BRIEFING PAPER NO. 8

ELIGIBILITY TO VOTE AND ELECTION PROCEDURES

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The essential purpose of the Covenant -- reflected throughout its provisions -- is to provide the people of the Northern Mariana Islands with the opportunity to exercise the right of self-government. The achievement of this objective requires that the people have the regular opportunity to participate meaningfully and directly in the affairs of government -- to elect public officials and to reject or accept specific proposals placed on the ballot. As the document of fundamental law, the Constitution should define and protect the people's right to vote and the election procedures which ensure the free exercise of that right. This briefing paper discusses eligibility to vote, election procedures and three other means that permit direct citizen participation in government: the initiative, the referendum and the recall. The first section of this paper reviews certain relevant background information, including the applicable provisions of the United States Constitution and the Covenant; and the second section of the paper discusses specific alternatives for the Convention to consider in framing Constitutional provisions relating to the electoral process.

I. BACKGROUND AND GENERAL CONSIDERATIONS

A. Applicable Provisions of the United States Constitution

Under the United States Constitution, the states have the right to decide who can vote in their elections. Several amendments to the Constitution, however, restrict their power to deny the right to vote based on age, race and sex. In addition, the equal protection clause of the Fourteenth Amendment prohibits discrimination among potential voters based on other classifications, such as property ownership. Section 501(a) of the Covenant makes these amendments applicable to the Northern Mariana Islands and their provisions therefore operate within the Northern Marianas to the same extent as within a state.

1. Age

The Twenty-sixth Amendment provides:

> The right of citizens of the United States, who are 18 years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

2. Race

The Fifteenth Amendment, section one, provides:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Enacted in the aftermath of the Civil War, the Fifteenth Amendment has been interpreted by the Supreme Court to

invalidate various state efforts to restrict the right to vote either overtly through statutory enactment or covertly through inequitable administration of electoral laws and toleration of discriminatory membership practices of political parties.[1/]

3. Sex

The Nineteenth Amendment, section one, provides:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

4. Equal Protection

The Fourteenth Amendment, section one, provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." The Supreme Court generally

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1/ Guinn v. United States, 238 U.S. 347 (1915), utilized the Fifteenth Amendment to invalidate a "grandfather clause" in Oklahoma's constitution. The clause permitted persons who had been voters, or descendants of those who had been voters, to register to vote notwithstanding their inability to meet any literacy requirement. Blacks were disqualified on grounds of illiteracy or through discriminatory administration of literacy tests, while illiterate whites were permitted to register without taking any tests.

Smith v. Allwright, 321 U.S. (1944), and Terry v. Adams, 345 U.S. 461 (1953), prohibited the exclusion of blacks from participation in primary elections.

Davis v. Schnell, 81 F. Supp. 872, 880 (S.D. Ala.), aff'd 336 U.S. 933 (1949), struck down an Alabama constitutional amendment providing for a literacy test as violative of the Fifteenth Amendment because its legislative history showed that it was intended to disfranchise blacks.

Gomillion v. Lightfoot, 364 U.S. 339 (1960), invalidated the racial gerrymandering of legislative districts under the Fifteenth Amendment.

interprets the application of the equal protection clause to the right to vote to mean that:

> [O]nce a State has determined that a decision is to be made by popular vote, it may exclude persons from the franchise only upon a showing of a compelling interest, and even then only when the exclusion is the least restrictive method of achieving the desired purpose.2/

Through specific interpretations of the Fourteenth Amendment over the years the Supreme Court has prohibited the following state practices: (1) racial discrimination in primary elections;3/ (2) poll taxes in elections;4/ (3) residency requirements of over 30 days except in special circumstances;5/ (4) property ownership as a prerequisite to voting except

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2/ Hall v. Beals, 396 U.S. 45, 52 (1969) (Marshall, J., dissenting).

3/ Leading cases prohibiting racial discrimination in primary elections include: Nixon v. Herndon, 273 U.S. 536 (1927), and Nixon v. Condon, 286 U.S. 73 (1932), both resting on the Fourteenth Amendment; Smith v. Allwright, 321 U.S. 649 (1944), and Terry v. Adams, 345 U.S. 461 (1953), relying on the Fifteenth Amendment.

4/ Harper v. Virginia Bd. of Educ., 383 U.S. 663 (1966), declaring that voter qualifications have no relation to wealth or to ability to pay a poll tax.

5/ Dunn v. Blumstein, 405 U.S. 330 (1972). Arizona's 50-day rule was upheld because of difficulty in administration and in light of Arizona's other efforts to register voters. Marston v. Lewis, 410 U.S. 679 (1973). In Burns v. Fortson, 410 U.S. 686 (1973), Georgia's 50-day requirement was also upheld.

in limited special-purpose elections;[6/] (5) limitations on the right to vote of residents of federal enclaves who otherwise meet voter qualifications;[7/] and (6) limitations on the right to vote of military personnel who otherwise meet voter qualifications.[8/]

Taken together, the limitations flowing from the United States Constitution mandate broad electoral participation in the Northern Mariana Islands. Some issues remain

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6/ Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969) (a voter qualification statute for school district elections based on property ownership declared unconstitutional); Cipriano v. City of Houma, 395 U.S. 701 (1969) (a statute limiting to property taxpayers the right to vote in elections called to approve the issuance of revenue bonds by a municipal utility declared unconstitutional); City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970) (expanded Cipriano to include elections called to approve general obligation bonds of municipalities). But see Salyer Land Co. v. Tulare Water Dist., 410 U.S. 719 (1973), and Associated Enterprises, Inc. v. Toltec Watershed Improvement Dist., 410 U.S. 743 (1973), in which the Court validated property ownership qualifications for voting in water district elections because the landowners involved received the primary burdens and benefits of the establishment and operation of the watershed districts.

7/ Evans v. Cornman, 398 U.S. 419 (1970) (residents of federal enclaves eligible to vote in the state in which the federal area is located).

8/ Carrington v. Rash, 380 U.S. 89 (1965) (invalidated a Texas constitutional provision allowing military personnel to vote only in the county of residence at the time of entry into service, so long as they remained in the Armed Forces. The provision effectively denied the franchise to those who moved to the state after joining the service.) The states and the Commonwealth remain free to require that military personnel meet the requirements for voting where they are stationed and do not exercise the right to vote elsewhere.

open for consideration by the Convention, such as the voting rights of aliens and nationals, and are discussed subsequently in this paper.

B. Applicable Provisions of the Covenant

As indicated above, section 501(a) of the Covenant makes the amendments to the United States Constitution pertinent to the right to vote applicable to the Northern Mariana Islands. Other provisions of the Covenant are also relevant to the deliberations of the Convention on this subject, especially those resulting in a classification of people in the Northern Mariana Islands as United States citizens, nationals or aliens. Section 301 of the Covenant defines those eligible to become United States citizens under the Covenant, and section 302 grants this group the election of status of a United States national rather than a citizen. Section 1003(c) provides that sections 301 and 302 become effective "upon the termination of the Trusteeship Agreement and the establishment of the Commonwealth of the Northern Mariana Islands." Alternatives with respect to voting rights of U.S. citizens, nationals and aliens are discussed below in section II(A)(1).

C. Background Information

The Charter of the Mariana Islands District Legislature and the Mariana Islands District Code presently govern eligibility to vote and the electoral process in the Northern Mariana Islands. A review of these provisions may assist the delegates in deciding how to address the subject in the Commonwealth Constitution.

The Charter sets out the framework for the election of members of the Marianas District Legislature and prescribes the qualifications of voters:

> Each shall be eighteen (18) years of age or over; a citizen of the Trust Territory of the Pacific Islands; have been a resident of his electoral precinct for a period of at least one (1) year immediately preceding the election; not be serving a criminal sentence at the time of the election and be of sound mind.9/

The Charter does not define residence for voting purposes, nor does it include a literacy requirement. Article I, section 8 of the Charter describes the electoral process:

> Election of Representatives shall be by secret ballot, and the Legislature shall set the time of election by law. Municipalities shall enact ordinances prescribing the manner and places of election, although the Legislature may change them at any time by law.

Within the general provisions of the Charter, the District Legislature has exercised responsibility for all other

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9/ CHARTER, MARIANA ISLAND DIST. LEGIS. art. I, § 13.

details concerning eligibility to vote and election procedures, including nominating procedures, election scheduling, voter registration, absentee voting, resolving election disputes, ballot preparation and election supervision. The provisions of the District Code dealing with these and other issues pertaining to the electoral process may highlight for the delegates the necessity of singling out for Constitutional treatment only those matters that the delegates consider to be fundamental.

Section 2.32.050 of the District Code defines the persons entitled to vote and enlarges upon the Charter provision by requiring a voter to be domiciled in his electoral precinct for at least five years preceding the election.

Elections are scheduled "on the first Sunday in November, and every four years thereafter."[10/] Section 2.32.110 permits absentee voting by persons absent on election day due to business or "other necessary travel," and for persons unable to attend the polls because of "illness or physical disability." The election commissioner prepares "rules, regulations, and instructions for absentee ballots."[11/]

Section 2.32.010 reaffirms the Charter guarantee of a secret ballot. Section 2.32.190 specifies the penalty for violations of the election process.

