BRIEFING PAPER NO. 3

THE LEGISLATIVE BRANCH OF GOVERNMENT

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THE LEGISLATIVE BRANCH OF GOVERNMENT

The legislative branch is one of the institutions basic to a republican form of government. As a representative body, it has the greatest capacity to reflect the direction and determination of the people of the Northern Mariana Islands with respect to their government. The legislative branch must be effective in translating the popular mandate into the laws and appropriations that will provide for the political, social and economic development of the Commonwealth. This briefing paper discusses the principal issues facing the delegates in defining the powers and shaping the organization of the legislative branch. The first section sets out the relevant provisions of the Covenant, describes briefly the current legislature, and identifies the underlying policy choices that will affect many of the decisions to be made by the delegates. The second section discusses the specific alternatives available to the delegates with respect to legislative powers, organization and procedures.

I. BACKGROUND AND GENERAL CONSIDERATIONS

A. Relevant Provisions of the Covenant

The Covenant imposes relatively few limitations on the Convention's freedom to shape the legislative branch.

At the outset, section 203(a) requires "separate executive, legislative and judicial branches." The delegates, therefore, must provide for a legislative branch and

respect a separation of powers between the three governmental branches. Section 203(c) provides that "the legislative power . . . will extend to all rightful subjects of legislation." This is as broad a grant of authority as it is possible to confer. The Drafting Committee's comment makes this clear:

> It is the intention of the parties that the provision stating that the legislative powers of the Northern Mariana Islands will extend "to all rightful subjects of legislation" be broadly interpreted, consistent with Section 102, to mean that the power of the legislature will be limited only by the terms of the Covenant, the provisions of the Constitution, treaties and laws of the United States applicable to the Northern Mariana Islands, and the Constitution of the Northern Mariana Islands. 1/

The power of the Commonwealth legislature is as broad as that of a state legislature, which makes relevant the general rule that a state legislature can exercise any power whatsoever, except those denied by the United States Constitution or laws, or by the state's own constitution. 2/

The Covenant restricts the Convention in granting power to the legislature in only three respects. Section 601 requires imposition of a territorial income tax in a manner consistent with the provisions of the Internal Revenue Code.

1/ Report of the Joint Drafting Committee on the Negotiating History, reprinted in S. Rep. No. 433, 94th Cong., 1st Sess., p. 404 (1975).

2/ F. Grad, THE DRAFTING OF STATE CONSTITUTIONS: WORKING PAPERS FOR A MANUAL, pt. II, pp. 31-32 (1967)(National Municipal League).

Section 605 limits the taxing power with respect to certain customs duties. Section 607(b) limits the power to incur public debt beyond 10 percent of the assessed valuation of real property in the Northern Mariana Islands for a specified time period.

The Covenant imposes one substantial limitation on legislative representation. Section 203(c) requires that there be "equal representation for each of the chartered municipalities . . . in one house of a bicameral legislature." Therefore, the delegates do not have the option of creating a unicameral legislature, or of making both houses in a bicameral legislature apportioned solely on the basis of population. In specifying that representation in the upper house must be based on municipalities, the Covenant specifically exempts only one house from provisions of the United States Constitution which are applicable to the Northern Mariana Islands. Therefore, since section 501(a) of the Covenant applies Amendment XIV, section 1 of the United States Constitution to the Northern Marianas,[3/] the requirement of

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3/ That Amendment provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

"equal protection" will restrict any constitutional provisions specifying the system of representation in the other house.

The Covenant further requires that certain qualifications be established for legislators. Section 203(c) mandates that legislators be "popularly elected." This prohibits selection of legislators by means other than the popular vote; for example, the Constitution could not have the delegates of one house elected by members of the other. Section 204 requires that:

> "all members of the legislature . . . take an oath or affirmation to support this Covenant, those provisions of the Constitution, treaties and laws of the United States applicable to the Northern Mariana Islands, and the Constitution and laws of the Northern Mariana Islands."

B. Current Structure of the Legislature

The Mariana Islands District Legislature was established by a Charter issued by the high commissioner of the Trust Territory of the Pacific Islands pursuant to the law of the Trust Territory.[4/] Since the establishment of separate administration for the Northern Mariana Islands,[5/] the powers of the legislature -- now known as the Northern Mariana

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4/ CHARTER OF THE MARIANA ISLANDS DIST. LEGISLATURE [hereinafter cited as CHARTER]; TRUST TERRITORY CODE tit. 3, ch. 1, § 2 [hereinafter cited as TTC].

5/ Sec. Order No. 2989, 41 Fed. Reg. p. 15892 (Apr. 15, 1976) [hereinafter cited as Order 2989].

Islands Legislature -- have been increased. Formerly limited to power over particular subjects, such as land law and inheritance law,[6] the power of the legislature now extends to "all rightful subjects of legislation."[7] Its form, however, has not been altered very much, since the Charter of the legislature, to the extent not inconsistent with Secretarial Order 2989, continues to apply.[8]

The legislature is a unicameral body with not more than 26 members.[9] The members are elected from four electoral districts, Saipan electing 11 members of the legislature, Rota three, and Tinian and the islands north of Saipan one each.[10] Reapportionment is to take place every five years, with the representation accorded the three smaller districts not to be reduced.[11] Up to five legislators may

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6/ TTC tit. 3, ch. 1, § 2.

7/ Order 2989, pt. III, § 6. Its legislation, however, may not be inconsistent with treaties or international agreements of the United States, the Covenant to Establish the Commonwealth of the Northern Mariana Islands, United States laws applicable to the Northern Mariana Islands, executive orders of the President, orders of the Secretary of the Interior, or the TTC bill of rights. In addition, certain limitations of the powers to tax and to impose customs duties, as these powers could affect either the United States government or parts of the Trust Territory, are established. Id.

8/ MARIANA ISLANDS DIST. CODE tit. 2, ch. 2.20, § 2.20.020 (1975) [hereinafter cited as MIDC.]

9/ Order 2989, pt. III, § 3; MIDC tit. 2, ch. 2.20, § 2.20.020.

10/ Order 2989, pt. III, §§ 1 & 2; MIDC tit. 2, ch. 2.20, § 2.20.010.

11/ CHARTER art. I, § 4.

be added, with an electoral district receiving one new legislator for each increase in population of one thousand persons between the original chartering of the legislature and the 1970 amendment.[12/] The five former members of the Mariana Islands delegation to the Congress of Micronisia are also members at large of the legislature, until the terms for which they were elected expire.[13/]

Legislative terms are four years.[14/] A legislator must be a citizen of the Northern Mariana Islands, at least 25 years old, a resident of his electoral precinct for two years preceding his election, not currently serving a sentence for felony,[15/] and not holding either an elective municipal office or a judicial office.[16/] A representative unable to take office is replaced at a special election; one who is unable to complete his term once begun is replaced by a person selected by the chief executive of the municipality for which he is elected.[17/]

The legislature meets in regular session two times yearly.[18/] Sessions are deemed to be continuous, but are

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12/ MIDC tit. 2, ch. 2.20, § 2.20.020/

13/ Order 2989, pt. III, § 3.

14/ CHARTER art. I, § 2.

15/ CHARTER art. I, § 5.

16/ CHARTER art. I, § 6.

17/ CHARTER art. I, § 7.

18/ CHARTER art. II, § 1.

limited to thirty calendar days.[19] The legislature may meet in special session at the call of the resident commissioner, considering only those subjects stated in the resident commissioner's call.[20]

Two-thirds of the membership of the legislature, including at least two members from one or more islands other than Saipan, constitute a quorum.[21] Bills must pass two readings on separate days to become law,[22] and may embrace only one subject, which must be expressed in the title.[23] Except for legislation introduced by the resident commissioner with the express concurrence of the Secretary of the Interior or his delegate, amendment by reference is prohibited.[24] Sessions of the legislature and its committees must be public except when meeting in executive session.[25]

C. General Policy Considerations

The three general policy considerations that affect most of the specific issues to be decided by the delegates are the type of representation to be made available to the

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19/ CHARTER art. II, § 2.

20/ CHARTER art. II, § 1.

21/ Order 2989, pt. III, § 9(a).

22/ Order 2989, pt. III, § 9(b).

23/ Order 2989, pt. III, § 9(c).

24/ Order 2989, pt. III, § 9(d).

25/ Order 2989, pt. III, § 9(f).

people of the Northern Mariana Islands, the relative position of the legislative and executive branches of the government and the relative positions of the two houses of the legislature.

The central function of the legislature is to afford representation of the people of the Northern Mariana Islands, and through representation, participation in the affairs of the Commonwealth government. The type of representation to be afforded by the legislature, in terms of both method of representation and number of members, affects many of the specific decisions to be made by the Convention. Representation by geographic location -- on the islands of Saipan, Rota and Tinian -- is guaranteed by the Covenant's requirement of one of two houses with equal representation from each of these jurisdictions.[26/] The Covenant, however, does not deal with the extent of the representation in either house. One member of the legislature can represent a relatively large or relatively small number of residents. At one end of the spectrum, all legislators could be required to run at-large within each island (for one house) or within all municipalities in the Commonwealth (for the other house).

26/ Without intending to prejudge decisions to be made by the Convention, the house with equal representation for the three islands will sometimes be referred to in this discussion as "the upper house," and the other will be referred to as "the lower house."

At the other end, each legislator could represent only the residents of a small village district within one of the municipalities. Numerous variations exist between these two alternatives. At-large representation maximizes the community of interest in the larger geographic area, either the Commonwealth as a whole or an island within the Commonwealth. District representation emphasizes the unique needs of villages or other discrete parts of the islands.

The type of representation affects (and is affected by) decisions with respect to the size of the legislature, the length of terms of legislators, the legislative powers to be granted and the allocation of those powers between the houses. At-large representation permits a smaller legislature, supports longer terms (or at least is likely to produce incumbents over longer terms), presents fewer reasons for withholding a full grant of legislative power, and permits maximum flexibility in allocating the powers between the houses. Small district representation, at the other end of the spectrum, requires a larger legislature because of the limitations of the one-man one-vote rule (applied to the lower house) that will require all districts to be as nearly the same size as practicable. It might support shorter terms (or at least is more likely to permit incumbents to be unseated) and might present more reasons for a grant of enumerated powers rather than general powers.

The second general policy issue that affects many of the specific issues to be decided by the delegates is the relative position of the executive and legislative branches. The executive branch and the legislative branch must be separate institutions under the Covenant's mandate. However, the relative powers given to the two branches and their organization will determine how these two branches mesh in the making of governmental decisions.

If the delegates want to shape a very strong legislative branch, they would consider a full grant of all legislative power to the legislative branch, allocation of most of the legislative power to one house that could function as the focus of legislative branch policy-making, at-large election of all legislators, and relatively long (five- to six-year) terms of office for legislators.[27/] These factors would enable the legislature to exercise full control over the legislative domain and maximum political power within the government.

A legislative branch with less emphasis on political power might utilize a general grant of legislative power, a more equal allocation of that legislative power between the two houses, and election of legislators from

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27/ In addition, such an objective would influence the Convention's decision on the veto power and those other powers exercised by the executive branch affecting the legislative powers. See BRIEFING PAPER NO. 2: THE EXECUTIVE BRANCH OF GOVERNMENT § II(A).

medium to large districts for medium length (three- to four-year) terms.

If the legislative branch is to be subordinated to the other branches, the delegates could consider a grant only of enumerated powers (rather than a general grant of power), allocation of all powers to each house, and the election of legislators from small districts for short terms.

