

ARTICLE III

LEGISLATIVE DEPARTMENT

Sec. 1. SENATE AND HOUSE OF REPRESENTATIVES. The Legislative power of this State shall be vested in a Senate and House of Representatives, which together shall be styled "The Legislature of the State of Texas."

History

The present language has been unchanged since 1876 and closely resembles that contained in the Constitution of 1836. The only significant difference between the two is the name given to the senate and house of representatives. The Constitution of 1836 labeled these two bodies the "Congress of the Republic of Texas," whereas the present constitution of course describes them as "The Legislature of the State of Texas."

Curiously, constitutions after 1836 changed "legislative power" to "legislative powers." The Constitution of 1869 restored the singular, however. From 1845 to 1876 the legislative power provision of each constitution contained the requirement that "The Style of the laws shall be, 'Be it enacted by the Legislature of the State of Texas,' " a requirement now located in Section 29.

Explanation

Section 1 does three things: It vests the lawmaking power in the legislature, although by no means exclusively. It commits Texas to a two-house, or bicameral, legislature. It names each house or chamber of the legislature. The last provision is of little significance—some states call their lower houses "assemblies," a distinction without a difference—but the issues of who may exercise the lawmaking power and bicameralism versus unicameralism are still vital.

Legislative Power

Other parts of the constitution itself make clear that the legislature is not the sole repository of lawmaking power. For example, home-rule cities are authorized to enact laws (Art. XI, Sec. 5), the governor is given veto power over acts of the legislature (Art. IV, Secs. 14 and 15), and the people must approve legislatively initiated amendments to the constitution (Art. XVII, Sec. 1). The doctrine of judicial review, under which the courts may nullify legislation because it is contrary to some higher law, vests lawmaking power in the courts but of course is not mentioned in the constitution. Finally, some constitutional theorists argue that the people, through declarations of the social compact theory like Article I, Section 2, of the Texas Constitution, have reserved some residuum of lawmaking power to themselves. (See Robert B. Dishman, *State Constitutions: The Shape of the Document*, rev. ed. (National Municipal League, 1968), pp. 15-24.)

Limiting Instrument. Although obscured by the fact that it contains so many express limitations on the exercise of legislative power, the Texas Constitution has always been interpreted to authorize the legislature to do anything neither it nor the United States Constitution forbids. This is a general principle of state constitutions—they are limiting instruments—and in theory contrasts with the United States Constitution, which *delegates* to congress power to legislate only on the subjects enumerated in Article I. As stated by the Supreme Court of Texas, in opinions more than 50 years apart,

This language [Article III, Section 1] vests in the Legislature all legislative power which the people possessed, unless limited by some other provision of the Constitution. . . .

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There can be no dispute but that in this State the provisions of the Constitution serve only as a limitation on the power of the Legislature, and not as a grant of power. . . . (*Brown v. City of Galveston*, 97 Tex. 1, 9, 75 S.W. 488, 492 (1903); *Bexar County Hosp. Dist. v. Crosby*, 160 Tex. 116, 120, 327 S.W.2d 445, 447 (1959).)

Delegation of Legislative Power. The rule is universally stated by the courts that the legislature may not delegate its power to make law. This rule rarely has determined the result in concrete cases, however, at least during the last five decades, because the courts usually have upheld lawmaking under statutory authorization by administrative agencies and local governments. The nondelegation rule has been interred by the federal courts, and Professor Kenneth Culp Davis, the leading administrative law scholar, asserts that state courts are celebrating its wake. (*Administrative Law: Cases—Text—Problems*, 5th ed. (St. Paul: West Publishing Co., 1973), ch. 2.)

The threshold question of delegation has not been of much concern in Texas. In the early case of *Kinney v. Zimpleman* (36 Tex. 554 (1872)), for example, the court upheld against nondelegation attack a statute directing the State Board of Education to district the state for educational purposes, remarking that the maxim *delegata potestas non potest delegari* (a delegated power cannot be delegated) did not apply. (See also *Housing Authority v. Higginbotham*, 135 Tex. 158, 143 S.W.2d 79 (1940), for a useful categorization of cases sustaining legislative delegations.) Early courts had trouble with local option legislation, however, and their reasoning may be relevant today on the issue of whether the legislature without constitutional authorization may authorize statewide initiative and referendum.

In *State v. Swisher* (17 Tex. 441 (1856)), the defendant appealed his conviction for selling liquor in a dry area. Before his appeal was considered, the local option law under which he was convicted was repealed. The court noted this fact and dismissed the appeal because of an inadequate record, but in its opinion chose to label the law unconstitutional because it violated the separation of powers and nondelegation doctrines. In 1915 the supreme court relied on *Swisher* to invalidate a local option pool hall law, despite a dissent pointing out that the constitutional discussion in that case was dicta (language not necessary to the court's decision) and thus not authoritative. (Ex parte *Mitchell*, 109 Tex. 11, 177 S.W. 953 (1915).) The court in *Mitchell* did not cite *Stanfield v. State* (83 Tex. 317, 18 S.W. 577 (1892)), or *Werner v. City of Galveston* (72 Tex. 22, 7 S.W. 726 (1888)), which upheld statutes authorizing the commissioners court to abolish the office of county school superintendent and thereby permit municipalities to manage their schools. Not until 1920 did the supreme court distinguish away *Swisher* and its progeny, in upholding a local option statute for municipal street improvement, holding that a statute whose complete execution and application to the subject matter is made to depend on the assent of some other body is not an unconstitutional delegation of legislative power. (*Spears v. City of San Antonio*, 110 Tex. 618, 223 S.W. 166 (1920).) Today the validity of local option legislation is firmly established and of course in the case of liquor regulation expressly authorized by Article XVI, Section 20. (See generally C. Dallas Sands, *Sutherland Statutory Construction*, 4th ed. (Chicago: Callaghan & Co., 1972), vol. 1, pp. 87-89.)