10/ MARIANA ISLANDS DIST. CODE tit. 2, ch. 2.32, § 2.32.020 [hereinafter cited as MIDC].

11/ MIDC tit. 2, ch. 2.32, § 2.32.030.

Nomination of candidates for the District Legislature may be by petition or by political parties.[12] The election commissioner is responsible for the printing of ballots. Ballots list the candidates for each office in alphabetical order and in vertical columns. Candidates endorsed or sponsored by any registered political party are entitled to have the name of the political party printed directly below their names.[13]

Election ballots and other materials are prepared in Chamorro and English. The election commissioner (the resident commissioner) is authorized to "determine the acceptability of the individual ballots,"[14] "declare the winning candidates from each electoral precinct,"[15] and resolve tied elections "by the drawing of lots between the tied candidates, or between their designated representatives."[16] Precinct election committees review and decide complaints concerning election irregularities.[17]

12/ MIDC tit. 2, ch. 2.32, §§ 2.32.060 - 2.32.100.

13/ Id.

14/ MIDC tit. 2, ch. 2.32, § 2.32.140.

15/ MIDC tit. 2, ch. 2.32, § 2.32.150. The victorious candidate must receive a plurality of the votes cast.

16/ MIDC tit. 2, ch. 2.32, § 2.32.160.

17/ MIDC tit. 2, ch. 2.32, § 2.32.040. A committee decision denying registration of a voter may be appealed to the district court by the voter.

Section 2.32.030 gives the election commissioner responsibility for "the overall supervision and administration" of elections. The duties of the election commissioner include providing for poll workers and other election officers, furnishing ballots and tally sheets, preparing complete lists of eligible voters within each electoral precinct not less than 20 days before each election and designating polling places and poll supervisors.[18/] The election commissioner is responsible for voter registration. Registration is not permitted within five days of an election.[19/]

The election commissioner also establishes committees in each electoral precinct to count ballots[20/] and announces election results certified by the precinct election committees.[21/]

Secretarial Order No. 2973 defined the authority and procedures for the plebiscite held on June 17, 1975 that approved the Covenant. This order designated a plebiscite commissioner as responsible for the planning and preparation for, and conduct of, the election. A person could vote in the plebiscite who was:[22/]

18/ MIDC § 2.32.030.

19/ MIDC § 2.32.050.

20/ MIDC § 2.32.140.

21/ MIDC § 2.32.150.

22/ Sec. Order No. 2973, Hearings on S.J. Res. 107 Before the Senate Comm. on Interior and Insular Affairs, 94th Cong., 1st Sess., p. 171 (1975).

> (1) a Trust Territory citizen domiciled in the Mariana Islands District;
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> (2) 18 years of age or older on the date of the plebiscite;
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> (3) at the time of registration not serving a sentence or under parole or probation for any felony for which he [had] been convicted by any court of the Trust Territory;
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> (4) at the time of registration not under a judgment of mental incompetency or insanity; and
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> (5) registered to vote in accordance with the procedures established by the Plebiscite Commissioner.

These qualifications differed from those in the Mariana Islands District Code by omitting the durational residence requirement and by requiring a felony conviction (instead of any "criminal sentence") for disqualification. The Secretarial Order also provided criteria to help define the "domicile" of a person for voting purposes:[23/]

> (1) whether he maintains a permanent residence or permanent place of abode in a place outside of the Mariana Islands District; or
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> (2) whether his presence in the Mariana Islands District is solely the result of his own public or private employment or that of a person on whom he is economically dependent; or

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23/ Id. p. 172.

(3) whether he or the person on whom he is economically dependent receives housing or pay differentials for housing or living allowances as a consequence of his employment in the Mariana Islands District; or

(4) whether he maintains contacts with another district of the Trust Territory of the Pacific Islands or with the jurisdiction of the United States or another country such as: supporting a spouse and/or family who reside in such place; maintenance of a boat or driver's license issued by such place; holding a postal address at such place; continuing affiliations with the professional, religious or fraternal life in such place; or the payment of taxes in such place imposed because of residence or physical presence in such place; or

(5) whether he has expressed his intention not to establish domicile in the Mariana Islands District; or

(6) whether he is registered or qualified to vote in any other district or jurisdiction of the Trust Territory or the United States or any other country during the past year.

The same qualifications were established for those persons eligible to vote for delegates to the Constitutional Convention, with the addition of a one-year residence requirement in the voter's electoral precinct in the Northern Mariana Islands. The resident commissioner served as election commissioner.

D. General Policy Considerations

Within the limitations imposed by the Covenant and the United States Constitution, the Convention has the right

to determine who can vote in the Commonwealth. The principal issue before the Convention is whether to create as broad an electorate as legally possible. Resolution of this issue requires the delegates to consider carefully the importance of the right to vote and any special needs within the Commonwealth that could possibly justify restrictions of this basic right.

To ensure that government derives its powers from the consent of the governed, the United States and its constituent political entities are committed to broad electoral participation. In Reynolds v. Sims Chief Justice Warren wrote:

> The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. . . . Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized. Almost a century ago, . . . the Court referred to "the political franchise of voting" as "a fundamental political right, because preservative of all rights."24/

24/ 377 U.S. 533, 555, 561-62 (1964), quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

For these reasons, restrictions on the right to vote in the United States have diminished substantially.[25/]

Even assuming that the Convention is fully committed to the principles articulated by the Chief Justice, delegates may still wish to define certain standards aimed at ensuring a responsible electorate. With this as the objective, the Convention may desire to consider voter qualifications such as a minimum age requirement, citizenship and residence requirements, and disqualification for insanity, conviction of certain crimes or failure to pass a literacy test.

A second major policy question before the Convention is the extent to which the Constitution should prescribe election procedures. In evaluating this issue, the delegates will necessarily have to make a judgment as to what procedural safeguards are desired to protect the right of the electorate to vote freely, and which of them are so essential as to require inclusion in the Constitution. As demonstrated by the extensive provisions on this subject in the current Mariana Islands District Code, much of the necessary procedural machinery can be left to the discretion of the Commonwealth legislature within general guidelines provided by the Constitution.

25/ C. Adrian, THE AMERICAN POLITICAL PROCESS pp. 35-38 (2d ed. 1969).

A third policy issue before the Convention is whether the Constitution should extend the opportunity for direct citizen participation in the Commonwealth government by including provisions for the initiative, the referendum or the recall. The Convention's decision on this question will depend in part on the emphasis that the delegates wish to place on the representative role and authority of the legislature in the new Commonwealth, the decisions made by the Convention with respect to the frequency of elections and terms of office of the legislators, and the perceived political desirability of assuring the people of the Northern Marianas that all available procedural mechanisms are provided under the Constitution for ensuring maximum citizen involvement in public affairs.

II. SPECIFIC ISSUES FOR DECISION

This section has three parts: part A deals with eligibility to vote; part B deals with the election process; and part C deals with the initiative, the referendum and the recall. Each of these sections reviews the principal constitutional alternatives for the Convention, summarizes the relevant state practices, and analyzes the specific considerations which should be evaluated by the delegates.

A. Eligibility to Vote

All state constitutions and the Puerto Rico constitution include provisions on voter eligibility.[26/] Based upon these precedents, the Convention can establish requirements in the Commonwealth Constitution with respect to:

1. United States citizenship or national status;

2. attainment of at least 18 years of age;

3. residence in the Commonwealth for a period of 30 to 60 days;

4. some level of literacy in English or in another language;

5. mental competency; and

6. no history of conviction of certain crimes.

The alternatives with respect to each of these possible voter qualification requirements are set out below.

1. United States citizenship

The Convention must decide whether to require United States citizenship as a qualification for voting.[27/]

[26/] The short Puerto Rico provision states:

> Every person over eighteen years of age shall be entitled to vote if he fulfills the other conditions determined by law. No person shall be deprived of the right to vote because he does not know how to read or does not own property.
> P.R. CONST. art. VI, § 4.

[27/] If citizenship is required, a transitional problem arises because no one can become a United States citizen or national until the end of the Trusteeship agreement and establishment of the Commonwealth. Under the provisions of § 1003(a) and (b), however, it is expected that the Constitution of the

A citizenship requirement would attempt to ensure voter loyalty to the Commonwealth and the United States and voter familiarity with candidates and issues. It can be contended that such a citizenship requirement does not ensure any more loyalty or familiarity than a short-term residence requirement based on domicile.[28/] Nonetheless, all 50 states require United States citizenship and Puerto Rico requires United States citizenship by statutory provision.[29/] The United States Supreme Court has never questioned U.S.

[footnote continued]

Northern Mariana Islands will become effective before termination of the Trusteeship.

28/ Domicile can be defined briefly as maintaining a residence with the intention of remaining indefinitely. See the definition in § 1005(e) of the Covenant and the discussion below in § II(A)(3)(b) of this paper. The Constitution can impose a citizenship requirement alone or in conjunction with a residency requirement.

