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Honorable Delegates
Third Northern Marianas
Constitutional Convention
Saipan, MP 96950

Dear Delegates:

I am writing this letter to express my grave concern about what I consider to be serious defects in several of the provisions of the proposed amended Article II reported by the Committee on Legislative Branch and Public Finance. I write in my personal capacity, not as Senate Legal Counsel.

In particular, I am convinced the proposals for a six-member senate, for ties in the senate to be broken by the lieutenant governor, for a four-year term for members of the house of representatives, and for election at large of Saipan representatives are all unsound. These and some lesser concerns are discussed below.

Size of Senate

Six members is too small for the senate to function properly as a deliberative assembly. The views of the United States Supreme Court in the analogous context of juries are instructive. The functioning of juries and legislative bodies are parallel in many respects. Indeed, legislatures may be more sensitive to these elements than juries, because the legislative process is more open-ended and lacks the limiting effect of focus on specific legal questions and the guidance of the judge's instructions.

The U.S. Supreme Court held in Ballew v. Georgia, 435 U.S. 223 (1978), that six members in a jury is the smallest number of persons sufficient "to promote group deliberation, to insulate members from outside intimidation, and to provide a representative cross-section of the community." Id. at 230. Justice Blackmun noted a direct correlation between the size of a body and "the quality of both group performance and group productivity." Id. at 232-33. Group size is particularly important where "complex problems laden with value choices" are faced, id. at 233, as is the case in the legislative process. "In particular," Justice Blackmun wrote, "the counter-balancing of various biases is critical to the accurate application of the common sense of the community to the facts of any given case." Id. at 233-34

In Burch v. Louisiana, 441 U.S. 130, 135, 139 (1978), the Court made clear that six-member juries were sufficiently large only because of the requirement that their decisions be unanimous. The Court had previously held that unanimous decisions were not essential with larger juries. In Brown v. Louisiana, 447 U.S. 323 (1980), the Court emphasized the importance of its decisions by holding that the requirement of unanimity declared in Burch must be given retroactive application.

The proposed six-member senate contains no protection of the public interest in the form of a unanimity requirement. Indeed, it is theoretically possible for a single member to pass a bill, if the Analysis of the Constitution is correct:

> A majority of those voting in each house of the legislature (a majority of the senators voting and a majority of the representatives voting) must approve a bill for it to become law. This is a minimum requirement. Either house may require a greater margin for passage of a bill in its procedural rules. This section requires only a majority of the votes cast. It does not require a majority of the total number of members of either house or a majority of a quorum. A quorum requirement may be added by the legislature by law or by procedural rule. If no quorum is defined or if the quorum is not questioned under the applicable procedural rule, a bill may be enacted by a majority of those present and voting even though the number of members present and voting is less than a majority of the total number of members. Abstentions are not votes cast and therefore are not counted either in determining the number of members present and voting or in determining whether there is a majority of those present and voting.

Analysis of the Constitution 43. Thus, if one member voted "yes" and the rest abstained, the bill would pass. Moreover, if one member voted "yes," one "no," the rest abstained, and the lieutenant governor voted "yes," the bill would pass. It certainly would be possible for a mere three members, acting in concert with the executive branch (in the person of the lieutenant governor), to pass a bill despite the most vigorous protestations of the other three members. Normally, in a body governed by majority rule, a motion fails if it garners the support of only half of the votes cast.

If the traditional rule that a majority of the membership constitutes a quorum prevails, a quorum would be four, and a mere two members acting in concert with the lieutenant governor could pass bills.

The committee report optimistically states that "these changes may, in a small and cohesive community like the Northern Marianas, increase the likelihood that the legislative and executive branches of government make work together in a more collaborative manner than has often been the experience in the Commonwealth." In fact, the reverse is at least equally possible. The executive and the legislature could be at permanent loggerheads for a full four years. Alternatively, the two could combine into a political juggernaut, running roughshod over the interests of the people in single-minded pursuit of self-interest and permanent party hegemony.

And the committee's reference to a "cohesive community" is plainly ingenuous in the political context.. Were it so, the committee would have no need to hope for "a more collaborative manner," and the Commonwealth would not be witnessing bitter fights over local autonomy versus centralized power.

The present composition of the senate should be retained.

Tie-Breaking Votes by the Lt. Governor

For the reasons stated in the foregoing discussion, giving the lieutenant governor the ability to break ties in the senate would constitute an excessive intrusion of the executive into the operations of the legislative branch. This is a direct result of the small size of the senate.

The practice of the U.S. Senate and a number of state legislatures provides no model for the Commonwealth. None of these bodies are as small as the Commonwealth Senate. For example, the 13 original states sent a total of 26 senators to the First Congress, nearly 5 times the size of the proposed senate and 3 times the size of the current senate. The odds of a tie--and hence the significance of the executive role in lawmaking--are much greater with a smaller body than with a larger.

Further, the proposed amendment would allow the lieutenant governor to cast the decisive vote as to who would be the presiding officer/majority leader in the event of a tie. This is undesirable. Instead of forcing the senate to agree on a compromise candidate or plan, it forces a divided senate to live with a choice made by the lieutenant governor. It suggests the injection of the lieutenant governor into preorganization politics. It would mean the lieutenant governor determines which senator gets the extra office allowance.