Standardless Delegation. "Generally, a legislative delegation of rule-making authority must fix standards in order to be valid." (*Southwestern Savings & Loan Ass'n of Houston v. Falkner*, 160 Tex. 417, 422, 331 S.W.2d 917, 921 (1960).) This statement represents the majority rule in state courts today, but it is a rule embattled. Professor Davis asserts that the federal courts have abandoned the rule as impracticable and that its application by state courts is "ritualistic." (Davis, pp.

34-42.) As the quotation from the *Southwestern* opinion indicates, however, Texas courts still intone the rule while upholding such standards as "public convenience and advantage" (*Southwestern*), "prevent waste" (*Railroad Comm'n v. Shell Oil Co.*, 139 Tex. 66, 161 S.W.2d 1022 (1942)), and "decent, safe and sanitary urban or rural dwellings" (*Housing Authority v. Higginbotham*, 135 Tex. 158, 143 S.W.2d 79 (1940)).

Professor Davis recommends reforming, not abolishing, the nondelegation rule.

The non-delegation doctrine has often been altered. During various stages of its development, the doctrine has at least to a considerable extent (1) prohibited the delegation of legislative power, (2) allowed such delegation with meaningful standards, (3) relaxed the requirement that standards be meaningful so that vague standards will suffice, and (4) added to the requirement of standards the requirement of safeguards. What other alterations might make the doctrine effective and useful?

(1) The purpose of the doctrine could be shifted to the broader and deeper one, perhaps with a due process base, of protecting against unnecessary and uncontrolled discretionary power; the purpose could be nothing less than the grand purpose of minimizing injustice to private parties from official action. (2) The emphasis on safeguards could be further strengthened. (3) The requirement of statutory standards, which has so often failed because of legislative inability or unwillingness to comply with it, could be supplanted with a requirement of either statutory or administrative standards and safeguards. Administrative standards and safeguards, provided by administrative rulemaking, can be as effective as requirements laid down by legislative bodies, and administrators are more likely than legislators to comply with judicial requirements. (4) The doctrine could gradually grow into a broad requirement, perhaps with a due process base, that officers with discretionary power must do about as much as feasible to structure their discretion through such safeguards as open findings, open reasons, and open precedents, to guide their discretion through administrative standards which are as clear and definite as are feasible in the circumstances, and to turn the administrative standards into principles and rules as rapidly as feasible. (5) The protection could be extended so as to reach not only delegated power but also such undelegated power as that of selective enforcement, which is now generally uncontrolled. (Davis, p. 45.)

Initiative and Referendum. Initiative and referendum allow the people to participate directly in the lawmaking process. Initiative involves circulating a petition to place some matter on the ballot for popular vote; if the petition must first go through the legislature, the process is labeled "indirect initiative"; if it goes directly to a vote, it is labeled "direct initiative." Referendum also involves a direct vote of the people, but after the fact, that is, on a law already passed by the lawmaking body. Initiative and referendum are used alike for legislation and constitutional amendment—the Texas citizens' right to vote on proposed constitutional amendments is an example of the latter referendum practice—but discussion here is limited to initiating and approving/disapproving legislation.

Direct legislation is hardly a new idea. The classical Greek assembly and its American counterpart, the legendary New England town meeting, produced direct legislation, in the sense that every member of the electorate could propose and vote on it, but the initiative and referendum were given the form we know today by the Progressive movement in American politics around the turn of the century. (For a flavor of the reformist zeal of that period, see the September 1912 issue of the *Annals of the American Political Science Association*, vol. 43, which was devoted to proselytizing direct legislation.) This movement produced effects in Texas, where in 1913 a constitutional amendment was unsuccessfully proposed to give the people "the power to propose laws at the polls, and to approve or reject at

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the polls any Act of the Legislature.” (S.J.R. 12, Tex. Laws 1913, p. 464.) The Progressives’ success in reforming municipal government was greater, however, and one result is that most Texas cities today permit direct legislation. (See, *e.g.*, Austin Charter, art. IV; Fort Worth Charter, chs. 21 & 22; Houston Charter, art. VIIb.)

Absent constitutional authorization, it is the general rule in this country that direct legislation violates the grant of lawmaking power to the legislature and thus is not permitted. (*Sutherland*, vol. 1, p. 84.) Judging from the Texas courts’ early hostility to local option legislation, this is no doubt the rule here, too, although no case considering the question was found.

Bicameralism

The single-house or unicameral legislature is of Scottish origin, and Oliver Cromwell experimented briefly with a unicameral Parliament in England. Three colonial legislatures, for what are now the states of Delaware, Georgia, and Pennsylvania, were unicameral, as was the Congress of the Confederation (1777-1789). Even after the United States Constitution enshrined bicameralism, three states remained unicameral, Vermont until 1836. (For an excellent if brief history of unicameralism, see O. Douglas Weeks, *Two Legislative Houses or One* (Dallas: Southern Methodist University, Arnold Foundation Studies in Public Affairs, 1938).)