29/ A. Howard, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA, vol. 1, p. 341 (1974). The Puerto Rico approach of requiring United States citizenship by statute could create a problem. If the Constitution includes United States citizenship as a voting qualification, citizens of the Northern Mariana Islands eligible for citizenship but who choose national status instead will have ample time between the ratification of the Constitution and the termination of the Trusteeship (the date they must make their choice) to learn that national status deprives them of the right to vote. If the Constitution grants the right to vote "to any person" but the legislature decides to require citizenship after establishment of the Commonwealth, that would unfairly discriminate against persons who chose national status with the understanding that they could vote in Commonwealth elections.

citizenship as a valid requirement for voter eligibility.[30] If the Convention adopts a citizenship requirement, it may also consider the minimum length of citizenship that will satisfy the policy reasons for imposing the requirement.[31]

Two categories of persons will satisfy a requirement of United States citizenship: (1) United States citizens from outside the Northern Mariana Islands;[32] and (2) persons in the Northern Mariana Islands who will become United States citizens by virtue of the Covenant.[33]

A citizenship requirement would deny the right to vote to aliens and United States nationals, and the Convention may wish to focus on the particular problems associated with each of these categories.

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[30] A. Howard, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA, vol. 1, p. 341 (1974).

[31] California, Minnesota, New York, and Utah require citizenship for 90 days prior to an election. Id. Other states omit such requirements because there is no reason to assume that a person who has been a citizen for several years is more loyal to the United States than a new citizen who has been forced to meet strict naturalization standards. Legislative Reference Bureau, HAWAII CONSTITUTIONAL CONVENTION STUDIES, ARTICLE II: SUFFRAGE AND ELECTIONS p. 9 (1968) [hereinafter cited as HAWAII STUDIES]. In Dunn v. Blumstein, 405 U.S. 330 (1972), the Supreme Court saw no compelling state interest that justified discrimination between old residents and new residents resulting from the durational residency requirement of more than 30 days. The reasoning of that case probably jeopardizes the constitutionality of durational citizenship requirements. A. Howard, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA, vol. 1, p. 341, n.28 (1974).

[32] For a discussion of this first category, particularly military personnel, see p. 24 n.42 below.

[33] COVENANT art. III, § 301.

a) Nationals

A requirement of United States citizenship for eligibility to vote in the Commonwealth creates a unique problem: it eliminates from the electorate those persons who choose to become United States nationals but not United States citizens under section 302 of the Covenant. The term "national of the United States" means a citizen of the United States or a person who, although not a citizen of the United States, owes permanent allegiance to the United States. 34/ There are very few substantive differences between a citizen and a national of the United States; and the legislative history of Section 302 indicates that it was included in the Covenant to meet the desires of

> a small number of generally older residents of the Northern Mariana Islands who felt that the acquisition of United States citizenship would be contrary to their local traditions, and who preferred the national but not citizen status held by the residents of American Samoa. 35/

In light of the history of section 302, the Convention should consider whether any rational basis exists for distinguishing between citizens and nationals with respect to their eligibility to vote in Commonwealth elections. It is logical to assume that those who elect to become nationals will know as much about Commonwealth issues and candidates as those who choose to become United States citizens. Nationals also will

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34/ Immigration and Naturalization Act, 8 U.S.C. § 1101(a)(22).

35/ S. Rep. No. 94-433, 94th Cong., 1st Sess., p. 71 (1975).

have the same local obligations as persons who prefer United States citizenship. Further, because the choice of national status is available only once (within six months of establishment of the Commonwealth for persons over 18 years of age who are eligible for citizenship, or within six months after reaching the age of 18 for children eligible for citizenship), nationals will comprise a transitional group that will disappear with time.

Under these circumstances, the Convention might decide in favor of granting the right to vote to persons who choose national status under section 302 of the Covenant. A provision granting the right to vote to "all citizens and nationals" would accomplish this purpose.[36/]

b) Aliens

Any person who is not a citizen or national of the United States is an alien.[37/] Generally, aliens are not

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36/ This would allow other nationals of the United States (e.g., Samoans) who meet other Commonwealth voting qualifications (e.g., age and domicile) to vote in Commonwealth elections.

37/ 8 U.S.C. § 1101(a)(3). In addition to persons owing allegiance to foreign nations, aliens include two groups excluded from citizenship by the Covenant: (1) persons domiciled in the Northern Mariana Islands for less than five years at the date of establishment of the Commonwealth who were not born in the Commonwealth; and (2) persons domiciled in the Northern Mariana Islands for more than five years at the date of establishment of the Commonwealth who failed to register to vote prior to January 1, 1975. COVENANT art. III, § 301(b). The second group had notice of the registration requirement prior to the formal signing of the Covenant and is probably few in number. Under the provisions of § 506(c), however, aliens in these two groups who are "immediate relatives" of United States citizens permanently residing in the Northern Marianas will be able to become citizens under the provisions of the United States Immigration and Naturalization Act.

permitted to vote in state or federal elections. A citizenship requirement in the Constitution would deny aliens the right to vote in the Northern Marianas. Omitting a citizenship requirement and allowing aliens to vote in Commonwealth elections would promote universal suffrage. Because the voters in the Commonwealth will not vote in United States elections, the Convention might choose not to conform to the practice within the United States.

If the Convention chooses to omit the citizenship requirement, a residence requirement based on domicile would distinguish between resident aliens and temporary aliens who maintain their foreign allegiances while within the Commonwealth.[38/] Resident aliens in the Commonwealth will undeniably have an interest in the affairs of the Commonwealth. Nevertheless, the Convention might decide, based on American tradition and a judgment that a citizenship requirement helps ensure responsible voting, to deny aliens the voting privilege.[39/]

2. Age

The Convention may not establish a more stringent voting age requirement than the 18-year standard set by the Twenty-sixth Amendment to the United States Constitution.

38/ This is discussed further below in Part II(A)(3)(b).

39/ Under § 503(a) of the Covenant, the immigration and naturalization laws of the United States will not apply to the Commonwealth (except as otherwise provided in § 506 of the Covenant) unless Congress acts to make them applicable after termination of the Trusteeship Agreement. Therefore, most immigrants to the Northern Mariana Islands cannot become United States citizens.

It may establish a lower voting age requirement or authorize the legislature to do so. No state constitution has done so.

3. Residence

The Convention must make three basic decisions with respect to a residence requirement: (a) whether to include any such requirement; (b) if a requirement is included, whether residence should be defined in the Constitution and, if so, how; and (c) if a residence requirement is included, how long it should be.

a) Purpose of a resident requirement

A residence requirement serves three primary purposes: (1) it seeks to ensure that voters make informed decisons about candidates and issues and that they have an interest in the outcome of elections; (2) it helps prevent some abuses of the electoral process such as multiple voting and temporary residence to influence the outcome of an election; and (3) it facilitates recordkeeping in election administration. All fifty states require a period of state residence as a qualification for voting.[40/]

b) Definition of residence for voting purposes

A good definition of residence is difficult to draft because determination of a person's intent to live in the

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40/ The constitution of Puerto Rico does not have a residence requirement, but the laws of Puerto Rico require all voters to be "bona fide" residents. P.R. ANN. LAWS tit. 16, § 41.

Commonwealth on a permanent basis will require review of many criteria that will vary as the complexity of social organization and the mobility of the population increase.[41/] These criteria might include year-round residence, payment of taxes, property ownership, possession of a driver's

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41/ Section 1005(e) of the Covenant defines domicile as

> that place where a person maintains a residence with the intention of continuing such residence for an unlimited or indefinite period, and to which such person has the intention of returning whenever he is absent, even for an extended period.

Residence for voting purposes in Puerto Rico is defined by statute. The definition is based on domicile:

> The domicile which is the voter's legal residence, shall be determined in accordance with the following rules: (1) Every person has a domicile. (2) There can be but one domicile. (3) Legal residence or domicile is the place where a person habitually resides when not called elsewhere to work or for some other temporary purpose, and to which such person returns in seasons for rest. (4) Legal domicile or residence may be changed by joinder of acts and intent. (5) A domicile cannot be lost until a new one has been acquired.

P.R. ANN. LAWS tit. 16, § 41.

Criteria used for determining residence for voting purposes in the June, 1975 plebiscite election in the Commonwealth are set out above, at pp. 11-12.

license and other indicia of permanent abode.[42] An alternative solution if a residence requirement is adopted might be to leave the definition of residence to determination by the courts on a case-by-case basis.[43]

A third alternative would leave the definition of residence to the Commonwealth legislature. The Model State

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42/ The Convention may be concerned about granting the right to vote to military personnel stationed in the Commonwealth. Many states have had the same concern. Approximately half of the state constitutions contain provisions designed to exclude military personnel from voting in their elections by preventing military personnel from gaining or losing residence for voting purposes. Other classes of persons often named in these provisions include students, paupers and mental incompetents. E.g., N.Y. CONST. art. II, § 4; ORE. CONST. art. II, §§ 4-5.

The United States Supreme Court, however, in Carrington v. Rash, 380 U.S. 89 (1965), invalidated a Texas constitutional provision denying military men the right to vote as long as they remained in the Armed Forces. In Evans v. Cornman, 398 U.S. 419 (1970), the Court declared residents of federal enclaves eligible for the franchise in the state in which the federal area is located.

