODEL CONST. art. V, § 5.06. The comment on the Model provision explains:

> Twenty is no magic number and, indeed, may be too large but a lesser number might inject an element of inflexibility into administrative arrangements. . . . Twenty departments is the suggested maximum, not necessarily the number that may be desirable for a particular state.

Id. (Comment), p. 71.

190/ E.g., MONT. CONST. art. VI, § 7:

> All executive and administrative offices, boards, bureaus, commissions, agencies and instrumentalities of the executive branch (except for the office of governor, lieutenant governor, secretary of state, attorney general, superintendent of public instruction, and auditor) and their respective

[Footnote continued on next page]

selected by the Convention for the Commonwealth Constitution should reflect the size and other particular characteristics of the Northern Marianas and the need for a simple and cost-effective government organization.

d) Other organizational measures

Numerous other devices have been used to promote efficiency in the organization of the executive branch. For example:

- a requirement that the principal heads of departments constitute a cabinet that meets regularly with the governor to advise on governmental policy;191/

[Footnote 190 continued]

> functions, powers, and duties, shall be allocated by law among not more than 20 principal departments so as to provide an orderly arrangement in the administrative organization of state government. Temporary commissions may be established by law and need not be allocated within a department.

191/ The Florida and Puerto Rico constitutions so provide. FLA. CONST. art. IV, § 4. P.R. CONST. art. IV, § 5 states:

> For the purpose of exercising executive power, the Governor shall be assisted by Secretaries whom he shall appoint with the advice and consent of the Senate. The appointment of the Secretary of State shall in addition require the advice and consent of the House of Representatives, and the person appointed shall fulfill the requirements established in Section 3 of this Article. The Secretaries shall collectively constitute the Governor's advisory council, which shall be designated as the Council of Secretaries.

- a specific delegation of authority to the governor to initiate administrative re-organization within the executive branch; 192/

192/ The constitutions of Alaska and Michigan provide for gubernatorial reorganization powers. ALAS. CONST. art. III, § 23; MICH. CONST. art. V, § 2. The Alaska provision states:

> The governor may make changes in the organization of the executive branch or in the assignment of functions among its units which he considers necessary for efficient administration. Where these changes require the force of law, they shall be set forth in executive orders. The legislature shall have sixty days of a regular session, or a full session if of shorter duration, to disapprove these executive orders. Unless disapproved by resolution concurred in by a majority of the members in joint session, these orders become effective at a date thereafter to be designated by the governor.

The Model State Constitution contains a similar provision. MODEL CONST. art. V, § 5.06. The comment on the provision states:

> In keeping with the concept of the governor as leader of state administration, however, the chief executive is also granted broad powers which permit him to take the initiative in administrative reorganization. He has broad powers to order changes in the organization of government but, when reorganization desired by the governor requires changes in law, the participation of the legislature is required to effectuate them -- the changes may be set forth in executive orders to become effective 60 days after submission to the legislature unless they are specifically modified or disapproved by resolution concurred in by a majority of all the members.

Id. (Comment), pp. 71-72.

° a provision guaranteeing the governor access to information from any executive branch department, office, or agency so that the Governor's power to coordinate and direct is strengthened. 193/

Conclusion

As the Convention deliberates regarding the specifics of a constitutional article on the executive branch of government, it should not lose sight of its overriding objective -- to create an executive branch that, for the first time in the history of the Northern Mariana Islands, can speak for and serve the people of the Commonwealth. Under the provisions of the Covenant, the executive branch headed by a popularly elected governor is one of the basic institutions by which the Northern Marianas people can achieve their objective of self-government. The Convention's decisions on the issues discussed in this briefing paper involve a special challenge and opportunity for the delegates -- to draft a provision on the executive branch that looks to the future and not to the past.

193/ The U.S. Constitution gives the President the power to "require the Opinion, in writing, of the principal officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices. . . ." U.S. CONST. art. II, § 2. The Model State Constitution provides that the governor "may at any time require information, in writing or otherwise, from the officers of any administrative department, office or agency upon any subject relating to their respective offices." MODEL CONST. art. V, § 5.04.

Several new and revised constitutions contain similar provisions. CAL. CONST. art. XIII, § 20; ILL. CONST. art. V, § 19; MONT. CONST. art. VI, § 15; VA. CONST. art. V, § 8.