The relative position of the legislative branch will also be affected by factors beyond the powers and basic structure that can be set out in the Constitution. The efficiency with which the legislative branch is run, the quality of the members, and the effectiveness of the staff will all contribute to the ability of the legislature to take the lead in articulating and shaping Commonwealth policy. Another important factor is the effectiveness with which the legislature exercises its power of oversight of the other branches. This function is usually exercised as a part of the appropriation process when executive branch performance is examined in the course of evaluating budget requests for particular agencies. Hearings on the confirmation of appointments also provide an opportunity for the legislature to evaluate the performance of an executive branch agency, as well as the qualifications of the appointee. A similarly useful power is that of investigation, normally held to be an inherent attribute of the law-making body.

Not only does this power permit informed law-making, but in a more general sense it provides a means of public education.[28/] None of these factors can be written into the Constitution; therefore the delegates should expect only to foster and not to guarantee the balance of power between the executive and legislative branches or legislative effectiveness.

The third policy issue facing the delegates is the allocation of legislative power between the two houses of the legislature. The upper and lower houses will represent the same constituency in different ways. The representatives from Rota and Tinian in the lower house, elected under the one-man one-vote rule, will be outnumbered by the representatives from Saipan. The opposite will pertain in the upper house where the representatives from Rota and Tinian, elected under the equal representation-by-island rule, will outnumber by a two-to-one margin the representatives from Saipan.

The delegates will have to decide what, if any, parts of the legislative power should be vested exclusively in the upper house because of the importance of an equal voice for all three islands. Local legislation and approval

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28/ J. Davies, LEGISLATIVE LAW AND PROCESS IN A NUTSHELL pp. 161-69 (1975).

of executive appointments may be two such areas. The delegates will also have to decide what, if any, parts of the legislative power should be vested exclusively in one or the other house to accommodate interests of efficiency or the particular needs of certain legislative functions. Impeachment is an example of a legislative function where an allocation of legislative authority between the houses may be required by the nature of the function itself. Traditionally, the lower house brings the impeachment charges and presents the case for impeachment, and the upper house sits as a court to decide whether the charges have been proven. As with the relative positions of the executive and legislative branches within the Commonwealth government, the relative positions of the upper and lower houses may be affected more by the quality of their members and the efficiency of their procedures than by any specific provision that can be included in the Constitution.

II. SPECIFIC ISSUES FOR DECISION

This section examines each of the major alternatives available in shaping the legislative branch. Section A describes the ways in which legislative power can be vested. Section B describes the basic organization of the legislative branch and discusses some of the principal issues relating to the size, method of representation, and length of terms that might be specified in the Constitution. Section C deals with constitutional provisions that affect the

individual legislators such as qualifications for office, method of filling vacancies, and privileges and immunities. Section D outlines briefly the alternatives with respect to the procedures that might be used by the legislature once it is organized and the members are elected.

A. Powers of the Legislative Branch

This section discusses two decisions to be made by the delegates: first, the extent of the legislative power to be vested in the legislature as a whole; and second, the allocation of that power between the two houses of the legislature.

1. Extent of legislative powers

Section 203(c) of the Covenant states that the legislative power of the Northern Mariana Islands extends to "all rightful subjects of legislation."[27A/] "Rightful subjects" exclude only those specifically prohibited by the Covenant, United States Constitution provisions, United States laws, or provisions of the Northern Marianas Constitution.[28A/]

27A/ The legislative history for this provision indicates that great latitude intended for the Convention with respect to legislative power. According to one authoritative analysis of the Covenant, § 203(c), the minimal restriction on legislative power, was "another manner in which the right of local self-government is guaranteed." This goal is achieved by providing "the broadest formulation of legislative power which is possible for the Commonwealth." Hearing on S.J. Res. 107 Before the Senate Comm. on Interior and Insular Affairs, 94th Cong., 1st Sess., pp. 382-83 (1975).

28A/ Id. p. 383.

The Convention, therefore, has a full range of options before it with respect to the grant of legislative power. It can:

- provide a full grant of all legislative authority made available by the Covenant subject only to the express and implied limitations created by other articles of this Constitution;
- provide a full grant of legislative authority with specified reservations included in the legislative branch article; or
- grant only selected powers that are specifically enumerated in the legislative branch article and restrict the legislative branch from exercising any power not so enumerated.

The advantages, disadvantages and state experience with each of these alternatives are set out below.

a) Full grant of legislative power

In order to vest all legislative authority in the legislature, the Convention could adopt a provision such as that used by the Model State Constitution: "The legislative power of the state shall be vested in the legislature,"[29/] or

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29/ National Municipal League, MODEL STATE CONSTITUTION art. IV, § 4.01 (6th rev. ed. 1968) [hereinafter cited as MODEL CONST.]

simply repeat the words of the Covenant's section 203(c): "The legislative power . . . will be vested in a popularly elected legislature and will extend to all rightful subjects of legislation." If no limitation is set out in the article on the legislative branch, then the legislature is free to exercise its power in any way not prohibited or limited by other articles in the Constitution. Any restrictions flowing from other articles will be of two types: express and implied.

Express limitations will result from any decisions by the Convention that a specific subject of possible legislative concern requires constitutional treatment.[30/] To the extent that the Constitution addresses a particular subject matter, it preempts the legislature from dealing with that subject matter in any different way. For example, if the Constitution specifies the basic structure of the Commonwealth educational system in an article on education, that provision operates as an express limitation on the legislative power to enact laws that deal with the structure of the educational system because such laws must be consistent with the constitutional provision.

30/ Some subjects that may be so regarded by the Convention are discussed in BRIEFING PAPER NO. 10: TAXATION AND FINANCE; BRIEFING PAPER NO. 11: NATURAL RESOURCES; BRIEFING PAPER NO. 12: RESTRICTIONS ON LAND ALIENATION; BRIEFING PAPER NO. 13: EDUCATION; and BRIEFING PAPER NO. 14: CORPORATIONS.

Implied limitations arise out of the grants of power in the Constitution to other government institutions. As the Convention considers the general rules applicable to each of these basic institutions,[31/] it will make decisions that may make a full grant of legislative power more limited than it appears on its face. For example, a grant of power to the governor to determine the number and jurisdiction of executive branch departments is an implied limitation on the legislative branch that restricts it from dealing with that subject.

One other type of implied limitation arises when the legislative article in the Constitution includes both a general grant of powers and specific grants of powers with respect to certain subjects. The implied limitation arises out of the concept that general grants of legislative power, as described above, are plenary and therefore an additional specific grant of power to enact a particular sort of law can give the legislature nothing, as it possessed complete power without the grant. Thus, such provisions are meaningless

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31/ The basic institutions of the Commonwealth government, other than the legislative branch, are discussed in BRIEFING PAPER No. 2: THE EXECUTIVE BRANCH OF GOVERNMENT; BRIEFING PAPER NO. 4: THE JUDICIAL BRANCH OF GOVERNMENT; BRIEFING PAPER NO. 5: LOCAL GOVERNMENT; and BRIEFING PAPER NO. 6: REPRESENTATION IN WASHINGTON.

The general rules applicable to all basic institutions of the Commonwealth government are discussed in BRIEFING PAPER NO. 7: BILL OF RIGHTS; BRIEFING PAPER NO. 8: ELIGIBILITY TO VOTE AND ELECTION PROCEDURES; and BRIEFING PAPER NO. 9: CONSTITUTIONAL AMENDMENT.

if read as serving only to confer power. In order to avoid reading them as meaningless, courts may therefore treat such particular grants as implicitly establishing exceptions to the general grant. This is done by reading particular grants as not merely permitting the particular power granted to be exercised, but further as forbidding the legislature to exercise the overall type of power in any circumstances other than those of the particular grant.[32/] In short, it may be said that grants of particular powers may be read as limitations on general powers. This result may be avoided by provisions such as that of article XIV, section 14 of the Hawaii constitution:

32/ For example, the Tennessee constitution, as it stood in 1932, permitted the legislature to impose "privilege" taxes. It also provided: "The legislature shall have the power to levy a tax upon incomes derived from stocks and bonds that are not taxed ad valorem." The legislature, in 1931, enacted a graduated tax upon incomes from all sources. The Tennessee supreme court struck down the income tax, stating:

> If the Convention of 1870 contemplated an income tax as a privilege tax, it must have included the income tax clause as a limitation on the power to levy such a tax. From such a viewpoint this clause is an exception or a proviso. The clause was certainly not designed to confer an additional power of privilege taxation. The preceding clause, in terms as broad as possible, had countenanced the power of the Legislature to tax every privilege.

Evans v. McCabe, 164 Tenn. 672, 52 S.W.2d 159, 162 (1932) (emphasis added).

> The enumeration in this constitution of specified powers shall not be construed as limitations upon the power of the State to provide for the general welfare of the people. 33/

The safest course, however, is simply to make no grants of particular powers except where limitations are in fact intended or when there is room for doubt that the power involved is included within a general grant, as is true, for example, of the impeachment power. 34/

The advantage of a system in which there is a full grant of legislative power in the legislative branch article, subject only to the express and implied limitations created by other articles in the Constitution, is the maximum flexibility given the legislature to deal with the future needs and desires of the people. The disadvantage of this system is that this wide latitude creates a greater possibility of unwise use of the legislative power either for the benefit of special interests or without sufficient fiscal and political responsibility.

33/ HAWAII CONST. art. XIV, § 14.

34/ See generally R. Berger, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS (1973).

b) Full grant of legislative power with specified exceptions in the legislative branch article

Under this option, the Convention would begin with the same general grant of legislative power discussed above, but would add specific restrictions on the exercise of that power.

There are two such restrictions that are used in a number of jurisdictions: a prohibition on special laws and a prohibition on local laws.

A special law is one that applies to some individuals or entities but does not apply to others that are similarly situated; for example, a law that gave a franchise to one corporation, a law that exempted grocery store owners from jury duty or a law that returned to a private owner the property on which a public street had been located. In each of these cases, the special law affected only a specified segment of the group that would have been affected if the law had been "general" in nature.

A local law is one that applies to all the persons living in a particular locality (a village, district, or island) but does not apply to all persons living in the Commonwealth. An example would be a law that permitted the residents of Rota to be exempted from jury duty, or a law that gave the power to regulate street vendors only to the local government of Tinian. Since jury duty and street

vendors are subjects that can arise on all three islands, these would be local laws.

The advantage of limitations with respect to special and local laws is that they prevent special interest groups or local lobbyists from persuading the legislature to provide benefits that are not available to all residents of the Commonwealth who are similarly situated.

The main disadvantage of such limitations, especially in the Commonwealth, is that they take away a principal legislative mechanism for providing the adjustments necessary to get the Commonwealth government underway. 35/ A subsidiary disadvantage is that legislatures have proven adept at circumventing these limitations by wording special laws or local laws so as to appear to be general laws. Therefore, the limitations may actually apply in only a few cases and those may not be the cases that were the main reason for enacting the limitation in the first place.

There are several ways in which the Convention could deal with the subject of special and local laws. First, the Constitution could state affirmatively that there shall be no limitation on the legislature's power to enact special laws.

35/ For example, a prohibition on special laws would cause difficulty in dealing with problems of land rights, as pointed out in BRIEFING PAPER NO. 11: NATURAL RESOURCES § II(A)(3).

A prohibition on local laws would deprive the legislature of one means of dealing with the problems of each island or village.