The decisions also stress that a state can limit the right to vote to bona fide residents. E.g., Carrington v. Rash, 380 U.S. 89, 94 (1965). The Convention can address its concern about military persons voting in the Commonwealth in two ways. First, the Constitution can include a strict definition of residence for voting purposes based on domicile (or it can direct the legislature to establish such a definition). Second, the Constitution can include a registration provision that places the burden on the applicant of proving bona fide residence and that requires a certification under penalty of law that the applicant is not registered to vote elsewhere. E.g., VA. CONST. art. II, § 2. These provisions would ensure that a military person or student can only vote in one place and cannot vote in the Commonwealth until his or her previous domicile is lost.

43/ The Virginia constitution contains a specific definition of residence for voting purposes: "Both domicile and a place of abode." VA. CONST. art. II, § 1. No other state constitution includes a specific definition.

Constitution adopts this approach: "The legislature shall by law define residence for voting purposes. . . ."[44/] The California and Michigan constitutions contain similar provisions.[45/]

c) Length of residence requirement

The Constitution may include a durational residence requirement of from 30 to 60 or perhaps 90 days. The United States Supreme Court has held that lengthy residence requirements are unconstitutional.[46/] The Court was not convinced that residence requirements ensure a more informed and interested electorate, but it did recognize the need for residence requirements for administrative purposes. The Court suggested a thirty-day requirement to meet this need. In recent cases the Court has allowed fifty-day rules in states showing special circumstances, while stating that fifty-day rules approach the constitutional limit.[47/]

4. Literacy

Literacy has been a traditional and permissible qualification for voting,[48/] and some 19 state constitutions

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44/ National Municipal League, MODEL STATE CONSTITUTION art. III, § 3.02 (6th rev. ed. 1968) [hereinafter cited as MODEL CONST.]

45/ CAL. CONST. art. II, § 2; MICH. CONST. art. II, § 1.

46/ Dunn v. Blumstein, 405 U.S. 330 (1972).

47/ Marston v. Lewis, 410 U.S. 679 (1973); Burns v. Foreston, 410 U.S. 686 (1973).

Prohibiting voter registration within 30 days of an election (see the discussion below in § II(B)(7)) eliminates the need for the Constituion to specify a length of residence requirement.

48/ Lassiter v. Northhampton County Bd. of Elections, 360 U.S. 45 (1959).

have such a requirement.[49] The utility of a literacy requirement as a policy tool, however, has been challenged by many political scientists and civil rights advocates.[50] The Puerto Rico constitution explicitly states: "No person shall be deprived of the right to vote because he does not know how to read or write."[51]

A literacy requirement can be enforced through any test of the ability to read, write, or interpret any written material.[52] Possible tests include: completing without assistance an application for voting registration; reading or writing any provision of the United States or Commonwealth Constitution; or writing one's own name.

Those who favor the constitutional inclusion of literacy provisions contend that they serve legitimate policy objectives because: (1) illiterates cannot understand the ballot and providing assistance for substantial numbers of illiterate voters at the polls could increase the opportunity for fraud; (2) illiterates must rely upon word-of-mouth recommendations and hearsay statements about issues and candidates

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49/ E.g., CONN. CONST. art. VI, § 1; GA. CONST. art. II, § 1; ME. CONST. art. II, § 1.

50/ J. Ferguson & D. McHenry, THE AMERICAN SYSTEM OF GOVERNMENT pp. 183, 215-17 (12th ed. 1973); R. Maddox & R. Fuquay, STATE AND LOCAL GOVERNMENT p. 215 (3d ed. 1975).

51/ P.R. CONST. art. VI, § 4.

52/ 42 U.S. § 1973b(c) (defining literacy "test or device").

and thus cannot make independent and intelligent choices at the polls; and (3) literacy requirements serve as an incentive for illiterate persons to learn to read.[53/]

Those who oppose literacy requirements contend: (1) illiterates can get adequate information about political issues and candidates from radio, television and talking with other persons; (2) since election officials help the blind and disabled, illiterates should get similar assistance; (3) illiterate persons have economic and social interests distinct from those of better educated and wealthier citizens and should have the opportunity to express those interests through the political process; (4) literacy tests attack the problem at the wrong place; the cure is to raise educational standards in schools rather than to penalize already disadvantaged persons; (5) literacy tests are open to abuse because they vest broad discretionary powers in the hands of election officials; and (6) literacy tests discriminate against the poor, the aged and rural inhabitants.[54/]

The United States Congress has prohibited states from using any kind of literacy test or device through the Voting

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53/ Lassiter v. Northhampton County Bd. of Elections, 360 U.S. 45, 51-52 (1959); R. Maddox & R. Fuquay, STATE AND LOCAL GOVERNMENT p. 215 (3d ed. 1975); HAWAII STUDIES p. 22.

54/ Lassiter v. Northhampton County Bd. of Elections, 360 U.S. 45, 52-53 (1959); U.S. CONG. & ADMIN. NEWS, 94th Cong., 1st Sess. pp. 787-804 (1975) (P.L. 74-73); Hearings on S. 1564 Before the Senate Comm. on the Judiciary, 89th Cong., 1st Sess., pt. 2, pp. 1447-55 (1965).

Rights Act of 1965, as amended in 1975.[55] Although this act is not applicable to the Commonwealth, the strong opposition to literacy tests reflected in this legislation argues against the inclusion of a literacy requirement in the Commonwealth Constitution.

The Convention may wish to consider another aspect of the literacy problem -- providing voter assistance in minority languages to encourage voting by persons literate in languages other than English (or Chamorro).[56]

5. Disqualifications

In defining the group of eligible voters, the Convention may desire to consider two widely-used types of disqualifications: conviction of a crime and adjudication of unsound mind.

a) Crime

The Supreme Court has upheld the right to disqualify convicted felons from voting,[57] and all but four state constitu-

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55/ 42 U.S.C. § 1973aa(a) (Supp. 1976).

56/ A precedent for this type of provision exists in the Voting Rights Act. Section 1973aa-1a requires a state to prepare "any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots" in the language of all minority groups in the state with members equaling more than 5% of the citizens of voting age in the state. In addition, where the language of the applicable minority group is oral or unwritten, the state is required to furnish oral instructions, assistance or other information relating to registration and voting. 42 U.S.C. § 1973aa-1a(b), (c) (Supp. 1976).

57/ Richardson v. Ramirez, 418 U.S. 24 (1974).

tions include such disqualification provisions.[58/] If it wishes to disqualify such persons from voting, there are three alternative methods that the Convention might select: (1) it may include a general disqualification provision, referring to broad classes of crime such as a "felony" or "infamous crime" or a crime involving "moral turpitude";[59/] (2) it may list specific crimes that result in disqualification (e.g., bribery, embezzlement, forgery, larceny, or treason);[60/] or (3) it may authorize the legislature to specify disqualifying crimes.[61/]

The first alternative provides some flexibility, but still limits the legislature's discretion to decide what crimes to include and what crimes to exclude. It eliminates the possibility of a person's losing the right to vote for conviction of a petty misdemeanor. Those who favor the second alternative believe that, if discretion is left to the legislature, the power may be abused and policy altered from year to

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58/ The exceptions are Indiana, Massachusetts, Pennsylvania and Vermont. The Puerto Rico constitution is also silent in this area.

59/ E.g., OHIO CONST. art. V, § 4; TEX. CONST. art. VI, § 1; WASH. CONST. art. VI, § 3.

60/ E.g., ALA. CONST. art. VIII, § 182, IDAHO CONST. art. VI, § 3.

61/ E.g., CONN. CONST. art. VI, § 3; N.J. CONST. art. II, § 7.

year. Those who favor the third alternative argue for constitutional flexibility, especially in light of changing ideas about penal reform.

At least 30 of the 46 states that use disqualification provisions follow the first alternative. Many of the same state constitutions also include lists of specific crimes.[62/] Ten states and the Model State Constitution specifically delegate the listing of crimes to the legislature. The remaining states list crimes and give the legislature the power to disqualify persons convicted of those crimes.

If a disqualification provision is to be included, the Commonwealth Constitution may provide for permanent disqualification of persons convicted of certain crimes unless pardoned; it may provide for restoration of voting rights at the end of imprisonment; or it may leave the extent of disqualification to the discretion of the legislature. Many authorities believe that permanent disqualification serves no useful purpose and that rehabilitation should include recovery of one's voting rights and the opportunity to participate in the political process.[63/] At least 24 state constitutions permit ex-felons who have served their sentences full voting rights. The most

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62/ MODEL CONST. art III, § 3.01.

63/ Richardson v. Ramirez, 418 U.S. 24, 83-85 (1974) (Marshall, J., dissenting).

common provision states that disqualification continues "unless restored to civil rights."[64/] Colorado limits disqualification to the full term of imprisonment.[65/] The Model State Constitution[66/] leaves the decision to the legislature.

b) Unsound mind

All states deny voting privileges to the mentally unsound either by constitutional provision, statute or judicial decision.[67/] A principal consideration in this respect is the definition of "unsound mind." The Secretarial Order that established eligibility to vote in the 1975 plebiscite in the Northern Marianas used the definition "under a judgment of mental incompetency or insanity."[68/] This definition has the advantage of resting on a judicial determination made prior to, and not for the purpose of, establishing qualifications to vote. Like the definition of disqualifying crimes, the Convention may decide to leave this matter to the legislature or to the courts for determination on a case-by-case basis.