In this country unicameralism was another swirl in the Progressive tide of reform; it did not reach flood stage until the 1930s, however, when unicameral proposals were submitted in most states only to be rejected everywhere but Nebraska. In Texas unicameral amendments were proposed in both houses in 1937, but neither survived the legislature. (For a summary of the first 20 years of Nebraska’s unicameral experience, see American Political Science Association, *American State Legislatures*, ed. Belle Zeller (New York: Crowell, 1954), pp. 240-55.) Again the reformists had better luck at the local government level, as virtually all local government legislative bodies in this country are unicameral today. Not surprisingly, the National Municipal League has recommended a unicameral state legislature since publication of its first *Model State Constitution* in 1921.

Comparative Analysis

In all states except Nebraska the legislature consists of two houses, one of which invariably is called “the senate,” the other of which usually is called either “the house of representatives” or “the assembly.” The single house in Nebraska is called “the senate.” Although Nebraska instituted its unicameral legislature in 1934, no noticeable movement toward unicameralism sprung up until quite recently. In 1972 two states, Montana and North Dakota, voted on new constitutions and each included unicameralism as an option for the voters. North Dakota voted down its new constitution and turned down the unicameral option by a wider margin than the unfavorable vote on the constitution as a whole. Montana approved its new constitution but voted down the unicameral option by a ratio of six to five. It has been suggested that a trend to unicameralism may be beginning since the one-man, one-vote cases have killed the principal justification for two houses—that is, one house based strictly on population and one wholly or partly based on geography. (See *Citizens’ Guide*, p. 29. For discussion of the one-man, one-vote cases in Texas, see the *Explanation* of Art. III, Sec. 26.) The *Model State Constitution* of course recommends a unicameral legislature in Section 4.02.

The constitutions of slightly more than one-third of the states authorize some form of direct legislation. Illinois’ new constitution authorizes the people to initiate amendments to the legislative article, with the legislature retaining the general

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initiative for constitutional amendments. (Art. XIV, Sec. 3.) The *Model State Constitution* includes an appendix authorizing legislative initiative and referendum (pp. 117-18).

Author's Comment

Article III, Section 1, is a typical (if ungrammatical: "shall be vested" is a false imperative) statement of the legislative power grant. It is also clear, as pointed out in the *Explanation*, that the legislature's lawmaking power is plenary, limited only by prohibitions elsewhere in the constitution. Nevertheless, because the 1876 document contained so many limitations on legislative power, and the exceptions to these limitations over the years added so many of their own, one contemplating a new constitution may wish to consider a cautionary statement, located in the transition schedule, something like the following (which derives from Article II of the *Model State Constitution*):

The enumeration in this constitution of specified powers and functions does not grant or limit the power of state government, but state government has all power not denied by this constitution or the constitution of the United States. The absence in this constitution of a grant of power contained in the Constitution of 1876, as amended, does not limit the power of state government.

The nature of state constitutions aside, there are two other basic issues: (1) Should the authorization for direct legislation be expanded? (Recall that the people already vote on proposed constitutional amendments.) (2) Should the Texas Legislature contain one house or two?

The traditional arguments for and against direct legislation will not be rehearsed; they are well stated, and evaluated from the perspective of a half-century's experience, in Lapalombara & Hagan, "Direct Legislation: An Appraisal and a Suggestion," (45 *American Political Science Review* 400 (1951)). The observer instead should rely mainly on the Texas experience with direct legislation, particularly the long and complicated constitutional amendment ballots the people have endured in recent years. Recent experience with direct legislation in other states should not be overlooked, especially the unfortunate racial context surrounding referenda on open and public housing. (See, e.g., *Reitman v. Mulkey*, 387 U.S. 369 (1967); *James v. Valtierra*, 402 U.S. 137 (1971).) In the end, perhaps heaviest weight should be accorded one's theory of representative government: if the legislature is to represent us, direct legislation should be evaluated together with the many other express constitutional limitations that have burdened the Texas Legislature since 1876.

Bicameralism versus unicameralism, on the other hand, is a less vital issue. Even in 1938, writing during the flood of the unicameralism movement in this country, Professor Weeks saw this. "Important though the present issue between unicameralism and bicameralism may be, it is decidedly of secondary importance in relation to some other aspects of the subject of legislatures and representative government," those other aspects being, today, more time and resources to do the job of legislating properly. (Weeks, p. 20.)

Sec. 2. MEMBERSHIP OF SENATE AND HOUSE OF REPRESENTATIVES.
The Senate shall consist of thirty-one members, and shall never be increased above this number. The House of Representatives shall consist of ninety-three members until the first apportionment after the adoption of this Constitution, when or at any apportionment thereafter, the number of Representatives may be increased by the Legislature, upon the ratio of not more than one Representative for every fifteen thousand

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inhabitants; provided, the number of Representatives shall never exceed one hundred and fifty.

History

The first state legislature, created by the Constitution of 1845, was composed of a senate of from 19 to 33 members and a house of representatives of from 45 to 90 members. This organization continued until the Constitution of 1869, which provided for a house of 90 members and a senate of 30 members. The present constitution, which has remained unchanged in this respect, provides for a 31-member senate and a house beginning with 93 members and increasing with population until the membership reached the constitutional maximum of 150 when the state's population first reached 1.5 million according to the 1880 decennial census.