This would leave the legislature totally unrestricted in the form in which laws might be enacted.

Second, the Convention could forbid all such laws, as Arkansas does.[36/] Alternatively, prohibitions on special laws as to certain subjects could be set out; Idaho's constitution lists 32 types of special laws which may not be enacted, ranging from acts punishing crimes to those chartering ferries.[37/] This manner of handling the problem prevents some types of discrimination through special laws, but is practical only in a situation where local authorities have the authority to deal with local affairs so that the special needs of localities can be met on that level. The advantages and disadvantages of this type of delegation of power to local governments is discussed in Briefing Paper No. 5: Local Government.

A third approach would permit special or local laws but limit the number of classifications that the legislature may make. Maryland uses this system, requiring its general assembly to act as to municipal corporations only by general laws applying alike to all municipalities in any

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36/ ARK. CONST. amend. 14: "The General Assembly shall not pass any local or special act. This amendment shall not prohibit the repeal of local or special act."

37/ IDAHO CONST. art. III, § 19.

one class, and requiring the classification of all municipalities into not more than four classes.[38/] In the Northern Mariana Islands, however, such a requirement is at most an illusory protection in view of the small number of entities potentially involved.

Fourth, the Constitution could forbid special laws as to subjects that a general law covers or could cover. California uses this approach.[39/] Such a provision is based on the assumption that, if general laws are not possible, then a special statute is probably justified. This approach could be used where no powers or very limited powers were delegated to local governments and special legislation is needed to meet particular local problems that fall outside the grant of authority to the local government.

Fifth, the Convention may wish to regulate the manner of adoption of a local law, without regard to its

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38/ MD. CONST. art. XI-E:

> Section 1. . . . the General Assembly shall act in relation to . . . any such municipal corporation only by general laws which shall in their terms . . . apply alike to all municipal corporations in one or more of the classes provided for in Section 2 of this Article. . . .
>
> Section 2. . . . the General Assembly, by law, shall classify all such municipal corporations . . . into not more than four classes based on populations. . . .

39/ CAL. CONST. art. IV, § 16:

> A local or special statute is invalid in any case if a general statute can be made applicable.

subject matter. One approach would permit local laws but would require an extraordinary majority of the legislature to enact them. Rhode Island does this.[40/] Since the three main islands of the Commonwealth will be equally represented in the upper house of the legislature, another approach would be to require local laws to originate in that house. Alternatively, the Constitution could permit local laws approved by both the legislature and the voters of the affected locality in a referendum. Alaska took this approach regarding certain laws.[41/] This avoids the rigidity inherent in limiting special laws by their subject matter, with the added advantage of leaving the ultimate choice up to the voters affected.[42/]

c) Grant of enumerated powers

The third alternative limits the grant of power to the legislative branch to certain enumerated powers. The

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40/ R.I. CONST. art. IV, § 14:

> The assent of two-thirds of the members elected to each house of the General Assembly shall be required to every bill appropriating the public money or property for local or private purposes.

41/ ALAS. CONST. art. II, § 19:

> Local acts necessitating appropriations by a political subdivision may not become effective unless approved by a majority of the qualified voters voting thereon in the subdivision affected.

42/ Some or all of the foregoing could be combined. Alaska is again an example, its constitution containing a prohibition on special laws when general laws can be made applicable, as well as the referendum requirement. ALAS. CONST. art. II, § 19.

United States Constitution is an example of this type of system.

Article I, section 1 provides:

> All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.

The limitation to powers "herein granted" means that Congress cannot exercise any power not specifically mentioned in Article I. 43/

43/ The powers that can be exercised by Congress are set out in § 8:

> The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;
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> To borrow Money on the credit of the United States;
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> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;
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> To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;
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> To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;
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> To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;
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> To establish Post Offices and post Roads;
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> To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;
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> To constitute Tribunals inferior to the supreme Court; . . . And
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> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

U.S. CONST. art. I, § 8.

The utility of limiting a legislature to enumerated powers is based on the propositions that the government can more easily be restrained if it must point to particular constitutional provisions to justify any exercise of power, and that it is impractical to rely on removal of legislators from office at the next election as a means of controlling legislative excesses. This approach assumes that it is possible to list clearly all the powers the government may need and further that the government may attempt to enact repressive laws on certain subjects unless its lack of power to act on these subjects is clear.

No American state uses this method of empowering its legislature. In part, this may be because the states, in American constitutional theory, hold all the powers of government not delegated to the United States government. If the public welfare requires the enactment of a law that is beyond the power of the United States government, it is up to the individual states to act. Since it is difficult to list all the powers that may be necessary for a government, it is possible that a state, limited to a list, could find itself in a situation in which it could not act as the public welfare demanded because the particular power involved was not on its list. If the needed power were not granted to the United States government or to a local government, the

people of the state would have to amend the constitution or do without the needed law.[44/]

A second problem with an enumeration lies in the definitional problems it creates. For example, if legislative powers included the subject of health and welfare, questions would arise as to whether the term "health" included activities in the fields of mental health, mental retardation or drug abuse control. Similarly, there are problems with the legal presumptions that would be created under this system. If a government can exercise no power not listed, and a particular exercise of power is challenged, it is up to the government to show that the power is granted, instead of being up to the challenger to show the power is

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44/ This is demonstrated by the rule applied to the U.S. government. As the Supreme Court has stated:

> The powers granted by the Constitution to the Federal Government are subtracted from the totality of sovereignty originally in the states and the people. Therefore, when objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed toward the granted power under which the action of the Union was taken. If granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail.

United Pub. Workers v. Mitchell, 330 U.S. 75, 95-96 (1947) (emphasis added).

However, it is likely that a court, faced with creating a vacuum by a restrictive interpretation of such a list, would construe the items on the list as liberally as possible.

not granted.[45/] Thus, to limit the legislative power to a list not only risks omitting an important power, but also makes it more difficult to justify any novel exercise of power not clearly on the list.

2. Allocation of legislative power

Section 203(c) of the Covenant requires that the legislature have two houses. However, the Covenant is silent as to the allocation of the legislative power between the two houses.

There are three basic alternatives from which the delegates may choose:

- There may be no allocation of powers in which case all powers would be required to be exercised jointly;
- The lower house may be given certain powers and responsibilities that it may exercise to the exclusion of the upper house;
- The upper house may be given significant powers and responsibilities to the exclusion of the lower house.

45/ In the Commonwealth, if full legislative power is not given to the legislature, the powers not given are retained by the people and may be given to the legislature by subsequent constitutional amendment.

These "alternatives" are not mutually exclusive. The roles of the two houses could vary with respect to different areas of legislative activity.

In determining how power should be distributed between the houses of the legislature, the Convention confronts a unique situation. It must find a fair way to take account of the interests of Rota and Tinian, as reflected by their control of the upper house, without losing sight of the basic undesirability and instability of a system that does not rely primarily on majority rule.

American experience will be of limited use in this area. The differences in powers between houses of American state legislatures are usually not very great. One or the other may have exclusive power to originate certain sorts of bills,[46/] or confirm appointments,[47/] and roles in impeachment proceedings may differ,[48/] but there are few other distinctions. In part, this is because both houses of American state legislatures are required to be apportioned under the one-man one-vote rule. There is no upper house in state legislatures based on equal representation for geographic

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46/ For example, in some states only one house may originate appropriation bills. E.g., ALA. CONST. art. IV, § 70; MINN. CONST. art. IV, § 10; PA. CONST. art. III, § 10.

47/ Several states reserve this function to the senate. E.g., HAWAII CONST. art. IV, § 6; MO. CONST. art. IV, § 17; N.Y. CONST. art. V, § 4.

48/ E.g., ALA. CONST. art. VII, § 173; ARK. CONST. art. XV, § 2.

areas similar to the upper house of the Northern Marianas legislature.

Under a system with no allocation of legislative powers between the houses, either house could initiate any kind of bill and both houses would have to pass a bill before it could be sent to the governor. This system, with minor limitations as to initiation of bills and impeachment proceedings, works well in all 49 states that have a legislature with two houses.[49/] Use of two houses exercising power jointly permits careful consideration of proposed measures by the representatives of two different constituencies and a thorough airing of points of view during successive debates. By requiring that every proposed bill be presented, debated, and voted on twice as it passes through the two houses, this system minimizes the risk of enacting ill-considered or poorly drafted legislation.

There are certain drawbacks to requiring joint action by the two houses. First, such an approach could lead to a less effective legislature since disagreements between the two houses, if unresolved, could result in a legislative deadlock. To avoid this difficulty, the Constitution could provide for an override by one house of the "veto" of the other. The purpose of requiring the joint action of both houses, however, is in part to give protection against arbitrary action by either house. Insofar as one

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49/ Nebraska has a legislature with only one house. NEB. CONST. art. III, § 1.

house is allowed to act autonomously through an override provision, this protection would be lost. A further mechanism for avoiding a deadlock between the two houses is the device of "conference committees." These joint committees, composed of members of both houses, meet to compromise differences in bills passed by both houses. Some visibility of the legislative process is lost with the use of these committees.

The alternative of vesting some portion of the legislative power exclusively in one house -- either the upper house or the lower house -- should be analyzed in terms of the type of power to be vested. A general legislative power -- enactment of legislation, appropriation of public funds or override of executive branch vetoes -- is of central importance to the functioning of the legislative branch. Allocating that power in a way that excludes one of the houses would be a very serious departure from traditional American practice and probably from the intent of the Covenant.[50/] A legislative power with respect to specific

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50/ The Covenant requires that the legislature have two houses. Implicit in that requirement is the exercise of the legislative power by the two houses in such a way as to give each a meaningful role. It is unlikely that the Covenant permits one house to be relegated to an advisory role by depriving it of general legislative powers. The legislative history of the Covenant indicates that the draftsmen intended the Northern Marianas legislature to function in the same general way as the Congress of the United States, where the two houses exercise the general legislative powers jointly. Hearing on H.J. Res. 549, H.J. Res. 550, and H.J. Res. 547 Before the Subcomm. on Territorial and Insular Affairs of the House Comm. on Interior and Insular Affairs, 94th Cong., 1st Sess., pp. 633-34 (1975).

functions -- such as impeachment or confirmation of executive appointments -- is more readily allocated to one house or the other. These functions are limited and there is a substantial precedent for allocation in the practice of the states. Similarly, a legislative power to initiate bills dealing with specific subjects -- such as taxation -- can be allocated to one house without serious inroads on the legislative capacity of the other house, and this is frequently done by the states.