The provision for the lieutenant governor to preside only at the organizational session and then vote to break ties also has

serious practical problems. Unless the lieutenant governor attends every session, he or she would be called in to break ties on procedural votes or on substantive matters without ever observing the events leading to the tie or having heard the debate. Another problem occurs in the event the lieutenant governor is out of the Commonwealth. Is the senate prevented from meeting? If the senate meets, what happens in the event of a tie vote?

The intrusion of the executive into the affairs of the legislature that would result from this proposed amendment is of such degree that it may very well violate Covenant Section 203(c), requiring that the legislative power be vested in the legislature, and Covenant Section 203(a), requiring separation of powers.

The power of the lieutenant governor to break ties in the senate should be removed. Motions that fail to garner a majority vote should simply be allowed to die.

Four-year terms for House Members

Two-year terms for members of the house of representatives serve to keep the House responsive to the electorate. The longer senate term is designed to provide a longer-term perspective and facilitate institutional memory in one of the two houses. Staggering of senate terms prevents stagnation in that body, by giving the voters an opportunity express their judgment of senate performance every two years and inject new thinking if necessary. Together, the two approaches nicely balance two important virtues in representative democracy. The proposed amendment would do away with this careful balance.

In its place, the amendment substitutes a prescription for sluggish and recalcitrant government. The voters get one chance to elect a government every four years and must live with it for the next four years. Gone is the opportunity for the voters to use the mid-term elections as a means of grading the performance of a governor. Gone is the opportunity for the electorate to vote out legislators who have been unreasonably blocking a governor's program.

Arguments about the costs of campaigning and time spent campaigning have been presented in support of a four-year term. These arguments are misplaced. Concern about campaign costs cannot be accorded much weight when the same amendment proposes to significantly increase the costs of campaigning by requiring every Saipan candidate to run at-large. The cost of election administration is minor compared to the overall cost of government and the importance of the function. As for time spent

campaigning, the most effective weapon in a political campaign is a solid record of performance. A representative who neglects performance for petty politicking will not last long.

Granted, the campaign trail is grueling--physically, mentally, and emotionally exhausting--but no one ever said public service is easy. This, unfortunately, is part of the price that must be paid for the privilege of serving as a representative in a government of, by, and for the people.

At-large House Elections for Saipan

The proposal that members of the house of representatives from Saipan be elected at-large moves in precisely the wrong direction. Instead, the current multi-member districts should be eliminated and single-member districts constitutionally mandated.

Single-member districts provide the broader and more diverse representation important to a true democracy where everyone has a voice. It also better ensures attention to the needs and concerns of every part of the island.

The committee report states that at-large election will "tend to promote unity" and "foster an island-wide perspective by the representatives." These conclusions are based on erroneous premises and reflect a lack of understanding of how at-large elections work in the real world. In fact, candidates in at-large elections do not need to "seek[] support from all elements of the community in order to gain office." They need only appeal to the largest groups and the lowest common denominator. Support from the same majority with the same homogenous views is sufficient to elect every member.

Fostering of an island-wide perspective is an equally improbable result of at-large elections. On the contrary, elected representatives will tend to concentrate resources on the most populated areas, to the detriment of less populated areas, in an effort to ensure reelection.

Although the U.S. Supreme Court has ruled that multi-member districts are acceptable unless they are drawn on some constitutionally impermissible basis, such districts nevertheless tend to concentrate the power of majorities in the legislature and diminish minority representation. As such, they reduce the ability for all parts of the citizenry to have a meaningful dialogue on public issues through the legislative process, and thereby contribute to a sense among a greater portion of the public that the government does not speak for them and is insensitive to their needs and concerns. That situation is not conducive to a healthy community and likely leads to an inferior

legislative product as well. An inferior legislative product in turn contributes to even greater community disaffection and dissatisfaction with the quality of government.

The committee's belief that "election at-large, together with [a longer] term, will increase the pool of qualified candidates that will better serve all segments of the community and provide a training ground for those candidates who aspire to higher office" is wishful thinking at best. While a longer term certainly might make more persons willing to take a chance on seeking the office, the increased cost and effort of campaigning island-wide is certain to limit the pool of candidates to those with significant financial resources or the most inflated expectations of what they will gain from holding office, and those rare few with an exceptional commitment to the public interest who would run in any event.

The idea that this approach creates a "training ground" is entirely unsupported. Training ordinarily begins with, and is most effective in, small steps. Training also requires frequent and regular review and corrections (i.e. elections). An important element of on the job training is the prospect of advancement to a more attractive position. The scheme in the proposed amendment essentially makes all the offices fungible from both a campaign and employment or tenure perspective. Every office has the same level of responsibility, i.e. is accountable to the same number of voters. There is no entry-level office.

Likewise, an island-wide perspective--a professed goal of the committee--is fostered by a desire to move up to the Senate or executive office, not by making all offices equally desirable, not by eliminating all need for an incumbent to appeal to a broader group of voters in order to move up.