Explanation

The only modern significance of this section is in the context of the one-man, one-vote struggle, which is reviewed in the *Explanation* of Section 26 of this article.

Comparative Analysis

Currently state legislatures range in size from Nebraska's unicameral body of 49 members to Delaware's two houses with a total of 58. New Hampshire has the largest bicameral body with 424 members.

State senates range in size from Delaware's 19 to Minnesota's 67; the median senate membership is 38. Only 19 states specify constitutionally the exact number of senators, however. The others set maximums and minimums or prescribe other criteria such as a ratio of state population.

Delaware with 39 members has the smallest lower house and New Hampshire with 400 members has the largest. The median lower house membership is 100.

The United States Constitution provides for two senators from each state, elected for six-year terms. Approximately one-third of the senate is elected every two years, producing, of course, staggered terms in each state.

Representatives are apportioned among the several states on the basis of population with the stipulation that every state is entitled to at least one representative. (There are six states with only one representative.) Until the 1920 census, congress regularly increased the size of the house of representatives as the country's population increased. Since then, the practice has been to retain the size of the house at 435 and to reapportion after each census. Since 1930 reapportionment has been automatic under a statutory formula. Congress can, of course, change the formula at any time.

The *Model State Constitution* recommends a unicameral legislature consisting of senators elected for two-year terms from single-member districts, with a constitutional maximum and minimum number of districts, but with the numbers left blank. An alternative recommendation for a bicameral legislature provides for the number of senators provided by law, but not exceeding one-third the number of assemblymen, elected from single-member districts for six-year staggered terms. The number of assemblymen is likewise to be provided by law, within a constitutional maximum and minimum, and assemblymen are elected from single-member districts for two-year terms. (Secs. 4.02 and 4.03.)

Author's Comment

Many observers of Texas legislative process claim that the Texas House with

150 members is unwieldy. A 1973 study of its operations undertaken by the Citizens Conference on State Legislatures—now The Center for Legislative Improvement—recommends a reduction to 100 members, for example. (*A New Order of Business: Recommendations for the Organization and Operation of the Texas House of Representatives* (Sept. 1973), p. 23; see also Weeks, "Toward a More Effective Legislature," 35 *Texas L. Rev.* 926 (1957).) A smaller house, it is claimed, would permit reducing committee membership, make the provision of staff and facilities easier, and generally bring about more orderly procedure for consideration and debate of legislation.

On the other hand, the state's large and diverse population may require a lower house of 150 or more members to represent it adequately. Certainly there is no magic in any given number of seats, although the *Model Constitution's* recommended ratio of three to one for house to senate size seems tidy.

Sec. 3. ELECTION AND TERM OF OFFICE OF SENATORS. The Senators shall be chosen by the qualified electors for the term of four years; but a new Senate shall be chosen after every apportionment, and the Senators elected after each apportionment shall be divided by lot into two classes. The seats of the Senators of the first class shall be vacated at the expiration of the first two years, and those of the second class at the expiration of four years, so that one half of the Senators shall be chosen biennially thereafter. Senators shall take office following their election, on the day set by law for the convening of the Regular Session of the Legislature, and shall serve thereafter for the full term of years to which elected and until their successors shall have been elected and qualified.

History

The 1836 Constitution called for three-year terms for senators "chosen by districts, as nearly equal in free population (free negroes and Indians excepted), as practicable."

The 1845 Constitution provided for four-year terms and the division by lot of the senators into two equal classes. The seats of senators of the first class were to be vacated at the expiration of the first two years and those of the second class at the expiration of four years, so that one-half of the senators were chosen biennially.

No further change occurred until the 1869 Constitution, which provided for a senatorial term of six years and for one-third of the senators to be chosen biennially.

The Constitutional Convention of 1875 arrived at the present senatorial term of four years only after some debate. One delegate suggested, for example, that the senatorial term should be two years; he saw no reason why a senator's term should be longer than that of a member of the popular branch, the house of representatives. (*Debates*, p. 95.) Tradition was against the minority, however, and in the end four-year terms prevailed.

Section 3 was amended in 1966 to add the last sentence.

Explanation

Section 3 staggers the terms (and elections) of senators by dividing them into two classes. The 1845 Constitution provided for division into two classes "as nearly equal as can be," a clause omitted from the present section. Despite its omission, however, the Senate in practice awards four-year terms to 16 of its members, and two-year terms to 15, following each reapportionment.

A senatorial reapportionment has the effect of reducing to two years the terms

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of senators elected for four years before the reapportionment took effect. (*Spears v. Davis*, 398 S.W.2d 921 (Tex. 1966).) Senators elected from the reapportioned districts then draw lots to see which 16 get four-year terms and which 15 get two-year terms. Senators elected at the second and subsequent general elections following a reapportionment get full four-year-terms.

The 1966 amendment to this section added the third sentence to specify when senatorial terms of office begin. (They begin when newly elected senators qualify by taking the oath of office on the second Tuesday of January in odd-numbered years, the date prescribed by statute for convening the legislature in regular session. See the *Explanation* of Section 5 of this article.) This beginning date was traditional—or so thought the senators until the Texas Supreme Court held otherwise in *Spears v. Davis*.