State experience with allocation of legislative power is summarized below.

a) Impeachment

Forty-seven state constitutions require the lower house to bring impeachment proceedings against the governor and forty-six state constitutions require the senate to sit as the court of impeachment.[51/] Similarly, the United States Constitution gives the House of Representatives the sole responsibility for bringing impeachment charges and the Senate has the sole responsibility for deciding the case. Since the design for the Northern Marianas legislature was taken primarily from the Congress, the delegates might want to follow this allocation of legislative powers with respect to

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51/ Legislative Drafting Research Fund, INDEX DIGEST OF STATE CONSTITUTIONS pp. 536-37 (1959), and p. 154 (Supp. 1971) [hereinafter cited as INDEX DIGEST]. E.g., VA. CONST. art. IV, § 17: "The Governor . . . may be impeached by the House of Delegates and prosecuted before the Senate, which shall have the sole power to try impeachments."

impeachment. An alternative is to alter the role of the upper house. In light of the peculiar nature of the proceedings, and the distinction between their subject matter and the interests the upper house is to represent, the Convention may wish to consider the system followed by Missouri and Nebraska, whose highest courts try impeachments. 52/

b) Executive appointments

Because many aspects of government in the Commonwealth are likely to be the responsibility of the executive branch, it is important that the persons who actually administer the government's programs be especially sensitive to the needs of all the people of the Commonwealth. Appointment of agency heads by the governor will insure that majoritarian considerations are not neglected. For that reason, it might be somewhat redundant to involve the lower house in the process. But, to ensure that geographical minorities are not neglected, there is reason to give the upper house power to confirm executive appointments. This would ensure that no locality would find itself governed by an official known in advance to be unsympathetic to it.

c) Local legislation

The Commonwealth legislature may have extensive power to legislate for localities. In view of the sensitivity of this issue, the Convention may wish to provide that, however

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52/ MO. CONST. art. VII, § 2; NEB. CONST. art. III, § 17.

other legislation is treated, legislation affecting only one locality must originate in the house in which that locality's proportion of seats is greater. The Constitution could also require participation by the originating house in overriding a veto of such legislation, whatever the usual rule on vetoes might be. This approach would lessen the likelihood that local legislation could be put forward by the house in which the affected locality could not adequately make itself felt.

d) Origination of revenue bills

Twenty-one state constitutions provide that bills for raising revenue must originate in the lower house and that the upper house may propose amendments to them.[53/] Control over the public treasury is the essence of self-government and debate over appropriation bills is generally extensive. It may be appropriate, therefore, to permit the majority-selected house to originate money matters and to determine (by passage of appropriation bills) which revenue matters will be placed before the house selected to represent geographical areas.

53/ INDEX DIGEST p. 601. E.g., S.C. CONST. art. III, § 15: "Bills for raising revenue shall originate in the House of Representatives, but may be altered, amended, or rejected by the Senate . . . ."

B. Organization of the Legislature

This section outlines the decisions to be made by the delegates with respect to the basic organization of the legislature. It deals with the name, size and method of representation to be used and the length of the legislators' terms.

1. Name of the legislature

The Constitution should provide the official name for each house of the legislature and for the entire legislative body. All states having a bicameral legislature have named the upper house the "Senate." The lower house is most often referred to as the "House of Representatives" (with "House of Delegates," "Assembly" and "General Assembly" as alternatives). The legislative body as a whole is usually called the "Legislature." Alternatives include "General Assembly," "Legislative Assembly" and "General Court."[54/] The Convention, of course, may decide to use new names.

2. Size of the legislature

The Covenant does not restrict the number of members of either house of the legislature. In considering

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54/ Council of State Governments, BOOK OF THE STATES 1976-77 p. 41 (1976) [hereinafter cited as BOOK OF THE STATES].

what size is desirable for each house, the Convention must reconcile several competing concerns. A large house[55/] may provide better representation for the multitude of interests within the Northern Marianas. Many members will be available to staff committees specializing in various legislative areas. A relatively large number of representatives in the upper house from each of the chartered municipalities will decrease the likelihood of arbitrary action or unified voting by two of the municipalities against a third.

A small house[56/] tends to act more quickly and efficiently. Representation, although not as varied, may be more effective. Each representative will be afforded a greater opportunity to be heard and, therefore, will tend to be more influential. When the legislature is small, more legislative work will be done by the body at large than by committees since a small membership cannot staff extensive committees. Although this deprives the legislature of the expertise accumulated by committee members, it tends to make legislative activities more visible to the public. A small house is relatively less costly.

55/ At present, the largest state legislative house is the New Hampshire house of representatives which has 400 members. BOOK OF THE STATES, p. 43. Appendix A sets out the number of members of each house and compares the size of the legislature with the size of the state's population and its area.

56/ At present, the smallest state legislative house is the Delaware senate which has 18 members. BOOK OF THE STATES, p. 42.

There are three alternatives available to the delegates: (1) specify the size of each house in the Constitution; (2) set a maximum or minimum size in the Constitution and leave the exact number to the legislature; and (3) leave the entire decision with respect to size to the legislature.

The first alternative -- providing the specific number of seats in each house by Constitutional provision -- is the approach used by most state constitutions.[57/] This approach provides stability for the legislative branch, because this basic organizational characteristic cannot be changed except by constitutional amendment. It prevents changes in the size of the legislature to meet current political goals such as packing the legislature with newcomers favorable to a particular legislative program or denying an opponent a seat by reducing the number of seats. The principal disadvantage is that changes necessary to meet reapportionment requirements may be more difficult to accomplish.[58/]

57/ Appendix A lists the states that have such constitutional provisions. If the Constitution adopted any of the other alternatives, it would have to specify, as an interim measure, the number of members to be elected in the first election.

58/ Reapportionment is discussed at § II (B)(3)(b) below, and in Appendix B.

The second alternative -- setting a maximum or minimum size -- permits the legislature to establish the size of each house within specified constitutional limits. Nearly half of the states use this method.[59/] This approach provides some additional flexibility to meet reapportionment problems while limiting the scope of the political contest over the number of seats.

Under the third alternative, the entire matter is left to the legislature. This would permit the legislature to increase or decrease its own size whenever a majority could be mustered to do so. The advantage of this system is that it provides maximum flexibility to meet reapportionment and other unanticipated demands with respect to representation. The principal disadvantage is that there is a built-in incentive to increase steadily the size of the legislature and to incur all the disadvantages of large size. To require the legislators to act in a

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59/ INDEX DIGEST pp. 651-53, and pp. 185-86 (Supp. 1971). For example, the Virginia constitution specifies that the "Senate shall consist of not more than forty and not less than thirty-three members . . . ." and that the "House of Delegates shall consist of not more than one hundred and not less than ninety members . . . ." VA. CONST. art. IV, §§ 2, 3. Similarly, WASH. CONST. art. II, § 2: "The House of Representatives shall be composed of not less than sixty-three nor more than ninety-nine members . . . ."

manner that maximizes efficiency when their own seats are in question may be unrealistic.

3. Method of representation

Because the method of representation will be different for the upper house and the lower house, each is treated separately below. Before reaching the specific method to be used for each house, the delegates should consider the alternatives both with respect to the representation plan and the voting plan. There are three principal alternatives with respect to the representation plan:

- at-large election: all candidates represent the entire geographic area (an island or the Commonwealth) and are responsible to all the voters in that geographic area. Under this system, if there are five representatives to be elected and 10 candidates, the five candidates receiving the highest number of votes are elected;
- single-member districts: all candidates represent only the residents of a particular geographic area -- one or more villages, or some other portion of an island -- and the residents of that area have only a single representative. The single candidate

receiving the highest number of votes is elected; and

- multi-member districts: all candidates represent only the residents of a particular district, but some or all of the districts are represented by more than one representative. The election of candidates is similar to the at-large system.

Similarly, there are three principal alternatives with respect to the voting plan:

- single vote system: each qualified voter has one vote and may cast that vote for only one of the candidates;
- multiple vote system: each qualified voter has as many votes as there are representatives to be selected from his district (under a multi-member district system) or island or throughout the Commonwealth (under an at-large system). These votes can be cast in one of two ways:

  non-cumulative voting -- a voter may cast only one vote for a particular representative (if there are five

representatives to be chosen from a field of nine candidates and each voter has five votes, he must cast those five votes for different candidates or decline to use some of his votes); or

cumulative voting -- a voter may cast one vote for a particular representative or cumulate all of his votes and cast them for the same representative (under the example above, each voter would have five votes and could apply them in any combination -- all five votes for one candidate, one vote for each of five candidates, three votes for one candidate and two votes for another, and so on); and

° proportional vote system: each qualified voter has only one vote but in casting that vote the voter ranks the candidates in order of preference (through as many seats as there are to be filled). Under one such system, the votes are tabulated first by assigning the voter's single vote to his first-choice candidate. The candidates are ranked in order

of the number of first-choice votes, and the last-ranked candidate is eliminated. Then all of the votes for that last-ranked candidate are redistributed according to the second choice of the voters who voted for that candidate. After that redistribution, the remaining candidates are once again ranked, and the last candidate is again eliminated. The process is repeated until only enough candidates remain to fill the number of seats open. In this way every voter's contribution to the consensus is maximized.

a) Upper house

The upper house is required to have equal representation from each of the three main islands.[60/] The actual number of representatives from each island could vary from one to 10 or more, and there is no limitation on the method by which they are selected.

The simplest representation plan for the upper house would be to have all candidates from each island run

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60/ COVENANT art. II, § 203(c).

at-large. This would also be in keeping with the intent of the Covenant to afford representation in the upper house by island. If all candidates ran at-large, each representative elected to the upper house could speak for all the people of the island he represents.

The delegates could also choose representation by districts for the upper house, using either single-member or multi-member districts. The district system reduces the effectiveness of the members of the upper house as representatives of island-wide interests, but may increase the contact between the representatives and the voters.

Because the Covenant requires only equal representation for each island and the restrictions of the Fourteenth Amendment of the United States Constitution do not apply, the delegates could select a combination of at-large and district representation for the upper house. Under this system, each district might have one representative, and the remainder of the representatives would run at-large. This would combine the benefits of representation through smaller units with the benefits of having spokesmen with island-wide constituencies.

If the Convention chooses an at-large system or multi-member district system, it could use any one of the three voting systems -- single vote, multiple vote or

proportional vote. If the Convention chooses a single-member district plan, then it will probably want to use the single vote system, although proportional voting could be considered as well.

The single vote system is the traditional method of electing candidates for all types of offices, including those in the legislative branch. It is used in Congressional elections and in at least 28 states for elections of members of the legislative branch.[62/] Its advantages are simplicity and acceptance. Tabulating votes can be done quickly after the polls close even without sophisticated equipment. Most voters find this system easy to understand and an accepted part of the political tradition. It tends to promote a two-party system because the votes of splinter groups have relatively less effect if cast for separate candidates. Further, it minimizes the possibility of election fraud. Its disadvantages are: (1) if a substantial number of candidates run for office there is likely to be a thin distribution of votes over candidates and it would be possible to elect a representative on a very small plurality. This representative could be handicapped in having a relatively unstable political base; (2) the system minimizes the impact that minority group

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62/ BOOK OF THE STATES pp. 44-45 (states without multi-member districts).

voters have and if a great number of candidates participate (and run-off elections are not used), it does not necessarily reflect the consensus as to the best candidate; (3) voters who prefer one candidate only slightly over another, but prefer both of those candidates greatly over any other, cannot express those relative preferences; (4) where more than one candidate is to be elected, the single vote system allows the voter to express only a part of his preference.