B. Election Procedures

There are two basic approaches to constitutional provisions regulating the electoral process. One is to set forth

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64/ E.g., N.M. CONST. art. VII, § 1; WYO. CONST. art. VI, § 6.

65/ COLO. CONST. art. VII, § 10. The American Law Institute supports this approach. MODEL PENAL CODE § 306.3 (Proposed Official Draft 1962).

66/ MODEL CONST. art. III, § 3.01.

67/ E.g., HAWAII CONST. art. II, § 2; N.J. CONST. art. III, § 6.

68/ Sec. Order No. 2973, § 7; 40 Fed. Reg. 17300, 17301 (1975).

a few basic principles and authorize the legislature to provide statutory detail that adheres to the stated principles. The Model State Constitution chooses this approach:

> The legislature shall by law . . . insure secrecy in voting and provide for the registration of voters, absentee voting, the administration of elections and the nomination of candidates.69/

The Puerto Rico constitution also takes this approach. Article II, section 2 sets forth the relevant principles:

> The laws shall guarantee the expression of the will of the people by means of equal, direct and secret universal suffrage and shall protect the citizens against any coercion in the exercise of the electoral franchise.

Article IV, section 4 authorizes the Puerto Rican legislature to supply the details:

> All matters concerning the electoral process, registration of voters, political parties and candidates shall be determined by law.70/

The Convention might select this approach because of the need to promote flexibility that allows modification of

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69/ MODEL CONST. art. III, § 3.02.

70/ The remainder of this section supplies a few details: (1) that general elections shall be held every four years in November; and (2) that officials shall be elected by direct vote and the candidate receiving the most votes for an office shall be declared elected.

The Hawaii constitution is similarly simple. HAWAII CONST. art. II, § 4. See also CONN. CONST. art. VI, § 4; MICH. CONST. art. IV, § 4; MONT. CONST. art IV, § 3; NEV. CONST. art. II, § 6.

election procedures as circumstances and improved methods dictate, and because legislators are likely to develop greater expertise in these areas over the years. Since the Commonwealth legislature will need to fill in many details in any case,[71/] giving the entire job to the legislature from the start could avoid inconsistencies and the creation of disadvantageous constitutional rigidities.

The second approach permits somewhat more detail in the Constitution. If this approach is selected, the Convention may want to include general constitutional guidelines for the legislature in the following areas (listed in approximate order of constitutional priority):

1. orderly succession to office;
2. contested elections;
3. voting protections;
4. absentee voting;
5. language discrimination;
6. integrity of elections;
7. election scheduling;
8. balloting methods;
9. election administration;
10. voter registration;
11. nominating procedures.

71/ For example, the election laws of Puerto Rico cover over 400 pages. The Trust Territory election laws (title 43) are 35 pages in length.

1. Orderly succession to office

Three kinds of constitutional provisions are available to ensure orderly transition to office after elections.

a) Number of votes required for election

The Constitution may provide that a person to be elected shall receive the highest number of votes, a majority of the votes, or a plurality at least equal to a specified percentage of the votes cast. The advantage of the first provision is that it eliminates the need for (and cost of) special run-off elections. Requiring a majority may also require a run-off election, but it ensures agreement among a larger number of voters. A requirement of a plurality of a specified size is a compromise between the first two types of provisions.

The Puerto Rico constitution adopts the first alternative for all elected officials.[72/] The Hawaii constitution adopts the first alternative for governor and lieutenant governor.[73/]

b) Date of commencement of term of office

The Constitution may specify the date upon which the terms of public office begin, or these dates may be included in

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72/ P.R. CONST. art. VI, § 4. See also MONT. CONST. art. IV, § 5; ORE. CONST. art. II, § 16.

73/ HAWAII CONST. art. IV, §§ 1, 2. Legislators and local officials are elected similarly, by statutory provision.

the provisions establishing the offices.

c) Provision for continuity of office

The Constitution may include a provision for the continuity of office in the event that a newly elected official is unable to take office at the specified date. For example, the Texas constitution provides:

> All officers within this State shall continue to perform the duties of their offices until their successors shall be duly qualified.74/

2. Contested elections

The Constitution may include a provision for the resolution of contested election results. If so, the alternatives for resolving such contests are: (a) in a manner prescribed by law; (b) by one or both houses of the legislature; or (c) by the courts. The first alternative provides flexibility. The second alternative has the disadvantage of permitting partisan considerations existing at the time of the contested election to influence the legislature's resolution of the issue. The third alternative guarantees the contestants a court hearing under established procedures and precedents.75/

74/ TEX. CONST. art. XVI, § 17. Vacancies in executive and legislative branch positions are discussed in BRIEFING PAPER NO. 2: THE EXECUTIVE BRANCH OF GOVERNMENT § II(B)(1)(d); and BRIEFING PAPER NO. 3: THE LEGISLATIVE BRANCH OF GOVERNMENT § II(C)(3).

75/ Six states authorize the courts to determine contested elections: Colorado (with the exception of executive offices), Hawaii, Louisiana, Missouri, Pennsylvania and Wyoming. A judicial appeal as a last resort may be available even if one of the first two alternatives is prescribed.

Most state constitutions do not contain provisions for the resolution of all contested elections, and a number provide different methods for the resolution of elections for different offices. Contested elections for governor, lieutenant governor and other executive officers[76] are resolved by all three methods. Most state constitutions provide that contested elections for legislators shall be judged by the members of the house that is affected. Where the constitution is silent, the legislature is assumed to have the power to provide a method for resolving contested elections under its broad power to control and regulate elections.[77]

3. Voting protections[78]

All state constitutions except those of New Hampshire,

76/ Contested elections for executive officials are to be resolved:

(1) in a manner prescribed by law: Idaho, Montana, Nebraska and New Jersey;

(2) by one or both houses of the legislature: Alabama, Arkansas, Colorado, Delaware, Georgia, Illinois, Indiana, Iowa, Kentucky, Maryland, Mississippi, North Carolina, Oregon, South Carolina, Tennessee, Texas, Virginia, Washington, and West Virginia;

(3) the courts: Connecticut and Missouri.

77/ HAWAII STUDIES p. 42.

78/ The Constitution may provide for compulsory voting, as one way of achieving universal suffrage. No state constitution mandates compulsory voting. The constitution of Massachusetts authorizes the legislature to provide a system of compulsory voting, but no such legislation has been enacted. MASS. CONST. art. LXI.

New Jersey, Oregon, Rhode Island and Vermont guarantee the secrecy of voting. For example, the Hawaii constitution states: "Secrecy of voting shall be preserved." 79/

Several state constitutions include a provision protecting voters from other governmental duties or arrest while voting. The Virginia constitution, for example, provides:

> No voter, during the time of holding any election at which he is entitled to vote, shall be compelled to perform military service, except in time of war or public danger, nor to attend any court as suitor, juror, or witness; nor shall any such voter be subject to arrest under any civil process during his attendance at election or in going to or returning therefrom. 80/

4. Absentee voting

The Convention may desire to provide for absentee balloting in the Constitution. Such a provision may be limited to specific classes of voters, such as those required by occupational duties to be out of the voting district on election day, or may apply to all voters who are unable to visit the polling place, including the ill, the handicapped or those unable to attend the polls due to religious beliefs. The argument for extensive absentee voting provisions is that such provisions should not

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79/ HAWAII CONST. art. II, § 4. Other examples are: CAL. CONST. art. II, § 6; IDAHO CONST. art. VI, § 1; PA. CONST. art. VII, § 6.

80/ VA. CONST. art. II, § 9. Other examples are: MONT. CONST. art. IV, § 6; ORE. CONST. art. II, § 13; WYO. CONST. art. VI, § 3.

discriminate among classes of people, but should ensure that the maximum number of people who want to vote are able to do so.

The constitutions of over a third of the states authorize the legislature to provide a method of absentee voting.[81/] The constitutions of a few states require more than mere absence for absentee voting.[82/] All but three states provide for civilian absentee voting by statute, and all states provide by statute for absentee balloting by members of the armed forces.

5. Language aid

The Constitution may authorize the legislature to provide assistance for handicapped voters and for the preparation of all election and registration materials (including ballots) in languages (in addition to English or Chamorro) spoken or read by more than a specified percentage (e.g., five percent) of the Commonwealth population. Such provisions would aid potential voters with the possible effect of increasing voter turnout.

81/ E.g., HAWAII CONST. art. II, § 4.

82/ E.g., ME. CONST. art. II, § 4; PA. CONST. art. VII, § 14.

6. Integrity of elections

In order to preserve the integrity of elections, the Constitution may include a provision enabling the legislature to enact penalties for violations of election laws, such as dual voting or bribery. Specific safeguards or penalties (e.g., disqualification for conviction of election fraud) may also be included.

Such a Constitutional provision endeavors to assure the honesty of elections and the accuracy of voting results. On the other hand, including specific safeguards or penalties in the Constitution has the disadvantage of restricting flexibility. Those who oppose this kind of provision believe that it is unnecessary, arguing that the legislature can pass such legislation under a broad constitutional mandate to regulate and govern the electoral process. If the Convention adopts this view, the inclusion of a clause granting the legislature broad electoral powers will eliminate the need for any provision erecting specific safeguards or penalties.