At issue in *Spears* was whether a senator elected in November 1962 was eligible under Section 18 of this article to run for the office of attorney general, an office whose salary was increased by the legislature of which the senator was a member. (Section 18 is a conflict-of-interest provision and among other things makes a legislator ineligible during his elected term to run for any office created or for which salary was increased by the legislature of which he was a member.) If the senator's term did not begin until the legislature following his election convened (on January 9, 1967), it would overlap the beginning of the attorney general's term (January 1, 1967), thus making the senator ineligible for that office. The court held that a senator's term begins when he is elected (which is either the general election date or the date the returns are canvassed, the court never decided which); thus the senator's term expired November 23, 1966, at the latest, four years after his election, and there was no overlap with the attorney general's term. As to the asserted tradition, the court simply denied its existence, despite the existence of a 1962 attorney general's opinion relying on the tradition to rule that newly elected senators became entitled to salary only when their terms began, *i.e.*, when the legislature convened in regular session. (Tex. Att'y Gen. Op. No. WW-1481 (1962).) The legislature had the last word, however, by amending this section in 1966, only to find some of its members confronted with the same eligibility bar under Section 18 urged against Senator Spears, thus requiring, two years later, an amendment to that section. (See the *Explanation* of Sec. 18.)

Comparative Analysis

Texas is one of a large majority of 38 states setting four-year terms for senators. This includes unicameral Nebraska, which calls its single house members "senators." The remaining 12 states have two-year terms. Most of the four-year-term states stagger senatorial elections as Texas does. A few states have four-year terms for both houses.

The United States Constitution provides for two senators from each state, elected for six-year terms. Approximately one-third of the United States Senate is elected every two years, and, as a result, the terms are staggered in each state.

The *Model State Constitution* recommends two-year terms for senators in states with a unicameral legislature. An alternative recommendation is six-year staggered terms in states with a bicameral legislature. (Sec. 4.03.)

Author's Comment

Giving senators longer terms than representatives reflects the historical bases of representation in the congress (equality of states in the United States Senate and of population in the House), bases themselves the product of compromise necessary to pass the United States Constitution but of little if any relevance to

state legislatures. Longer terms are the overwhelming tradition, however, and barring a new movement to unicameralism Texas and most other states are probably stuck with a second house whose members enjoy longer terms. Perhaps, with the beginning of four-year terms for the governor and other principal executive-branch officers, four-year terms for senators in Texas will assume new relevance.

There was practical logic in the supreme court's *Spears* decision to begin and end legislative terms on the general election date. A newly elected legislator's constituents would no longer be saddled with two-plus months of "lame duckism." Senators- and representatives-elect could officially participate in pre-session organization; in fact, as Texas inevitably moves toward a full-time legislature, the gap between election and taking office will appear more and more anachronistic. On the other hand, beginning and ending legislative terms on election day would bar many other officeholders from seeking legislative office under Section 19 of this article. Section 19 makes most officeholders ineligible for the legislature during their terms of office, which usually end in December, two months *after* the proposed November beginning of legislative terms. (See the *Explanations* of Sec. 19 of this article and Sec. 12 of Art. XVI.) A legislator's eligibility for other office under Section 18 of this article would not be affected by beginning and ending legislative terms on election day, however, because the terms of most other offices begin January 1.

As a matter of sound draftsmanship, the holdover language in the third sentence of this section should be omitted because it is redundant with Article XVI, Section 17, which requires all officers to hold over until their successors take office. Before Section 3 of this article is amended again, moreover, the draftsman ought to consider carefully any proposed amendment's effect on other provisions of the constitution—Section 18 of this article being the favorite example.

Sec. 4. ELECTION AND TERM OF MEMBERS OF HOUSE OF REPRESENTATIVES. The Members of the House of Representatives shall be chosen by the qualified electors for the term of two years. Representatives shall take office following their election, on the day set by law for the convening of the Regular Session of the Legislature, and shall serve thereafter for the full term of years to which elected and until their successors shall have been elected and qualified.

History

All state constitutions of Texas have incorporated two-year terms for representatives. The Constitution of the Republic provided for one-year terms.

In 1965 Texas voters defeated an amendment which would have increased the terms of house members from two to four years. Under the amendment, members would have been divided into two classes so that one-half of the membership would stand for election every two years. This is the same procedure now in effect for election of members to the senate.

A provision was included in the proposed amendment to prohibit a house member with more than one year of his term remaining from becoming a candidate for any other legislative office. (*Cf.* Art. XI, Sec. 11; Art. XVI, Sec. 65.) This would have prevented a member of the house from running for the senate while he still had at least a year of his house term remaining.

The same amendment adopted in 1966 that specified the beginning date for terms of senators also amended this section to cover representatives.

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Explanation

The 1966 amendment was not necessary to clarify when representative terms began. Before the amendment the section provided that "their term of office shall be two years from the day of their election," and the attorney general long ago ruled that the phrase meant what it said. (See Tex. Att'y Gen. Op. No. WW-1476 (1962) for a survey of opinions.) In fact, the supreme court in the *Spears* case in effect read this phrase from Section 4 into Section 3 to hold that senatorial terms began at the same time. (See the *Explanation* of Sec. 3.) The terms of both still begin at the same time, under the 1966 amendment, but the time has been moved forward to the second Tuesday in January following their election, which is the date the legislature convenes in regular session.