A multiple vote system is also relatively easy to manage administratively, and results can be tabulated about as fast as under a single vote system. This system permits each voter to contribute more to the consensus, increases the likelihood that representatives will be elected by a majority vote and allows minority group voters to have more chance of electing their candidate (either by withholding votes under the non-cumulative system, or by casting all votes for one candidate under the cumulative system.)[63/] The disadvantages of this system are: (1) some voter education would be required to ensure that voters who have never used this system exercise their right to vote in an informed fashion; (2) it is somewhat more difficult to administer with illiterate voters and may be somewhat more susceptible to election fraud than

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63/ This system generally provides better representation for minorities that are dispersed geographically.

the single vote system; and (3) this system may permit the election of more candidates by splinter groups, thus affecting the security of the two-party system. Every state that has at-large elections to fill more than one vacancy or that uses multi-member districts also uses a multiple vote system except Puerto Rico. The Puerto Rico constitution limits voters to a single vote.[64/] Every state that uses a multiple vote system also uses the non-cumulative form of that system except Illinois, which has a system of cumulative voting.[65/]

A proportional vote system maximizes the contribution of each voter to the consensus and ensures that the candidates with the broadest popular support are elected. Under this system, a vote cast for an obscure candidate is not wasted because if that candidate does not succeed in getting enough other votes to stay on the list, the voter's second choice gets his vote. Similarly, if the voter's second choice does not get enough other votes to stay on the list, the voter's third choice then gets his vote. This system encourages a wide range of candidates to run for office and provides maximum opportunity for minority groups to elect representatives from their own group. The disadvantages of this system are the difficulty in

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64/ P.R. CONST. art. III, § 3.

65/ ILL. CONST. art. IV, § 2(b).

administration, although with modern tabulating equipment this problem is not great. This system is also somewhat more complicated and difficult for voters to understand so that it might require an extensive voter education program.

In weighing these possibilities with respect to the upper house, the delegates will want to take into consideration the plan for representation in the lower house as well. To the extent that the voting system for the two houses is the same, voter confusion and difficulty will be minimized.

b) Lower house

The lower house is required to have a representation system that ensures that each legislator represents, as nearly as possible, the same number of residents or voters. This is known as the one-man one-vote rule and it arises out of a Supreme Court decision interpreting the Fourteenth Amendment to the United States Constitution.[66/]

Under this rule, if Tinian has 1000 residents and two representatives, each representative represents

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66/ Reynolds v. Sims, 377 U.S. 533 (1964). Section 501 of the Covenant makes the Fourteenth Amendment applicable to the Northern Mariana Islands.

The one-man one-vote rule can be applied using standards of total population, citizen population, eligible voters, Burner v. Richardson, 384 U.S. 73, 91-92 (1966), and perhaps registered voters. Gaffney v. Cummings, 412 U.S. 735 (1973). The relevant standard may be set by the delegates in the Constitution or by the legislature.

500 residents. Then Saipan, if it has 14,000 residents, is then entitled to 28 representatives so that each of its representatives also represents 500 residents. The one-man one-vote rule does not require that a representative represent any particular number of residents -- only that the number of residents represented by each representative be approximately the same.[67/]

Decisions of the United States courts make clear that this equality requirement is stringently enforced. The measure of equality which the Supreme Court has used is the "total maximum deviation." This figure is computed by adding the percentage by which the population of the smallest electoral district is less than that of the "average" district to the percentage by which the population of the largest district exceeds the average.[68/] If this figure is less than 10 percent, there is no violation of the one-man one-vote rule.[69/] If the figure is greater than 10 percent, the state must justify the deviation from equality. A maximum deviation of 16.5 percent was accepted when found necessary to achieve a state's long-standing policy of refraining from dividing political subdivisions. Deviations

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67/ Appendix B sets out the apportionment of representatives to Saipan, Rota and Tinian that would be necessary over a range of possible sizes of the lower house.

68/ Mahan v. Howell, 410 U.S. 315 (1973).

69/ Gaffney v. Cummings, 412 U.S. 735 (1973).

of 25 percent, offered without justification, have been rejected.[70] Reynolds v. Sims mentions a desire to create contiguous, compact districts as another justification.[71] But it should be noted that one case specifically considering the matter held that the fact that a community is very small would not permit it to have larger maximum deviations even though, in such places, large percentage changes could be caused by movements of small numbers of people.[72]

The one-man one-vote rule affects only the decision with respect to the method of representation -- at large, multi-member districts, or single-member districts. It does not affect the delegates' choice with respect to the method of voting. Single vote, multiple vote and proportional vote systems all comply with the rule. The advantages and disadvantages of the three voting systems will be the same for the lower house as explained in section II(B)(3)(a) above with respect to the upper house.

i) At-large election. The delegates could adopt a system in which all of the seats in the lower

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70/ Swann v. Adams, 385 U.S. 440 (1967).

71/ Mahan v. Howell, 410 U.S. 315 (1973); 377 U.S. 533 (1964).

72/ Martin v. Venables, 401 F. Supp. 611 (D. Conn. 1975).

house would be filled by at-large elections throughout the Commonwealth. Under this system every candidate would be required to run on every island. Since every representative elected under this system would represent all of the residents of the Commonwealth, the one-man one-vote rule would be satisfied.[73/] If a multiple vote or proportional vote system were used, at-large elections would maximize the opportunity for the voters on Tinian and Rota and the Carolinian minority on Saipan to elect representatives most acceptable to them. No adjustments in the method of representation would have to be made to accommodate shifts or growth in population. Further, the system would be relatively simple and less costly to administer in a community of only about 15,000 residents.

The principal disadvantages of at-large election are that the representatives are not limited in their responsibility to represent a small area or a small number of voters, so that voter influence on any particular representative is likely to be minimized. This system also

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73/ At-large systems can be constitutional even in jurisdictions with significant minorities of particular ethnic groups. Dove v. Moore 45 U.S.L.W. 2064 (8th Cir. July 27, 1976). Such systems, however, have been criticized by the court in the past. Conner v. Johnson, 402 U.S. 690 (1971); Wallace v. House 96 S. Ct. 1721 (1976). If they are used for the specific purpose of diluting minority participation in politics, they are unconstitutional. White v. Regester 412 U.S. 755 (1973).

involves the largest number of candidates to be considered, and therefore each candidate may be scrutinized less by the voters. There is also a greater burden on the voter with respect to maximizing his preferences because the calculations and balances to be made in casting his vote (or votes) are of greater number and variety than under any other system.

ii) Multi-member districts. An alternative to at-large elections throughout the Commonwealth would be at-large elections on each island. This would in effect make each island a district and would require multiple members from each district in order to satisfy the one-man one-vote rule.[74/] This system has the advantage of tying each representative to a smaller geographic area and bringing representation closer to each voter. To the extent the districts are larger than single-member districts, this system also has the advantage of providing better representation for geographically dispersed minorities.[75/]

74/ The Northern Marianas legislature currently uses a multi-member district system in which each island is a separate district.

75/ If a multiple vote or proportional vote system is used, this advantage is enhanced. This advantage is also available through an at-large method of representation that uses the multiple vote or proportional vote system.

The principal disadvantage would be the need for reapportionment as the population grew or shifted.[76/] Under a multi-member district system, the number of members in each district would be changed in order to keep each representative responsible to approximately the same number of voters.[77/] This is generally less cumbersome than changing election districts (as discussed below) but requires some administrative machinery that would not be needed under an at-large system.

Two systems are available. The legislature can be given the responsibility for reapportionment. This presents the obvious difficulty that the legislators, while providing popular input for the representation decision, may be so personally involved in the outcome that their decision will be difficult and the result suspect. The alternative is to have reapportionment decisions made by

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76/ Another disadvantage is the relative burden on the voter which is somewhat less under this system than under an at-large system and somewhat greater than under a single-member district system.

For general discussion of the difficulties with multi-representative elections, see Kenney, Representation in the General Assembly, in CON CON: ISSUES FOR THE ILLINOIS CONSTITUTIONAL CONVENTION p. 125, at 132 (V. Ranney & S. Gove ed. 1970).

77/ The fact that all representatives from one island represent all residents of the island does not affect the arithmetic that is done to analyze compliance with the one-man one-vote rule. The cornerstone of the requirement is how many residents per representative there are in a given district.

the governor or a committee of specialists appointed by the governor (either with or without legislative approval).[78/] Current American practice uses both methods. Thirty states and the Virgin Islands vest complete responsibility in the legislature; the remainder use either another agency altogether or provide for another agency to act if the legislature fails to do so.[79/]

The delegates should consider specifying a permissible percentage by which any given district may vary from the average district population,[80/] and the enforcement mechanism (such as mandamus or a court-ordered plan) that will be available to guarantee that constitutionally required adjustments for population shifts are made.[81/]

78/ E.g., P.R. CONST. art. III, § 4:

> [T]he division of senatorial and representative districts . . . shall be revised by a Board composed of the Chief Justice of the Supreme Court as Chairman and of two additional members appointed by the Governor with the advice and consent of the Senate. The two additional members shall not belong to the same political party.

79/ BOOK OF THE STATES p. 42.

80/ E.g., MODEL CONST. art. IV, § 4.04(a):

> All districts shall be so nearly equal in population that the population of the largest district shall not exceed that of the smallest district by more than _____ per cent.

81/ E.g., HAWAII CONST. art. III, § 4:

> Original jurisdiction is hereby vested in the supreme court of the State to be exercised on the petition of any registered voter . . . [to] compel, by mandamus or otherwise, [the governor] to perform [the reapportionment].

The delegates must consider when and how often adjustment is to be made. The Supreme Court has held that once every ten years is constitutionally sufficient even though within the ten-year span some distortion invariably occurs resulting in the dilution of some votes.[82/] The ten-year span is related to the national decennial census that generally will form the basis for necessary adjustments. In light of this use of the census, it also is desirable to specify the time for reapportionment as immediately following the census.[83/]

iii) Single-member districts. Most states use the single-member district method of representation in lower houses of the legislature.[84/] Under this method, districts must be created that have approximately the same numbers of residents or voters. The advantage of this system is that the representatives each speak for a relatively small geographically defined unit and voter

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82/ Reynolds v. Sims, 377 U.S. 533, 583-84 (1964).

83/ An example of this kind of provision is MODEL CONST. art. IV, § 4.04(b):

> Immediately following each decennial census, the governor shall appoint a board of qualified voters to make recommendations within ninety days of their appointment concerning the redistricting of the state.

84/ Most states now use this system. BOOK OF THE STATES p. 43. However, the delegates should consider that all states are substantially larger (in both area and population) than the Northern Mariana Islands. See statistics in Appendix A.

contact with the representative is likely to be maximized. When a specific representative is obligated to a specific political unit, the voters within that unit will watch more closely the representative's official actions. Also, where there are fewer candidates to be considered, each candidate receives greater scrutiny. Such close observation will tend to provide a useful check on the representative. Single-member districts, if small, also provide better representation for geographically concentrated minority groups.[85/] This system minimizes voter confusion and thus maximizes the likelihood that a voter's choice will be well-informed and purposeful.

The principal disadvantage is that as the population grows or shifts, the district lines must be re-drawn periodically so that each district once again has approximately the same number of residents or voters. This re-districting requires the same type of machinery as described above in connection with multi-member districts, but is generally more time-consuming and difficult to accomplish. Redistricting will be particularly difficult in the Northern Marianas because creating districts that contain parts of two or more of the largest three islands is unlikely to be acceptable.

85/ This advantage may be minimized by the way the district lines are drawn.

4. Length of legislators' terms of office

The Constitution should specify the length of the term of office for members of each house. In setting forth how long legislators will serve, two issues must be decided: whether members of the two houses will serve for different periods and the specific number of years to be served.

State constitutions presently provide for terms of two or four years for state legislators. The provisions with respect to lower houses, with five exceptions, specify a two-year term.[86/] Two-thirds of the constitutional provisions that deal with upper houses specify four-year terms.[87/] Members of the Mariana Islands District legislature have four-year terms.[88/]

In deciding the length of terms for the members of each house, the delegates should balance basic considerations. First, legislators accumulate valuable experience over their period of service.[89/] Short legislative terms

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86/ All states except Alabama, Louisiana, Maryland, Mississippi and Puerto Rico. BOOK OF THE STATES p. 44.