The constitutions of almost half the states include statements to the effect that the legislature "shall pass laws to secure the purity of elections, and guard against abuses of the elective franchise."[83/] Eight other states specify

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83/ E.g., COLO. CONST. art. VII, § 11; WYO. CONST. art. VI, § 13.

particular methods for preserving the purity of elections such as the identification of voters by signature comparison, or numbering ballots and recording the number opposite the voter's name on the registration list.[84/]

7. Election scheduling

The Constitution may contain several general provisions with respect to the scheduling of elections, or these matters might be left to legislative action.

a) Regularly scheduled general elections

The Constitution may provide for regularly scheduled general elections. Such a provision would specify a date on which elections are to be held every year, every two years or at other fixed intervals. The advantages of this alternative are: (1) it ensures regularly held elections; (2) it is convenient for voters if Commonwealth and local officials are elected at the same time; and (3) it provides a reference point for other provisions of the Constitution related to the electoral process.

A second alternative is to include the election dates for elected officials in those sections of the Constitution creating the offices. This alternative can produce the same benefits as the first, provided that different officials are not elected at different times.

84/ These states are Alabama, Arkansas, Louisiana, Missouri, New York, Pennsylvania, South Dakota and Vermont. The Model State Constitution does not contain such a provision.

A third alternative is to permit the legislature to designate the time of general elections; or if a date is specified in the Constitution, to permit the legislature to alter the specified date. The advantage of this alternative is that it enables the legislature to meet special circumstances with some measure of flexibility.

b) Timing of elections

If the Constitution provides for regular general elections, all Commonwealth and local officials can be elected at the general election.[85/] An alternative approach would be to provide that only Commonwealth officials can be elected at general elections, leaving local elections to the control of any local governments in the Commonwealth.

Separate elections facilitate the separation of Commonwealth and local issues and permit the use of shorter ballots. The arguments favoring simultaneous elections are reduced cost and greater public participation. Requiring persons to vote at many different times tends to decrease voter turnout.

85/ E.g., MICH. CONST. art. XVII, § 11. A discussion of elected local government officials is set out in BRIEFING PAPER NO. 10: LOCAL GOVERNMENT § II(B)(2).

If regular elections are required by the Constitution they may be scheduled to coincide with U.S. Presidential and Congressional elections, or they may be scheduled at different times. In all states except Kentucky, Mississippi, New Jersey and Virginia, statewide elections coincide with national elections. Holding elections at the same time as federal elections might encourage popular association with the United States. Whereas holding state elections at the same time as federal elections might subordinate local issues to federal issues and candidates, this might be a more remote possibility in the Northern Marianas.

c) Election holiday

The Constitution may include a provision for an election holiday in order to alleviate crowding at the polls and emphasize the importance of voting. No state constitution makes election day a holiday. An Hawaii statute establishes general election day as a holiday and permits voters to take two consecutive hours off from work with pay for the purpose of voting.

8. The ballot

The Constitution may specify the method of voting[86/] -- by ballot, punch card or voting machine. If the method of voting is specified, other provisions can elaborate on the specified method or methods.

86/ E.g., ARK. CONST. art. III, § 3; COLO. CONST. art. VII, § 8; MO. CONST. art. VIII, § 3.

The Constitution may include provisions regarding the form of the ballot or the listing of candidates on a voting machine. Such matters can hardly be considered so fundamental as to justify constitutional treatment, and only a few states have done so.

One issue which has prompted constitutional attention is straight party voting, which is expressly authorized by Connecticut and forbidden by Ohio and Virginia. Straight party voting requires a ballot that lists candidates by party and provides a circle at the top of the list which, if marked, indicates the voter's wish to support all candidates of that party. This approach allows voters to determine candidates' positions on the issues in part by their political affiliation and to support an entire slate of candidates supposedly unified by adherence to a common party platform. Supporters of straight party voting also contend that it simplifies voting.

Forbidding straight party voting requires ballots with candidates listed by office in alphabetical order without any distinguishing mark or symbol. This approach requires voters to express a judgment about the candidates for each office and, theoretically at least, requires the electorate to be more informed about the candidates and issues.

9. Election administration

Election administration is a broad area covering the method of voting and counting votes, the supervision of voting places and similar matters. The alternatives with respect to election administration are to: (1) provide details in the Constitution; (2) authorize the legislature to provide all details; or (3) authorize the legislature to provide details within the framework of some guidelines or guarantees in the Constitution, such as centralized authority, merit appointment of election officials, and bipartisan representation on election boards.

Arkansas and Virginia are the only states that establish a detailed system for election administration in their constitutions. The Arkansas provision is a good example of the danger of including details in a constitution that become obsolete and inflexible.[87/] It required that each ballot be presented to an election officer who recorded the number of the ballot and who was under oath not to disclose how any person voted. The section was repealed and replaced by an amendment permitting the use of voting machines.

Twenty-two states and Puerto Rico follow the second alternative by providing brief provisions to the effect that the legislature shall pass laws to regulate and govern elections.[88/]

87/ ARK. CONST. art. III, § 3 (repealed and replaced by amend. 50).

88/ E.g., ALAS. CONST. art. V, § 3; MICH. CONST. art. II, § 4; MONT. CONST. art. IV, § 3; ORE. CONST. art. II, § 8.

If the Convention selects the third alternative, the Constitution can provide for a central authority to supervise elections and develop uniform procedures for election administration. This might involve the designation of a chief election official or board with the authority to appoint and remove local election officials.[89/] Such a centralized authority would be in a position to develop uniform election procedures, supervise and coordinate Commonwealth elections and enforce provisions penalizing election fraud. Although generally delegated to the offices of attorney general, lieutenant governor or secretary of state, these duties are usually considered minor compared to other duties of those offices and are often neglected. The Constitution may also provide for merit appointment of election personnel in order to reduce election fraud and vote-counting errors that can occur if political affiliation is the primary criterion for selection.[90/]

89/ A similar provision in the MIDC, tit. 2, ch. 2.32, § 2.32.030, sets out the duties of the election commissioner. Another example is the Illinois constitution. ILL. CONST. art III, § 5.

90/ Only the Arkansas constitution contains such a provision. ARK. CONST. amend. 51, § 5(a).

The Constitution might also provide for bipartisan representation on election boards in order to ensure fair and impartial election procedures as is done in Virginia. VA. CONST. art. II, § 8. The bipartisan system poses problems in states or jurisdictions with more than two major political parties (for example, New York City). An alternative is to provide for strict non-partisan representation on election boards, which assumes that such apolitical people can be found in the requisite number and quality.

10. Voter registration

The decisions that the Convention must make with regard to voter registration are: should the Constitution require voter registration; if so, how much detail should the Constitution include; and should the Constitution require a specific kind of registration.

a) Purpose of voter registration

Registration requires each person eligible to vote to fill out an application so that election authorities can determine that the person meets the requisite voter qualifications. Voter registration also reduces the opportunity for multiple voting and other kinds of election fraud. Opponents of voter registration contend that it results in many eligible voters being unable to vote because they fail to register properly.[91/] All states except North Dakota use registration systems.

Most state constitutions do not go beyond a brief statement authorizing the legislature to provide a system of registration. The Hawaii constitution is typical: "The legislature shall provide for the registration of voters."[92/] The Model State Constitution provision is similarly worded.[93/] Virginia's provision is an example of a detailed provision that

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91/ See Kelley, Ayers & Bowen, Registration and Voting: Putting First Things First, 61 POL. SCIENCE REV. p. 359 (1967).

92/ HAWAII CONST. art. II, § 4.

93/ MODEL CONST. art. III, § 3.02.

lists the information an applicant must provide and specifies how and where an application must be filled out.[94/] A detailed provision ensures that constitutionally specified voter qualifications will be enforced. The disadvantage of a detailed constitutional provision is the possibility that it will become obsolete and impede progress in improving registration methods.

b) Kinds of registration systems

If voter registration is required by the Constitution, the Convention might also want to specify one of the following types of registration system: periodic registration; permanent registration; or automatic registration. For example, Texas has a constitutional provision requiring periodic registration.[95/] Four states (Alaska, Arkansas, New York, and Rhode Island) have provisions specifically permitting or requiring permanent registration.[96/] No states have automatic registration systems, although Canada and some European countries have used these systems successfully.

Periodic registration requires all voters to re-register at stated intervals. Proponents of this

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94/ VA. CONST. art. II, § 2. Virginia's constitution also prohibits the closing of registration records within 30 days of an election. See also ALA. CONST. art. VIII, §§ 186-87.

95/ TEX. CONST. art. VI, § 2.