Comparative Analysis

All states except Alabama, Louisiana, Maryland, and Mississippi have two-year terms for representatives. Those four states have four-year terms for members of both houses. (Nebraska, of course, has no lower house.)

The United States Constitution provides for two-year terms for representatives.

The *Model State Constitution* recommends two-year terms for representatives, regardless of whether the legislature is unicameral or bicameral. (Sec. 4.03.)

Author's Comment

See the *Author's Comment* on Section 3 of this article.

Sec. 5. MEETINGS; ORDER OF BUSINESS. The Legislature shall meet every two years at such time as may be provided by law and at other times when convened by the Governor. When convened in regular Session, the first thirty days thereof shall be devoted to the introduction of bills and resolutions, acting upon emergency appropriations, passing upon the confirmation of the recess appointees of the Governor and such emergency matters as may be submitted by the Governor in special messages to the Legislature; provided that during the succeeding thirty days of the regular session of the Legislature the various committees of each House shall hold hearings to consider all bills and resolutions and other matters then pending; and such emergency matters as may be submitted by the Governor; provided further that during the following sixty days the Legislature shall act upon such bills and resolutions as may be then pending and upon such emergency matters as may be submitted by the Governor in special messages to the Legislature; provided, however, either House may otherwise determine its order of business by an affirmative vote of four-fifths of its membership.

History

All state constitutions have provided for biennial sessions of the legislature except for the Constitution of 1869, which provided for annual sessions. The Constitution of the Republic was silent on the frequency and duration of congressional sessions, but the first congress before adjourning in 1837 provided by concurrent resolution for annual sessions beginning the first day of each November. (A Resolution Regulating the Meeting of Congress, 1 *Gammel's Laws*, p. 1335.)

At the Convention of 1875 one delegate proposed quadrennial sessions instead of biennial sessions of the legislature. Another moved to insert after Section 5 an additional section containing the following oath to be taken by members of the legislature:

And I have not since my election received, and will not during the continuance of my term of office receive, any free ticket, gift, accomodation [sic] or compensation

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from any railroad or other corporate company, other than shall be extended to citizens of the State generally; nor any unusual accomodation [*sic*] or compensation from any private individual.

After considerable discussion a motion was made to add to this oath "or use a free pass, or try to borrow one," which was adopted. The entire amendment, however, lost by a vote of 41 to 36. (*Debates*, p. 95.) Its consideration may explain the mislocation of this section among those dealing with terms and qualifications of legislators.

All state constitutions also have authorized special sessions for emergency matters at the call of the governor when necessary. In 1930 Section 5 was amended to provide for the order of business during regular sessions.

An unsuccessful 1973 amendment would have provided for regular annual sessions not to exceed 180 days in each odd-numbered year or 60 days in each even-numbered year. During sessions in even-numbered years only fiscal matters and emergency submissions by the governor could be considered. The governor could extend the 60-day session for an additional 30 days. The present language for convening special sessions was retained but the order of business sentence deleted. The proposition lost 338,759 to 267,141, with only about 15 percent of the state's registered voters casting ballots.

Explanation

Other sections of the constitution fix the maximum length of regular sessions at 140 days (Sec. 24 of this article; the obvious conflict with the 120 days provided in this section has largely gone unnoticed) and of special sessions at 30 days (Sec. 40); Article IV, Section 8, empowers the governor to call special sessions. The civil statutes provide for convening each regular session of the legislature at noon on the second Tuesday in January of every odd-numbered year (Tex. Rev. Civ. Stat. Ann. art. 5422).

May the legislature convene itself in special session? The supreme court answered "no" when the senate did so to consider interim gubernatorial appointments, but the vote was 5-4 and the presiding chief justice wrote an angry dissent. (*Walker v. Baker*, 145 Tex. 121, 196 S.W.2d 324 (1946).) At the heart of the minority's position was the court's earlier decision in *Ferguson v. Maddox* (114 Tex. 85, 263 S.W. 888 (1924)). There the court upheld the trial and conviction on impeachment charges of Governor James E. Ferguson by the senate over the span of two special sessions. Ferguson's lawyers argued that their client's trial, begun during the second special session, ended with that session. The court in rejecting the argument compared the senate while trying impeachment charges to a court, and at one point stated flatly: "From the inception to the conclusion of impeachment proceedings the House and Senate, as to that matter, are not limited or restricted by legislative sessions." (114 Tex., at 95, 263 S.W., at 891. For discussion of the impeachment power see the *Explanation* of Art. XV.) The senate's confirmation responsibility is not legislative in nature either, argued the minority in *Walker*, so by analogy to the *Ferguson* holding the senate ought likewise to be empowered under the constitution to convene itself to consider gubernatorial appointments. Be that as it may, no appellate decision has considered whether the legislature (or one of its houses) may convene itself in *legislative* session, and it is reasonably clear that it may not.

The last sentence (and bulk) of Section 5 was designed to ensure a more orderly flow of business through the legislature by means of the so-called split session provision. It failed, as it had to because of the 140-day limitation on the length of regular sessions, and the legislature routinely suspends the order of business

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requirement, as the section allows by four-fifths vote, and the traditional logjam regularly recurs in the last days of each session. So inured to the logjam have legislators become, in fact, that the parliamentary comment to the House Rules actually defends the common practice of setting the chamber's clock back in the waning hours to save the "principal work of a session." (Tex. H. Rule 19, Sec. 11, comment, at p. 115 (1973).)