The proposed at-large elections for Saipan will increase the power of money and the power of large families in Commonwealth politics. Large blocs of votes will be able to elect all, or nearly all, of the Saipan members of the House. This, of course, assumes continuation of the current multiple vote system.

If the convention wishes to stick with the at-large election scheme, or continue to allow multi-member districts, I strongly suggest a modification of the multiple vote system to provide broader an more diverse representation by the candidates ultimately elected. If the constitution provides that voters shall be permitted to vote for a number of candidates specified by law but not greater than the number of persons to be elected divided by two rounded upward to the nearest whole number, differing groups with different first choices will all end up with representatives in the House. This would contribute to a

more representative and diverse, and therefore better, deliberative assembly.

Other Concerns

I understand the intent of the committee is that the basis for apportionment be changed from total population to the U.S. citizen population. This, however, is not clear in either the report or the proposed amended article. The draft article uses both the term "population" and the term "citizen" in ways that do nothing either to relieve the ambiguity or manifest the intended change.

Section 3(d) requires that a candidate be a registered voter of the district where he or she is a candidate. This may conflict with the fundamental constitutional right to vote (as including the right not to vote) in both its fundamental right and First Amendment aspects. This should be changed to simply require residence in the district.

Section 5 continues the current requirement that revenue bills originate in the house of representatives. This should be removed. The origination rule makes sense with respect to appropriation bills in order to give structure to the budget process and have the starting point for the budget be population based. The rule as applied to revenue bills, however, serves no useful purpose and only hampers the legislative process, stifling creativity, generating trivial and unnecessary discussions over what is and is not a revenue bill, and complicating development and passage of regulatory measures. Almost no states require revenue bills to originate in one house.

Section 5(a) can be read not only as requiring that hearings on money bills be joint but that a public hearing on all such measures must be held prior to passage. Is this the intent of the convention? Either way, the point should be clarified.

The provision in Section 5(a) that legislative compliance with the single-subject requirement not be subject to judicial review is, of course, essential to effective government. This legislative duty has not prevented the frequent attachment of riders to appropriations bills, however. The convention may wish to add language stating that the legislature is presumed to have complied with the single-subject requirement, and therefore all provisions in appropriations acts expire upon the enactment of a new budget, regardless of the language of enactment.

Section 5(d) continues the language added by the Second Con-Con stating that the legislature shall enact no law which increases the class of nonaliens. This language should be removed. This

provision suffers from two serious defects. It is extremely ambiguous. Its precise meaning and scope is unclear. And it impedes the ability of the legislature to deal vigorously, quickly, creatively, and effectively with pressing needs.

As it currently stands, anyone who doesn't like any particular bill extending any additional right or privilege to a non-citizen, for any reason, even if the same new right or privilege is given to citizens, could challenge it under this provision. With the clearly critical problems currently facing the legislature in the areas of labor and immigration, the risks and difficulties present by this provision are especially undesirable. The apparent ready willingness of at least some federal officials to take ill-considered and adverse actions relative to labor and immigration in the Commonwealth, without any sensitivity to Commonwealth needs and concerns, makes it important that the legislature have the flexibility to act in ways that will offset or mitigate the negative effects of inappropriate federal action. The Commonwealth economy could be at stake, and a court battle would be the worst thing possible when time is of the essence.

The provision in Section 7(c), recently added by legislative initiative, limiting the legislature to 60 days to override a gubernatorial veto should be deleted. This provision serves no useful purpose. The impetus for the legislative initiative apparently was an attempt by one legislature to override a veto of a measure originally enacted by a prior legislature. The members apparently were unaware of the common law rule that a veto override must be effected by the same legislature that originally passed the measure. The 60 day rule doesn't solve that problem, indeed, it could be construed as specifically authorizing an override by a subsequent legislature where the veto message is transmitted to the legislature after or less than 60 days prior to the organizational session.

A 60 day limitation simply encourages petty maneuvering by opponents of an override in an effort to delay action past the deadline. It places an artificial constraint on the normal timing of legislative activity, and allows a veto override to be avoided by mere technical coincidence. In the event the 60 day deadline is missed, it simply forces proponents of a measure to reintroduce it in the same or similar form and (unnecessarily) go through the whole cycle again.

Section 13 refers to the legislature as a continuous body for two years. This would have to be four years to be consistent with the rest of the proposed amendment. The provisions on timing and designation of sessions are largely superfluous. It may be appropriate to restore this to the language of the original

constitution.

Section 16(e) sets 1997 as the base for adjusting the budget ceiling. The committee report says 1996. Which is it? If the ceiling goes into effect in 1997, and the 1997 index must be compared with the 1999 index, it would not be possible to adjust the ceiling until FY 2000 because of the lead time required by the budget process.

The transitional provisions state that senators terms will expire on the second Monday of 1997. This is only a year after senators elected this November assume office and only three years into the term of senators elected in November of 1993. It is almost a full year before the next regularly scheduled general election.

Thank you for the opportunity to express my views. I hope you will give them careful consideration.

Sincerely,

Stephen C. Woodruff