96/ ALAS. CONST. art. V, § 4; ARK. CONST. amend. LI, § 1; N.Y. CONST. art. II, § 6; R.I. CONST. art. XXV.

system contend that it ensures that records are current and thereby diminishes opportunities for corruption. Critics claim that it is uneconomical and inconvenient, and that it tends to discriminate against the less informed and less politically motivated.[97/]

Permanent registration requires the voter to register only once. Re-registration can be required if the person changes residence or name, or fails to vote in a specified number of elections.[98/] Proponents of permanent registration contend: (1) the demands upon the voters are minimal, resulting in increased voter turnout at elections; (2) recordkeeping is facilitated because election officials need only enter newly eligible voters and delete ineligible voters; (3) it increases the rate of registration of less educated people; and (4) the requirement of re-registration following failure to vote in a specified number of elections or years reduces the possibility of fraud. Opponents of permanent registration argue: (1) fraudulent voting is easier because the voter rolls at any given time include the names of those who have died, moved away or lost their eligibility; and (2) the high mobility of modern society reduces the value of such provisions.[99/]

97/ HAWAII STUDIES p. 36.

98/ This kind of registration system is provided for in the TRUST TERRITORY CODE §§ 256, 257.

99/ HAWAII STUDIES p. 37.

In many countries (including Canada), the government assumes the responsibility for preparing lists of persons eligible to vote and reminding each eligible voter when an election is near so that the person can register and vote. Automatic registration systems are believed to produce larger voter turnout. No state in the United States uses such a system. In an area with a small population like the Commonwealth, however, automatic registration might be useful.

11. Nominating procedures

The nominating process selects the candidates among whom the voters must choose at elections. Because the process limits their choices at elections, it is important that voters have a role in nominating candidates. There are three basic alternatives for the Constitution regarding nominating procedures: (1) it can be silent as to nominating procedures; (2) it can authorize the legislature to provide nominating procedures by law; or (3) it can specify a method for nominating candidates.

Forty state constitutions and the Puerto Rico constitution do not contain any provisions pertaining to the manner of nominating candidates for public office. The effect of this omission is to leave the matter to legislative discretion.

The constitutions of five states direct the legislature in general terms to regulate primary elections or else refer incidentally to primary elections.[100/]

The more specific provisions of the Arizona and Oklahoma constitutions direct the legislature to provide for nomination of candidates by direct primary elections.[101/] The Ohio constitution is similar, with the added option of nomination by petition.[102/] The Michigan constitution requires candidates for certain public offices to be nominated by party convention.[103/] The Nebraska constitution requires candidates for its unicameral legislature to be nominated in a non-partisan manner.[104/]

The Convention might choose this third alternative if it has a clear view of the kind of nominating method to be required in the Commonwealth. The basic choice is a convention system, a direct primary system, or a combination of the two.[105/]

100/ The states are Alabama, California, Louisiana, Mississippi and Virginia.

101/ ARIZ. CONST. art. VII, § 10; OKLA. CONST. art. III, § 5.

102/ OHIO CONST. art. V, § 7.

103/ MICH. CONST. art. V, § 21 (lieutenant governor, secretary of state and attorney general).

104/ NEB. CONST. art. III, § 7.

105/ Practice in the Northern Mariana Islands has been to allow nomination of candidates for the district legislature by petition or by political parties. MIDC tit. 2, ch. 2.32, §§ 2.32.060-2.32.100.

Nominating conventions are composed of delegates elected by districts. Each political party generally holds its own convention. A certain number of delegate votes is required to nominate a candidate. The advantage of nominating conventions is that they allow members of political parties to discuss the candidate, until some accommodation or agreement is reached. Such a process, however, may diminish the opportunity of independent candidates to run for office.

The direct primary allows voters to choose their candidates for public offices through preliminary elections. The advantages of direct primaries are that they allow independent candidates to present their ideas to the public, decrease the possibility of special interest groups controlling all nominations, and give the people more free choice in selecting their officials. On the other hand, direct primaries are time consuming and costly. 106/

C. Other Sources of Direct Citizen Participation in Government

This section of the briefing paper discusses the initiative, the referendum and the recall. The initiative and referendum are procedures that allow the voters to propose, enact or repeal laws independently of the legislature. The

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106/ For a discussion of different kinds of nominating procedures, see C. Adrian, THE AMERICAN POLITICAL PROCESS pp. 326-35 (2d ed. 1969), and HAWAII STUDIES pp. 43-51.

recall is a device that allows the voters to determine whether a certain official should continue in office or be removed immediately. All three devices came into vogue as part of the Progressive movement in the United States during the early part of this century; they reflected widespread skepticism about the trustworthiness of popularly elected officials and a demand for more readily available means by which the voters could directly influence public policy.[107/]

1. Initiative

Twenty-one states have constitutional provisions for the initiative.[108/] Alaska is the only state, however, to include such a provision in its constitution since 1917. All states that initially adopted the initiative have retained it.

There are two kinds of initiative, both requiring circulation of proposed legislation in petition form until a certain number of signatures is obtained. Under the "direct initiative," once the signatures are obtained the proposed law is placed on the ballot for a vote at the next election.

107/ R. Maddox & R. Fuquay, STATE AND LOCAL GOVERNMENT pp. 271-75 (1975) [hereinafter cited as STATE AND LOCAL GOVERNment]; W. Crouch, et al., CALIFORNIA GOVERNMENT AND POLITICS pp. 103-05 (1967) [hereinafter cited as CALIFORNIA GOVERNMENT].

108/ Alaska, Arizona, Arkansas, California, Colorado, Idaho, Maine, Massachusetts, Michigan, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington and Wyoming. Council of State Governments, BOOK OF THE STATES: 1976-77 p. 218 (1976) [hereinafter cited as BOOK OF THE STATES].

The "indirect initiative" requires the completed petition to be submitted to the legislature, which has the option of enacting the proposed measure or a substantially similar substitute. If the legislature fails to act within a specified period of time, then the proposed law is submitted to the voters.

The Constitution can contain provisions for the direct initiative, the indirect initiative, or both. While the direct initiative is supported by those who desire an exclusively popular device, the indirect initiative allows the opportunity for debate on a proposed initiative by those both for and against it.[109/]

Those who favor the initiative contend that the initiative: (1) is necessary as a safeguard to ensure popular control of government; (2) serves as a democratizing and educational influence; (3) can guide the legislature on the course of public opinion; and (4) helps avoid legislative stalemates. Further, the mere existence of the initiative can induce a stubborn legislature to act.[110/]

109/ Direct initiative is used in Alaska, Arizona, Arkansas, California, Colorado, Idaho, Missouri, Montana, Nebraska, North Dakota, Oklahoma, Oregon and Wyoming. Indirect initiative is used in Maine, Massachusetts, Michigan, Nevada and South Dakota. Only three states, Ohio, Utah and Washington, use both. Council of State Governments, BOOK OF THE STATES 1976-1977 p. 218 (1976).

110/ STATE AND LOCAL GOVERNMENT pp. 280-86; HAWAII STUDIES pp. 55-56.

Those opposed to the initiative contend that: (1) the initiative tends to lessen the legislature's sense of responsibility; (2) the large sums of money and the extensive manpower required to refer a measure to the electorate make the initiative the instrument of large or wealthy organizations rather than ordinary citizens; (3) the numerous and often technical questions referred by initiative tend to confuse and overburden the voter; (4) the mechanics of the initiative prevent compromise and the clarification of issues available in the give-and-take of legislative debate; (5) the initiative violates the principle of republican government; (6) the frequency of elections serves as an adequate safeguard for popular control of the legislature; and (7) the initiative wastes public funds on matters in which only a relatively small minority is interested.[111/]

Several studies have analyzed state experience with the initiative. These studies indicate relatively infrequent use of the initiative. Since 1911, when California adopted the initiative, only 156 initiative proposals have gathered enough support to reach the ballot in that state.[112/] Over

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111/ STATE AND LOCAL GOVERNMENT pp. 280-86.

112/ Diamond, et al., California's Political Reform Act: Greater Access to the Initiative Process 7 SW. L. REV. p. 453, at 457 n.22 (1975) [hereinafter cited as Initiative Process].

roughly similar periods, only 78 initiative proposals reached the voters in Washington,[113] and only 67 made the ballot in Oklahoma.[114] Further, a relatively small number of those proposals succeeded with the voters: 43 of 156 in California;[115] 38 of 78 in Washington;[116] and 18 of 67[117] in Oklahoma.

Some evidence supports the contention that many voters find initiative proposals too complicated. In Washington, initiative proposals generally collect only about 90 percent as many votes as are cast for governor.[118] In Oklahoma, about 85 percent of the voters tend to vote on initiative proposals in general elections; in special elections -- not permitted in Washington -- a 40 percent turnout is average, with voter participation sometimes as low as 20 percent.[119]

113/ Bone & Benedict, Perspectives on Direct Legislation: Washington State's Experience 1914-1973, 28 WESTERN POL. Q. p. 330, at 337 (1975) [hereinafter cited as Washington - Direct Legislation].

114/ Hanson, Oklahoma's Experience with Direct Legislation 47 SW. SOCIAL SCIENCE Q. p. 263, at 265 (1966) [hereinafter cited as Oklahoma - Direct Legislation].

115/ Initiative Process p. 457 n.22.

116/ Washington - Direct Legislation p. 337.

117/ Oklahoma - Direct Legislation p. 265.

118/ Washington - Direct Legislation p. 3.

119/ Oklahoma - Direct Legislation p. 268.