Comparative Analysis

As a result of amendments adopted during the last decade, a large majority (38) of state legislatures for the first time in this century may meet in annual sessions. Of the 38 states with annual sessions, 21 have general sessions with no limitation on length, 12 have limitations, and five alternate general sessions with sessions limited to fiscal matters, but in four of these five the length of both the general and the budget session is limited. A majority of the states with biennial sessions also have limitations on their length. It is worth noting that in the many states with limitations on session length, only one has a required adjournment date later than June 30. Both the *Model State Constitution* and the United States Constitution call for annual sessions with no limitation on length.

Approximately three-fourths of the states specify in their constitutions the date for convening the session, usually a day early in January. Only about 12 include a specific hour, usually noon, but in a couple of states 10 a.m. is the magic hour. Another half dozen or so states set the time of convening but permit the time to be changed by law. Three states appear to leave the whole business up to the legislature. The *Model State Constitution* does the same. The United States Constitution calls for congress to convene at noon on the third day of January, "unless they shall by law appoint a different day."

Author's Comment

As noted in the *Comparative Analysis*, most state legislatures today may meet annually, and the trend toward permitting annual sessions of at least limited duration seems unstoppable.

Most of the inadequacies in operation of the Texas Legislature can be traced to the limited duration of its regular sessions, 140 days every two years. In that four and a half months the representatives of the fourth most populous state in the nation are expected to recruit and train a session staff; consider and act on a budget of billions of dollars to be spent beginning three months after adjournment over a 24-month period; deliberate on requests for more than 1,000 amendatory and new laws; oversee operations of the executive and judicial branches; and answer volumes of constituent mail—to mention only their more important responsibilities. Small wonder that the number of special sessions has increased over the past 20 years, so that only two legislatures during those two decades, the 52nd in 1951 and the 58th in 1963, did not require them. (The 62nd in 1971 with four special sessions nearly rivaled the record of five set by the 41st in 1929-30.)

A compromise increasingly accepted by proponents of unlimited annual sessions is to limit one of the sessions to a fixed period, usually three to six months, and restrict the topics considered during it, usually to fiscal matters. As noted, the unsuccessful 1973 amendment to this section would have provided for a 60- to 90-day session in even-numbered years but restricted the legislature to dealing with fiscal matters (and emergency submissions by the governor) during it. This compromise has not worked particularly well in practice because, in the words of a legislator from a budget session state, "Much of our time at the fiscal session is wasted arguing and debating over what is fiscal and what is non-fiscal. . . . I have

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serious doubt that one of the annual sessions should be restricted to fiscal matters.' ” (Quoted by Wirt, “The Legislature,” in John P. Wheeler, Jr., ed., *Salient Issues of Constitutional Revision* (New York: National Municipal League, 1961), p. 75.)

Whatever the decision on number, type, and duration of sessions, the order of business provision of Section 5 should be deleted. This will not change the legislature’s practice, which is as it should be to prescribe its own order of business by rule.

Section 5 should also be combined with those portions of Sections 24 and 40 of this article, and Section 8 of Article IV, that deal with legislative sessions.

Sec. 6. QUALIFICATIONS OF SENATORS. No person shall be a Senator, unless he be a citizen of the United States, and, at the time of his election a qualified elector of this State, and shall have been a resident of this State five years next preceding his election, and the last year thereof a resident of the district for which he shall be chosen, and shall have attained the age of twenty-six years.

History

The various constitutions of Texas have all prescribed qualifications for senators somewhat similar to those set forth in the present section. They differed, however, as to the length of time a senator must have been an inhabitant of the state prior to his election, the constitutions of 1845, 1861, and 1869 requiring a three-year period rather than the five-year period required by the Constitution of 1866 and the present constitution.

All the constitutions have required a senator to be a resident of his district for the year preceding his election.

The age limit has varied for senators. Prior to the Constitution of 1869 it was set at 30. By the terms of the latter, however, it was reduced to 25, then increased to 26 in the present section.

The Constitution of 1866 required a senator to be a white citizen of the United States. The Constitution of 1869, drafted by the Reconstruction Convention, eliminated this requirement.

Section 6 emerged from the 1875 Convention a product of compromise. Proposed two- and three-year residency requirements yielded to five years and suggested minimum ages for senators of 21, 24, 25, 26, and 30 finally produced the present 26. (*Debates*, pp. 95-97.)

Explanation

The qualifications for election to the senate prescribed by this section are exclusive, unless modified elsewhere in the constitution, and the legislature is powerless to add to or subtract from them. (*Dickson v. Strickland*, 114 Tex. 176, 265 S.W. 1012 (1924).) For example, a statute making resignation from county office a prerequisite to eligibility for election to the Senate was invalidated by the court because violative of Section 6, but the candidate was held ineligible anyway under Section 19 of this article because the latter section forbids election to one office while holding another. (*Burroughs v. Lyles*, 142 Tex. 704, 181 S.W.2d 570 (1944).)