87/ Id.

88/ MIDC tit. 2, ch. 2.32, § 2.32.020.

89/ One authority has stated: "A state legislature will not function effectively unless its members have acquired several sessions of experience in lawmaking." Hyneman, Tenure and Legislative Personnel, 195 ANNALS OF THE AM. ACADEMY OF POL. AND SOCIAL SCIENCE pp. 21-31 (1938).

minimize this experience and therefore will tend to limit legislators' ability to function effectively. Second, continuity in the direction of legislative action may be lost if the turnover of legislators is too frequent. Third, frequent elections impose substantial burdens -- financial and otherwise -- on the candidates and the public treasury. The burdens of candidacy may encourage legislators to direct more of their attention toward re-election than toward important legislative business. Fourth, legislators elected to long terms may be less responsive to changes in public opinion.

Closely related to the question of the length of legislative terms is the question of whether members of the two houses will serve for the same length of time. Legislators in both houses serving identical terms may be less confusing for the electorate since the same positions will be determined at any election for legislative seats. On the other hand, by establishing a different term of office for members of the upper house than for members of the lower house, the Convention may reconcile competing relevant concerns. For example, if upper house members serve a shorter term, they will be more responsive to the localities that they serve, or at least more active politically. At the same time, continuity and experience will be preserved in the lower house because of the longer term served there.

There are alternative mechanisms for preserving continuity and experience in the legislature. For example, 28 state constitutions provide for staggered terms for representatives in the upper house.[90/] Under this system, one-half of the upper house is elected every two years.

C. Provisions Affecting Legislators

Once delegates have made the decisions that determine the basic organization of the legislature, the Convention needs to decide several issues that affect individual legislators. This section outlines the alternatives with respect to qualifications, removal, filling of vacancies, rules of conduct, privileges and immunities, resources and salaries.

1. Qualifications

There are three types of qualifications that constitutions often specify with respect to legislators:[91/] age, citizenship and residency.

90/ Council of State Governments, AMERICAN STATE LEGISLATURES: THEIR STRUCTURES AND PROCEDURES (1967) p. 2. E.g., ALAS. CONST. art. II, § 3: "The term of representatives shall be two years, and the term of senators, four years. One-half of the senators shall be elected every two years."

91/ There is a discussion of qualifications with respect to executive branch officials in BRIEFING PAPER NO. 2: THE EXECUTIVE BRANCH OF GOVERNMENT § II(B)(1)(b). Judicial qualifications are discussed in BRIEFING PAPER NO. 4: THE JUDICIAL BRANCH OF GOVERNMENT § II(B). Qualifications for eligibility to vote are discussed in BRIEFING PAPER NO. 8: ELIGIBILITY TO VOTE AND ELECTION PROCEDURES § II(A).

a) Age

In drafting provisions dealing with the qualifications of legislators, the Convention must consider whether to require a minimum or maximum age, and, if so, what age will be required. Minimum age requirements are generally included in state constitutions in order to regulate the quality of membership in the legislature. However, there is some question this kind of requirement has any effect on quality because it is unlikely that the electorate would select a representative so young as to be incompetent.[92/] Nonetheless, all states but two (Massachsetts and New York) have minimum age requirements for legislators in each legislative house.[93/] In the lower house the age limit varies from 21 to 25 with 21 being the most common requirement.[94/] The age requirement for membership in the upper house ranges from 21 years of age to 30 with 25 being the most common.[95/]

92/ Wahlke, Organization and Procedure, in STATE LEGISLATURES IN AMERICAN POLITICS pp. 129-30 (A. Heard ed. 1966): "It may safely be said that formal prerequisites for the office of state legislature no longer influence significantly the character of legislative membership."

93/ The age requirements used by the states are summarized in Appendix C.

94/ Thirty-eight states require 21 years for members in the lower house. Appendix C.

95/ Twenty-three states require 25 years for members in the upper house. Appendix C.

If the Convention decides to include in the Constitution some minimum age requirement for representatives, there are two alternative methods available. First, the Constitution can specify an age.[96/] Second, the Constitution can require some other qualification of legislators that invariably will require that elected representatives be of a particular age. For example, the Constitution could require that any candidate for the legislature be a registered voter.

The delegates may also wish to specify a maximum age for legislators. This requirement could be the equivalent of mandatory retirement in the judicial branch[97/] and may be designed to operate in the same fashion as any age limit used with respect to the executive branch.[98/] The purpose of such a requirement would be to create opportunities for younger candidates and to achieve the same benefits that corporate or other mandatory retirement systems offer.

96/ The delegates should be aware that the Fourteenth Amendment to the United States Constitution (applicable to the Northern Marianas under § 501 of the Covenant) may restrict the age that can be required for candidates. Compare Manson v. Edwards, 345 F. Supp. 719 (E.D. Mich. 1972) (striking down 25-year age requirement for candidates for city council as violative of equal protection clause) with Human Rights Party v. Secretary, 370 F. Supp. 921 (E.D. Mich. 1973), aff'd, 414 U.S. 1058 (1973) (upholding 18-year age requirement for candidates for board of education).

97/ See BRIEFING PAPER NO. 4: THE JUDICIAL BRANCH OF GOVERNMENT § II(C)(2).

98/ See BRIEFING PAPER NO. 2: THE EXECUTIVE BRANCH OF GOVERNMENT § II(B)(1)(b).

b) Citizenship

Non-citizens may be elected to legislative office unless the Convention provides otherwise.[99/] The imposition of a citizenship requirement should be considered in conjunction with the citizenship requirement for eligibility to vote.[100/] It may be unwise to permit non-citizens to vote while prohibiting them from holding office as a representative of voters. At the present time, 25 state constitutions require that legislators be United States citizens.[101/]

c) Residency

Many constitutions specify that any candidate for the legislature must be a resident of either the state or the smaller political subdivision of the state that will be represented by the candidate if successful. Such provisions are intended to ensure that representatives to the legislature have adequate knowledge of and concern with local affairs. Thirty-two states explicitly require that candidates have been residents of the state for periods ranging

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99/ This issue is discussed in BRIEFING PAPER NO. 8: ELIGIBILITY TO VOTE AND ELECTION PROCEDURES § II(A)(1). One possible limitation on office-holding by aliens is the oath of office required by the Covenant. See discussion of the oath at p. 3 above.

100/ Many states take this approach. A summary of these requirements is set out in Appendix C.

101/ Appendix C.

from one to seven years.[102/] Forty-two states require residency in the district or county to be represented; some require no more than residence at the time of election, while others require up to two years residence prior to election.[103/]

One of the principal problems with any residency requirement is defining "residency." There are various approaches available to the delegates in dealing with this problem. The Constitution could specify what will constitute residency. Alternatively, as with minimum age

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102/ INDEX DIGEST pp. 667, 668. WIS. CONST. art. IV, § 6 (1 year); N.H. CONST. pt. II, art. 29 (seven years, senate only); COLO. CONST. art. V, § 4:

> No person shall be a representative or senator who . . . shall not for at least twelve months next preceding his election, have resided within the territory included in the limits of the county or district in which he shall be chosen . . . .

Residency requirements alone do not violate the equal protection clause of the Fourteenth Amendment. However, residency requirements in conjunction with a fixed durational requirement may interfere with fundamental rights -- either the voting franchise or the right to travel. Such requirements for voting privileges abridge equal protection. Dunn v. Blumstein, 405 U.S. 331 (1972). The relationship between the right to vote and the right to run as a candidate is close. Lubin v. Panish, 415 U.S. 709 (1974).

103/ INDEX DIGEST pp. 667, 668. KAN. CONST. art. II, § 4 (residence at time of election); ILL. CONST. art. IV, § 2(c) (two years).

If a durational residency requirement is imposed, the Convention should consider including a transitional provision. E.g., COLO. CONST. art. V, § 4:

> [P]rovided, that any person who at the time of the adoption of this constitution, was a qualified elector under the territorial laws, shall be eligible to the first general assembly.

requirements, the Constitution could require that only registered voters may run for the legislature and then make some form of residency necessary in order to register to vote.[104/] While not subverting the requirement by allowing qualification too easily, the Constitution should not discourage persons with genuine but newly formed connections with the Northern Marianas from running for legislative office. Perhaps the best approach is to leave the basis for residency for the legislature to define by law or for the courts to decide, when residency is challenged, on a case-by-case basis.

2. Removal

Members of a legislature are not normally subject to impeachment.[105/] Forty-nine states, however, permit the legislature to judge the elections[106/] and qualifications[107/] of its members, and 44 states permit the legislature, by a two-thirds vote, to expel a member.[108/]

104/ Residency requirements are discussed in BRIEFING PAPER NO. 8: ELIGIBILITY TO VOTE AND ELECTION PROCEDURES § II(A)(3); BRIEFING PAPER NO. 2: THE EXECUTIVE BRANCH OF GOVERNMENT § II(B)(1)(b); BRIEFING PAPER NO. 4: THE JUDICIAL BRANCH OF GOVERNMENT § II(B)(2); BRIEFING PAPER NO. 6: REPRESENTATION IN WASHINGTON § II(B)(2)(c).

105/ Public Administration Service, CONSTITUTIONAL STUDIES, vol. 2, pt. V, p. 18 (1955) [hereinafter cited as ALASKA STUDIES].

106/ INDEX DIGEST p. 638.

107/ Id. p. 662.

108/ Id. pp. 650-51.

Generally, state constitutions do not indicate the grounds on which a member may be expelled.[109] The legislature thus has considerable discretion. This discretion is fortified by the reluctance of the state courts to involve themselves in the process.[110] Such a constitutional provision, if interpreted as broadly in the Commonwealth as it has been elsewhere, would permit the legislature to expel a member for almost any reason.[111]

If the Convention wishes to establish certain ethical requirements for legislators,[112] a broad-ranging power of expulsion may be necessary since an immunity clause[113] will prevent any other state agency from disciplining legislators who wrongfully act. The Convention should be aware, however, that there are certain limits, established by the United States Constitution, on the explusion power. In 1968, the Georgia legislature attempted

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109/ INDEX DIGEST pp. 650-51.

110/ E.g., In re McGee, 36 Cal.2d 592, 226 P.2d 1 (1951) (legislative power to judge elections of its members exclusive and non-delegable).

111/ At least one state court has read an expulsion clause as implicitly permitting the legislature to impose lesser penalties as well. Pine v. Commonwealth, 121 Va. 812, 93 S.E. 652 (1917).

112/ Ethical rules are discussed in § II(C)(5) below.

113/ A privileges and immunities provision is discussed in § II(C)(7) below.

to expel a member who opposed the Vietnam war on the ground that his anti-war views meant that he could not sincerely have taken the required oath of allegiance. The United States Supreme Court ordered that the legislator be seated, holding that the legislature's action violated the member's right to freedom of speech.[114/] It is unclear how far the federal courts will look behind the actions of state legislatures in expelling members.[115/]

In addition to the power of the legislature to remove its members, any recall provisions that are adopted may be applied to legislators.[116/]

3. Vacancies

There are essentially the following options for filling vacancies occurring when an elected representative can no longer serve (due to death, resignation, disqualification or incapacity):

114/ Bond v. Floyd, 385 U.S. 116 (1966).