Nor has the initiative been the exclusive tool of reformist groups; traditional interest groups also frequently use the device.[120/]

On the other hand, the initiative process has produced some very significant legislation. Both Washington and California have adopted fundamental campaign reform[121/] and conservation provisions[122/] by means of the initiative. Further, participation in initiative elections increases when the issues involved relate to basic social choices instead of technical matters.[123/] This is evidence that voters do understand and take an interest in initiative proposals.

If the Convention opts for inclusion of an initiative provision in the Constitution, it may authorize the legislature to fill in the details of the initiative system,[124/] or it may provide the details in the Constitution.[125/] The argument for a detailed constitutional provision is that the initiative is a check on the legislature and therefore should not be left to the legislature's control. Procedural

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120/ CALIFORNIA GOVERNMENT p. 112; Oklahoma - Direct Legislation p. 266; Washington - Direct Legislation p. 335.

121/ Initiative Process, p. 453; Washington - Direct Legislation pp. 348-49.

122/ Steck, California Legislation: Sources Unlimited 6 PAC. L.J. p. 536, at 545 (1975).

123/ Oklahoma - Direct Legislation p. 268; Washington - Direct Legislation pp. 348-49.

124/ E.g., IDAHO CONST. art. III, § 1.

125/ E.g., WASH. CONST. art. II, § 1.

requirements may determine the extent to which the initiative is actually available. Rigid requirements can effectively moot the initiative, while loose requirements might permit its use by almost any group with a position on a controversial issue. The argument favoring delegation to the legislature is increased flexibility.

Among the details frequently included in state constitutions are: (1) number and geographical distribution of signatures;[126/] (2) requirements for filing the initiative petition;[127/] (3) provision for review of the petition;[128/]

126/ One state, North Dakota, requires 10,000 signatures for an initiative petition. N.D. CONST. art. II, § 25. Nineteen other states require a number of signatures equal to a percentage of the votes cast in a prior election, varying from 3% to 10%. California specifies 8% and 5% respectively. CAL. CONST. art. IV, § 22.

At least two states require a geographical distribution of the petition signatures. The signatures must come from two-thirds of the election districts in Alaska, ALAS. CONST. art. XI, § 3, and from two-thirds of the Congressional districts in Missouri. MO. CONST. art. III, § 50.

127/ Most state constitutions that provide for the initiative specify the offices with which petitions must be filed and the minimum time for filing prior to the elections. The purpose of filing requirements is to provide time for public education and debate on the issues prior to the vote on the initiative. The most common filing requirement is not less than several months prior to the election. E.g., MONT. CONST. art. III, § 4 (3 months); WASH. CONST. art. II, § 1(a) (4 months).

128/ The constitution of Massachusetts provides for review of the proposed initiative measure by the attorney general. MASS. CONST. amend. 74. The Alaska constitution provides for review by the lieutenant governor. ALAS. CONST. art. XI, § 2. Review assures clarity and proper legal form. A disadvantage of review is that it may be done by an official hostile to the proposal.

(4) circulation requirements;[129] (5) limitations on subject matter;[130] (6) publicity requirements;[131] (7) vote majority required to adopt an initiative proposal;[132] and (8) availability of initiative to local government units.[133]

129/ The Constitution can specify the form for petitions, including such matters as who may sign them and who may circula them. See, e.g., COLO. CONST. art. V, § 1; NEV. CONST. art. XIX, § 3.

130/ Common limitations on the initiative include:

- no law that could not be enacted by the legislature;
- no special or local legislation;
- no appropriation measures;
- no proposals affecting the judicial functions;
- restrictions on the frequency with which defeated measures may be resubmitted;
- one-subject limitations and title-subject agreement;
- prohibiting the legislature from amending or repealing the initiated measure except by referendum.

See, e.g., ALAS. CONST. art. XI, § 7; MASS. CONST. art. 48, § 2; MICH. CONST. art. II, § 9.

131/ The Constitution can require distribution to registered voters at public expense of summaries and arguments both for and against proposed measures in order to increase voter interest in initiative proposals. See, e.g., WASH. CONST. art. II, § 1(e).

132/ All states where the initiative may occur require a majority of the popular vote on an initiative proposal to adopt the proposal. In Massachusetts the majority must equal at least 30% of the votes cast in the election. MASS. CONST. art. 48, § 5.

133/ All states that use the initiative make initiative proposals available to all or some local government units. E.g., ME. CONST. art. IV, pt. 3, § 21.

2. Referendum

There are two kinds of referenda. Under the "petition referendum," laws passed (except for special emergency measures) do not go into effect for a specified period of time, usually 90 days. During this period, voters may circulate petitions calling for referral of a particular law to the voters at a special election or at the next general election. If the required signatures are obtained, the law is held in abeyance pending the outcome of the referendum. The "optional referendum" permits the legislature itself to order a referendum on any measure it has passed. In addition, the Constitution may require referral of certain measures to the voters, such as constitutional amendments,[134] the levying of taxes, bond issues, and moving state or county capitals.

The arguments favoring and opposing the referendum are similar to those discussed with respect to the initiative. Unfortunately, relatively little information is available on the experience of various states with the referendum. One study of Washington's use of the referendum revealed that the use of petition referenda has fallen off sharply since 1943.[135] The researchers conducting the study concluded

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134/ Washington - Direct Legislation p. 337.

135/ Referendum on constitutional amendments is discussed in BRIEFING PAPER NO. 9: CONSTITUTIONAL AMENDMENT § II(A)(4).

that the decline in the number of petition referenda could not be attributed to indifference in light of the continued use of the initiative in areas where the legislature had not acted. Rather, they concluded, the number of legislative enactments sufficiently objectionable to provoke a successful petition campaign must have declined. They attributed this decline in part to an improvement in the honesty and professionalism of the legislature and in part to the legislature's desire to avoid being overruled in a referendum.[136/]

Of the 38 state constitutions with a referendum provision, 24 provide for the petition referendum. In these 24 states, many of the procedural details that apply to the initiative also apply to the referendum, although the signature requirements are usually less rigid than those required for an initiative petition. The number required ranges from two percent to 15 percent of the votes cast in the last general election.[137/] Some constitutions include an "emergency clause" that exempts certain laws from the referendum.[138/] Appropriations bills also may be exempted.

136/ Washington - Direct Legislation p. 347.

137/ BOOK OF THE STATES pp. 216-17. Massachusetts requires 2%, Wyoming 15%. The most common requirement, used in California, Kentucky, Michigan, Nebraska and South Dakota, is 5% of the votes cast in the last general election for governor. Id.

138/ See, e.g., ARK. CONST. amend. 7; WASH. CONST. art. II, §1(b).

3. Recall

A recall is a special election or special proposal on the ballot at a general election devoted to the removal of a particular public official. The recall operates in much the same fashion as the initiative and the referendum. The required number of signatures is collected on a petition calling for the removal of a named official. No grounds need be stated. The proposal is then put to the voters and if passed by the percentage or majority of voters required, the official is automatically removed from office and replaced by a successor.

Most states with recall provisions require petitions signed by 25 percent of the voters.[139/] In all of the states with recall provisions a majority of the votes in a recall election will remove a person from public office. Those who favor use of the recall contend that: the voters should not need to wait until an official's term comes to an end in order to rectify abuses; the constant threat of recall influences officials to act in the public interest; and provision for the recall facilitates the acceptance by the people of longer terms for public officials.

139/ The constitutions of 13 states include recall provisions: Alaska, Arizona, California, Colorado, Idaho, Kansas, Louisiana, Michigan, Nevada, North Dakota, Oregon, Washington and Wisconsin. BOOK OF THE STATES p. 137. Nine of these states require petitions signed by 25% of the voters in the last election. Id.

Those opposed to recall point out: recall elections are costly; a minority of disgruntled voters may use the device merely to persuade the electorate to remove an incumbent; recall provisions are unnecessary because improper conduct by public officials is grounds for removal by judicial, legislative, or sometimes gubernatorial action; and recall can be used by well-organized groups to intimidate public officials.

In contrast to initiative and referendum, state electorates have rarely used the recall. The only successful recalls of officials elected statewide occurred in North Dakota in 1921[140/] and in California shortly after adoption of the recall in that state.[141/] Although used with more frequency against local officals,[142/] even at that level there appears to be little analysis of the reasons for its relative non-use. Political scientists speculate that voters simply are reluctant to use the recall.[143/]

Alaska's provision for recall is an example of a relatively simple format:

140/ STATE AND LOCAL GOVERNMENT p. 288.

141/ CALIFORNIA GOVERNMENT pp. 119-20.

142/ STATE AND LOCAL GOVERNMENT p. 288.

143/ Id. p. 289.

> All elected public officials in the State, except judicial officers, are subject to recall by the voters of the State or political subdivision from which elected. Procedures and grounds for recall shall be prescribed by the legislature.144/

A more detailed constitutional provision for recall might contain: (a) a list of the public offices to which recall applies; (b) a limitation that a recall petition may not be filed against an official during the first six months or year of a term of office; (c) the number of signatures required for a recall petition; (d) a requirement that the recall petition contain a statement of the ground on which the recall is being sought; (e) a specified number of days between the filing of a recall petition and the holding of a special election; (f) a specified type of recall election; and (g) a vote requirement for removal.145/

144/ ALAS. CONST. art. XI, § 8.

145/ See, e.g., ORE. CONST. art. II, § 18.