115/ The Supreme Court found jurisdiction to examine the expulsion of a member of the United States House of Representatives in Powell v. McCormick, 395 U.S. 486 (1969), but the Court stands in a different position regarding state legislatures.

116/ BRIEFING PAPER NO. 8: ELIGIBILITY TO VOTE AND ELECTION PROCEDURES § II(C)(3).

- appointment by the governor or other official;
- special election;
- succession by the runner-up in the previous election;
- selection by the legislative delegation from the district; or
- leaving the matter to the legislature.

Assigning this responsibility to the governor makes the process simple and inexpensive.[117] On the other hand, the governor's choice may be determined largely by political considerations and therefore may not result in the most appropriate representation for the voters who are affected. The Constitution might also provide that an elected official in the affected area appoint a substitute for the missing representative, as is done in a few states.[118] This alternative provides representation for

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117/ An example of this kind of provision is MD. CONST. art. III, § 13.

118/ E.g., NEV. CONST. art. IV, § 12:

> In case of the death or resignation of any member of the legislature, either senator or assemblyman, the county commissioners of the county from which such member was elected shall appoint a person of the same political party as the party which elected such senator or assemblyman to fill such vacancy; provided, that this section shall apply only in cases where no biennial election or any regular election at which county officers are to [be] elected takes place between the time of such death or resignation and the next succeeding session of the legislature.

the majority view of the district while avoiding the necessity of a burdensome election, although this confers considerable power on the appointing official.

Holding a special election for the district will guarantee that the substitute will truly reflect the current wishes of the electorate. While the expense and time involved may make such an approach unrealistic, at least if only a short portion of the term remains to be filled, 29 states follow this practice.[119/]

One compromise between appointment and special election would be the appointment of the runner-up in the previous election. The runner-up may more nearly reflect the views of the voters, particularly if the election was close, than a representative appointed by other means. On the other hand, if a two-party system is in operation, this alternative would probably result in giving the seat to a party different from the one favored by the voters in the last election. Another compromise might be the use of two of the possible methods -- appointment if the remaining term is short, and a special election if a substantial portion of the term remains.

119/ HAWAII STUDIES p. 12. E.g., MINN. CONST. art. IV, § 17: "The governor shall issue writs of election to fill such vacancies as may occur, by resignation or any other cause, in either house of the legislature."

Finally, the convention may decide not to specify in the Constitution any method of filling vacancies and to leave the entire matter to the legislature.[120/]

4. Concurrent employment and salary

The principal question with respect to legislators' salaries that the Convention must confront is whether to permit concurrent office-holding or employment.[121/] This decision will affect not only the amount of legislative salaries but the frequency with which they must be revised.

The delegates should then decide whether there should be any salary paid to legislators (or only reimbursement for expenses) and if so, whether compensation for legislators will be specified in the Constitution or will be left to the determination of the legislature or some other agency.[122/] It appears unwise to specify any dollar figure in the Constitution. Constitutional provisions in this regard necessarily are inflexible because they can be changed

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120/ E.g., N.C. CONST. art. II, § 10.

121/ For a discussion of concurrent employment and office-holding with respect to executive branch officials, see BRIEFING PAPER NO. 2: THE EXECUTIVE BRANCH OF GOVERNMENT § II(B)(1). For a similar discussion with respect to judges, see BRIEFING PAPER NO. 4: THE JUDICIAL BRANCH OF GOVERNMENT § II(B)(3).

122/ Three states -- Massachusetts, Vermont and Wisconsin -- have no constitutional provision that affects legislative salaries.

only through the burdensome process of constitutional amendment. Current inflation rates quickly render such figures obsolete, requiring either constitutional amendment or unlawful salary increases, and most states leave the matter to the legislature.[123] On the other hand, the Convention may be reluctant to leave to the legislators a question in which they have so high a personal stake.[124]

If the Convention decides to specify legislators' compensation in the Constitution, there are two methods the delegates should consider. First, the Constitution could specify a set salary -- by year or month.[125] Second, the Constitution could limit the compensation received by legislators to a per diem allowance for the days when the legislature is in session.[126] In setting

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123/ E.g., MINN. CONST. art. IV, § 7: "The compensation of senators and representatives shall be prescribed by law."

124/ Over half the state constitutions permit the legislature to establish its own salary. HAWAII STUDIES p. 57. E.g., HAWAII CONST. art. III, § 10.

125/ Fourteen states use this method. HAWAII STUDIES p. 57.

Appendix D provides data with respect to the compensation methods used by various states and the amount of compensation provided.

126/ The delegates should realize that if legislators are paid on a per diem basis, constitutional provisions pertaining to length of sessions and special sessions will directly affect state expenditures. This problem could be alleviated by specifying per diem subject to an annual maximum.

the amount of compensation, the delegates must reconcile two competing considerations. On the one hand, high salaries place a drain on limited governmental resources. On the other hand, adequate salaries make it possible for persons of modest means to serve in the legislature without financial sacrifice.

If the Convention leaves questions of compensation to the determination of the legislature or another agency, it should consider two further possibilities. First, the Constitution could specify an upper limit on how much the legislature could set for compensation.[127/] Second, state constitutions often provide that no legislator may receive a salary increase during the term for which he was elected. Such provisions, used by 23 states, are intended to minimize the self-serving aspect of legislators voting to increase their own pay.[128/] Recent trends favor independent commissions to set legislators' pay.[129/]

127/ A few states use this method. E.g., NEB. CONST. art. III, § 7; N.M. CONST. art. IV, § 10: "Each member of the legislature shall receive: A. As per diem expense the sum of not more than forty dollars for each day's attendance, as provided by law . . . ."

128/ HAWAII STUDIES p. 58. E.g., MINN. CONST. art. IV, § 7: "But no increase of compensation shall be prescribed which shall take effect during the period for which the members of the existing House of Representatives may have been elected."

129/ Compare BOOK OF THE STATES 1970-71 pp. 66-67 with BOOK OF THE STATES 1976-77 pp. 56-57. An extensive provision creating such a commission is set out in W. VA. CONST. art. VI, § 33.

5. Conduct

Rules of conduct establishing the definition and effect of conflicts of interest and other unethical practices are important to public acceptance of the work of the legislature. Generally, legislators' conduct is regulated by the internal rules of the house in which they sit. However, the Convention may consider this a matter of sufficient importance to warrant specific constitutional prohibitions or guidelines. The Convention has four alternatives in this respect: it may leave the Constitution devoid of provisions pertaining to improper conduct; it may explicitly grant power to the legislature or some other government agency to deal with such problems; it may mandate that the legislature or some other government agency deal with problems of improper conduct; or it may include in the Constitution specific prohibitions on certain activity.

Leaving the question of legislators' conduct entirely to the legislature affords the greatest degree of flexibility. However, it also provides the least encouragement to the legislature to deal with a very sensitive issue. An explicit requirement that the legislature act to deal with these problems would not reduce the legislature's flexibility but might induce action. This requirement might include

an ethics board that could render advisory opinions on questions posed by legislators. It appears that the recent concern in the United States with these matters has manifested itself in the form of corrective laws rather than as constitutional amendments.[130/] This is understandable because legislatures clearly have power to pass laws on this subject and constitutional treatment of such questions is not needed unless the legislature cannot be trusted.

If the Convention decides to require that some governmental agency deal with legislative improprieties, there are two general approaches open to it. First, the Constitution could require the legislature to act to forbid certain activities,[131/] such as members voting on measures in which they are personally interested. Second, the Constitution could require that the legislature (or some other government agency) establish both a code of conduct and a separate government body to enforce the code.[132/] By creating an independent enforcement body, difficulties inherent in self-regulation would be avoided.

130/ BOOK OF THE STATES p. 183.

131/ E.g., CAL. CONST. art. IV, § 5.

132/ E.g., (Proposed) MD. CONST. art. IX, § 9.02:

> "The General Assembly shall prescribe by law a code of ethics, and provide for the regulation of conflicts of interest, for all elected state officers."

As a final alternative, the Constitution itself could prohibit legislators from engaging in certain activities, e.g., holding more than one government office simultaneously or voting on issues in which the legislator has a direct, pecuniary interest.

At present, 20 state constitutions refer to conflicts of interest of legislators.[133/] Twelve states require a legislator with a personal interest in a measure before the legislature to disclose this interest and not vote on the bill.[134/] Eight constitutions forbid a legislator to have an interest in any contract authorized by the legislature.[135/] The California constitution specifically empowers the legislature to enact laws dealing with conflicts of interest.[136/]

133/ INDEX DIGEST pp. 651, 794.

134/ E.g., ALA. CONST. art. IV, § 82:

> A member of the legislature who has a personal or private interest in any measure or bill pending before the legislature shall disclose the fact to the house of which he is a member, and shall not vote thereon.

135/ E.g., MICH. CONST. art. IV, § 10:

> No members of the legislature . . . shall be interested directly or indirectly in any contract with the state or any political subdivision thereof which shall cause a substantial conflict of interest.

136/ CAL. CONST. art. IV, § 5:

> The Legislature shall enact laws to prohibit members of the Legislature from engaging in activities or having interests which conflict with the proper discharge of their duties and responsibilities . . . .

6. Resources

State constitutions generally do not specify the resources to be provided legislators, although a qualified professional staff may be one of the most important factors in ensuring legislative branch efficiency and effectiveness.[137/] Due to the importance of legislative review of the state budget,[138/] however, an exception is sometimes made by setting forth in the constitution the mechanisms for monitoring fiscal affairs. Specifically, state constitutions may provide for individuals or committees responsible for budget review, fiscal analysis or "post-audit." Budget review is a process by which particular expenditures are assessed in terms of their immediate effect. Fiscal analysis, in contrast, involves the gathering of long-term data in order to develop a sound fiscal program. Post-audit programs review past expenditures of the state in order to determine their conformity with law and legislative policy. It is especially important that the group or individual responsible for post-audit be responsible directly to the legislature since the principal task is to ascertain whether money was spent in accord with legislative intent.

137/ Citizens Conference on State Legislatures, STATE LEGISLATURES: AN EVALUATION OF THEIR EFFECTIVENESS (1971).

138/ Some authorities regard legislative budget review as the major device in state government for reviewing executive actions. M. Jewell and S. Patterson, THE LEGISLATIVE PROCESS IN THE UNITED STATES p. 507 (1966).

At the present time, three state constitutions provide for an auditor to be responsible for the fiscal services that the legislature requires.[139] However, the majority of states provide for legislative fiscal review by law without mentioning such mechanisms in the text of the Constitution.

7. Privileges and immunities

At present, 41 state constitutions provide for a legislative privilege from arrest during the legislative session.[140] Usually such provisions contain exceptions

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139/ E.g., HAWAII CONST. art. VI, § 7:

> The legislature, by a majority vote of each house in joint session, shall appoint an auditor who shall serve for a period of eight years and thereafter until a successor shall have been appointed. The legislature, by a two-thirds vote of the members in joint session, may remove the auditor from office at any time for cause. It shall be the duty of the auditor to conduct post-audits of all transactions and of all accounts kept by or for all departments, offices and agencies of the State and its political subdivisions, to certify to the accuracy of all financial statements issued by the respective accounting officers and to report his findings and recommendations to the governor and to the legislature at such times as shall be prescribed by law.

140/ INDEX DIGEST p. 643. E.g., ALA. CONST. art. IV, § 56:

> Members of the legislature shall, in all cases, except treason, felony, violation of their oath of office, and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same . . . .

Constitutions in Florida, Maryland, New York, North Carolina, Rhode Island and Vermont have no provision dealing with legislative privilege.

for such offenses as treason, felonies or breaches of the peace. Further, provisions may be found in state constitutions specifying that legislators will not be held accountable for words spoken in the course of the exercise of their legislative function.[141/] The purpose of such provisions is to allow legislators to carry out their duties without interference. By limiting the duration of the legislative privilege to the time the legislature is in session, this purpose may be fully accomplished without placing legislators totally beyond the reach of the law.

D. Legislative Procedure

The Constitution may deal with certain important matters of legislative procedure in order to ensure that the work of the legislature is efficiently and fairly conducted. Generally, the legislature should be permitted to formulate and periodically adjust its own rules. The only matters that should be given constitutional stature are those that directly affect the public interest across a broad spectrum of the legislature's work. Past experience of state legislatures indicates that three types of procedural matters might be of sufficient importance for the Convention to consider: rules with respect to legislative sessions, open meetings and the form of enactments.

141/ E.g., CONN. CONST. art. III, § 15: "And for any speech or debate in either house, [the legislators] shall not be questioned in any other place."

1. Legislative sessions

The Convention might consider the basic rules with respect to general and special legislative sessions.

a) General sessions

The principal decision with respect to legislative sessions is whether to have annual (once a year) or biennial (once every two years) sessions. Advocates of annual sessions claim that frequent sessions are required for the legislature to be an effective force in state government.[142/] Opponents of frequent sessions believe that more frequent meetings will encourage the legislature to be unnecessarily active, and that infrequent meetings encourage more careful consideration during those times that the legislature is in session.[143/] At present, most states have moved to annual sessions.[144/]

As a subsidiary but related matter, the Convention may want also to consider how long legislative sessions should be. Strict limits on the length of sessions are defended as (1) minimizing the tendency to pass unnecessary legislation, (2) requiring smaller salaries for legislators and their assistants, (3) providing opportunities for highly qualified people in the private sector to participate in the

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142/ ALASKA STUDIES vol. 2, pt. V, pp. 21-22.

143/ Id.

144/ BOOK OF THE STATES pp. 58-59.

legislature, (4) requiring that policy decisions be made quickly since the alternative of postponement will not be available, and (5) increasing the focus of public attention upon legislative affairs.

On the other hand, it has been argued that no limitation on the length of legislative sessions should be constitutionally mandated for the following reasons:[145] (1) to limit legislative sessions may encourage the use of delaying tactics to defeat legislation; (2) specifying when the legislative session must end increases the likelihood of insufficient consideration of bills caught in the legislative "logjam" that inevitably arises at the end of a session of fixed length;[146] (3) untoward emphasis on timing may shift the focus of legislative discussion from the substance of the arguments advanced to the parliamentary procedure involved; and (4) deterring legislative action will not lessen the amount of legislation enacted; rather, the executive branch will be forced to deal with those issues not confronted by the legislature and limitations on the duration of legislative sessions act as a de facto delegation of power to the executive branch.

145/ HAWAII STUDIES p. 28.

146/ Gove & Carlson, The Legislature, in CON CON: ISSUES FOR THE ILLINOIS CONSTITUTIONAL CONVENTION p. 101, at 117-18 (S. Gove & V. Ranney ed. 1970).

The trend appears to be toward allowing state legislatures to act continuously over the period of time between the beginning of sessions without any time limitations.[147/] Further, some states having biennial sessions provide for two annual regular sessions within the biennium and explicitly provide that business unfinished in the first of the two sessions will be carried over to the second.[148/]

Generally, neither biennial nor annual sessions are limited with respect to subject matter. However, some states use a system in which the legislature meets biennially in a session unrestricted with respect to subject matter, and meets to consider budget matters only in years in which

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147/ E.g., MODEL CONST. art. IV, § 4.08:

> The legislature shall be a continuous body during the term for which its members are elected. It shall meet in regular sessions annually as provided by law.

148/ Absent such a provision, bills not acted upon in a legislative session simply "die" and are of no effect in the succeeding session. The delegates should consider providing that bills not dealt with in the previous session are carried over into the following session, especially if two annual regular sessions are provided for within one biennial session.

At the present time, three states (Georgia, Kansas and Michigan) provide that unfinished bills in the first session of a general biennial session will be carried over to the second session with the same status. E.g., MICH. CONST. art. IV, § 13:

> Any business, bill or joint resolution pending at the final adjournment of a regular session held in an odd numbered year shall carry over with the same status to the next regular session.

there is no regular session.[149] This alternative, seen as a compromise between frequent and infrequent meetings, is particularly desirable if annual sessions in general are not acceptable, because budget matters require frequent review and adjustment.[150] By allowing the legislature to meet every year at least to consider fiscal affairs, the proper monitoring of these matters is permitted. By restricting general action to sessions held every other year, the objections to annual sessions are met.

b) Special sessions

If the length of legislative sessions is fixed in the Constitution, it will be necessary to provide some way to permit the legislature to meet when the regular session is not long enough, or in emergencies. Such special sessions may be needed even when no limit is fixed if the unexpected happens after the legislature has adjourned sine die. Such special sessions raise several issues for the Convention.

149/ E.g. COLO. CONST. art. V, § 7:

> The General Assembly shall meet in regular sessions at 10:00 a.m. on the first Wednesday after the first Tuesday of January of each year, but at such regular sessions convening in even numbered years, the General Assembly shall not enact any bills except those raising revenue, those making appropriations, and those pertaining to subjects designated in writing by the governor during the first 10 days of the session.

150/ HAWAII STUDIES p. 29.

The most important question is who may call them. At the present time, the constitutions of all fifty states and Puerto Rico give the governor power to call special sessions.[151/] Traditionally, the governor did not share this power, but the current trend is to permit the legislature as well as the governor to call special sessions. Twenty-seven constitutions allow the legislature to call a special session, although some require an extraordinary majority vote, e.g., two-thirds, or three-fifths of the elected members.[152/] The rationale for this shift is that the legislature itself is at least as well qualified as the governor to determine when extraordinary action is needed.

Constitutions in 16 states and Puerto Rico explicitly limit the length of special sessions. Nevada, while not specifically limiting the length of special sessions, provides compensation for legislators for only 20 days of a special session.[153/] Such limitations are defended on the same grounds as are limitations on the length of regular sessions, and may be evaluated accordingly.

151/ E.g., OHIO CONST. art. II, § 8:

> Either the governor, or the presiding officers of the general assembly chosen by the members thereof, acting jointly, may convene the general assembly in special session . . . .

152/ BOOK OF THE STATES pp. 33, 58-59.

153/ Id.

Constitutions in 20 states and Puerto Rico provide some limitations on the subjects that may be considered in special sessions.[154/] Five state constitutions differentiate between special sessions called by the governor and those called by the legislature itself. In these states, the subjects considered in special sessions called by the governor are limited, but the subjects open for consideration in sessions called by the legislature are unlimited. Alabama and Arkansas allow the legislature, by a two-thirds vote of both houses, to extend the scope of possible subjects for consideration in special session.[155/]

2. Open meetings and published proceedings

Requirements of openness and recordkeeping in the legislature and its committees offer two main advantages. First, they permit the public to keep track of the actions of the representatives. Second, they provide legislative history that may be

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154/ E.g., N.Y. CONST. art. IV, § 3: "At extraordinary sessions no subject will be acted upon, except such as the governor may recommend for consideration."

155/ ALA. CONST. art. IV, § 76; ARK. CONST. art VI, § 19.

useful for judicial interpretation. These advantages are important. Thirty-seven state constitutions require that proceedings be open to the public, though all, except Montana, permit closed sessions, for example, "in cases which require secrecy."[156/] In general, it should be noted that recent trends toward greater openness, though marked, have been reflected in legislation rather than in constitutions. The Convention might consider a provision that no final vote may be taken on a bill until there has been a public hearing, and that no vote may be taken on any bill, either in committee or in the full house, except at an open session. This provision would require open sessions at critical points in the legislative process without limiting the flexibility of the legislature to hold closed sessions when those appear necessary.

All states require that some sort of journal of legislative proceedings be maintained, though the content of these journals varies from an uninformative tally of votes to a verbatim record similar to the Congressional Record. Constitutions also vary widely as to whether they address the question of roll-call voting on the floor of the house or recording of committee proceedings. It should be noted

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156/ MONT. CONST. art. V, § 10(3).

here that verbatim transcripts, particularly of the floor debates, provide an invaluable legislative history that has special merit in a new government. The disadvantage of such requirements is expense. Verbatim records of all legislative proceedings would be quite costly. A possible middle course lies in requiring verbatim records only of proceedings in the full house, and of such committee proceedings as the full house directs.

3. Subject rules

The "single subject rule" requires that each bill embrace one subject only. This is intended to prevent "rider amendments" -- that is, attaching an unrelated amendment to an existing bill. Forty-one states use it.[157/]

The "title subject rule" mandates that only subjects mentioned in the title may be dealt with in the text of a bill. It is justified as enabling legislators to rely on a bill's title in considering the scope of the bill and informing the public of the nature of legislative business being conducted.

Prohibitions on "amendment by reference" require that bills amending existing statutes include the full text of the section being amended. Such a requirement is supposed

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157/ INDEX DIGEST pp. 603-04; e.g., N.D. CONST. art. II, § 61.

to encourage careful drafting and force the legislators to consider completely the changes that are being made.

The principal objection to the single subject, title subject and amendment by reference rules is that they allow important legislation to be overturned on the basis of minor violations of technical rules. Further, even if procedural requirements are fulfilled, opponents of a statute can in theory use these provisions as the basis for lengthy litigation, thus delaying the effect of the act. To avoid such objections, some have recommended that state constitutional provisions include rules governing the form of enactments but exempt statutes from judicial review for the violation of such rules.[158/] In any case, it is not clear that these hypothetical opportunities for delay have been seized upon.[159/]

Another problem with the single subject and title subject rules is their tendency to impede the adoption of broad statutes leading to uniform codifications of the

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158/ E.g., MODEL CONST. art. IV, § 4.14:

> The legislature shall enact no law except by bill and every bill except bills for appropriations and bills for codification, revision or rearrangement of existing law shall be confined to one subject. All appropriations bills shall be limited to the subject of appropriations. Legislative compliance with the requirements of this section is a constitutional responsibility not subject to judicial review.

159/ This has not happened in Illinois, for example. See Gove & Carlson, The Legislature, in CON CON: ISSUES FOR THE ILLINOIS CONSTITUTIONAL CONVENTION p. 101, at 121-22 (S. Gove & V. Ranney ed. 1970).

laws. A difficulty peculiar to the ban on amendments by reference is the ambiguity of whether it applies only to express amendments or to both express and implied amendments. For the legislature to search the entire corpus of state legislation seeking statutes amended by implication would be extremely burdensome. This difficulty may, of course, be reduced by forbidding only those bills that expressly amend existing laws by reference.

Conclusion

Although a large number of decisions must be made in order to draft a constitutional article on the legislative branch, the article itself should be simple and straightforward. The article need not be lengthy. The key to framing a short, workable article is to focus on the fundamental matters that need to be set out in a document of basic law. The Constitution need not (and cannot) deal with every possible exceptional circumstance or unworthy purpose; the courts are available, if necessary, to meet such problems. If the legislative article provides a guide for those who would apply it fairly and evenhandedly, the Convention will have made a substantial contribution toward ensuring a vital, efficient and representative legislature in the new Commonwealth.