A candidate for the senate (or the house) apparently must meet the qualifications of Section 6 (or Section 7) as of the date of the general or special election, not as of the primary date or date of taking office. This interpretation results from

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reading the phrase "at the time of his election" to modify all the qualifications that follow, a reading impliedly approved by the supreme court in *Luna v. Blanton* (478 S.W.2d 76 (Tex. 1974)). (See also Election Code art. 1.05.)

Comparative Analysis

About 13 states prescribe a minimum age for senators of 21, which is the youngest, and two a minimum of 30, which is the oldest. The median age requirement is 25.

The United States Constitution sets a minimum age of 30 for United States Senators. The *Model State Constitution* leaves a blank space for age but does recommend in its alternative provision for a bicameral legislature that the minimum age requirement be the same for both houses. At least 18 states have the same minimum age for both houses. These are the 13 states with a minimum age of 21 for the senate, Idaho (22 for both house and senate), and four states with a 25-year minimum for the house.

There appear to be only 26 states that explicitly require senators to be United States citizens. It is likely that most of the other states in fact require United States citizenship, however. In some states, for example, a senator must be a voter and a voter must be a citizen. In others, a senator must be a citizen of the state and it is assumed that that means citizen of the United States. The United States Constitution requires nine years' citizenship for senators. The *Model State Constitution* requires senators to be voters and requires voters to be "citizens."

All states have a residency requirement, but not all constitutions spell it out in the section on qualifications of senators. Connecticut, for example, requires a senator to be an elector (voter) residing in his district, but to be an elector he must have resided in a town for at least six months. In New Hampshire, Massachusetts, and Vermont residency in the district is not required prior to the election date.

Under the United States Constitution, as is well known from the case of the late Senator Robert F. Kennedy, the residency requirement must be met as of the date of election, not as of the date of taking office. The *Model State Constitution* requires a senator to be a voter and a voter must have resided for a minimum of three months in the state.

Author's Comment

The citizenship requirement phrase in this section is superfluous because the next phrase requires a candidate to be a qualified voter and a qualified voter must be a citizen. (See Art. VI, Sec. 2.) The more important issue, however, is whether such lengthy residency requirements, especially five years in the state, are justified. As noted, the *Model State Constitution* requires but three months' residency in the district, and although this may be too brief a period to become familiar with a particular district's needs, five years' residence in the state clearly is too long.

Another issue, both here and under Section 7, which prescribes the qualifications for representatives, is the minimum age requirement. The legislature in 1973 reduced the age of majority to 18 across the board. (Tex. Rev. Civ. Stat. Ann. art. 5923b.) If 18 is old enough to vote, serve on juries, contract, etc., perhaps it is also old enough to hold district office.

A senator (or representative) faces an extra burden in seeking reelection if his district boundaries have been changed as a result of reapportionment. The *Model State Constitution* minimizes the difficulty by requiring only three months' residency in the (new) district before election, but perhaps a more realistic solution, given the tradition of this state's more stringent residency requirements, is that of

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the proposed New York Constitution of 1967:

... If, however, any redistricting plan for senate or assembly has been certified . . . since the last general election for the legislature, he shall have been domiciled for the twelve months preceding his election in a county in which all or part of the new district is located or in a county contiguous to such district if such district be composed of a whole county and all or parts of another county or counties.

Sec. 7. QUALIFICATIONS OF REPRESENTATIVES. No person shall be a Representative, unless he be a citizen of the United States, and, at the time of his election, a qualified elector of this State, and shall have been a resident of this State two years next preceding his election, the last year thereof a resident of the district for which he shall be chosen, and shall have attained the age of twenty-one years.

History

All Texas constitutions except that of 1866 have imposed identical age and residence requirements for representatives; the Constitution of 1866, as in the case of senators, increased the state residence requirement to five years and also specified that a representative be a white citizen.

This section apparently caused very little debate in the Convention of 1875. The only alternative proposal, applicable to both senators and representatives, required five years' residence in the state, one year in the district, and a minimum age of 21. The convention defeated this proposal by a vote of 59 to 21. (*Debates*, p. 96.)

Explanation

See the *Explanation* of Section 6.

Comparative Analysis

Except for the variations noted below, the *Comparative Analysis* for Section 6 (qualifications for senators) applies to this section as well.

About 39 states set a minimum age of 21 for representatives; nine states prescribe minimums ranging from 22 to 25; and two states have no minimum age requirement.

The United States Constitution sets a minimum age of 25 for membership in the house of representatives.

About five states require a one-year residence in the state, four require two years, seven require three years, and one requires four years.

Approximately 22 states require a one-year residence in the representative district, two require two years, and a few states require less than a year. One state, New Hampshire, does not specify any length of residency in the district before the election date.

Author's Comment

See the *Author's Comment* on Section 6.

Sec. 8. EACH HOUSE JUDGE OF QUALIFICATIONS AND ELECTION; CONTESTS. Each House shall be the judge of the qualifications and election of its

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own members; but contested elections shall be determined in such manner as shall be provided by law.

History

The present section resembles that in the Constitution of the Republic, except that the latter also provided for the house to judge the "returns" of its own members. The 1845 Constitution deleted "returns" and added the clause that "contested elections shall be determined in such manner as shall be directed by law." Subsequent constitutions have used essentially the same language.

Explanation

A 19th century constitutional law scholar asserted that sections like 8 were "essential to enable [the legislature] to enter upon and proceed with its legislative functions without liability to interruption and confusion [resulting from contested elections of its members]" (Walter Carrington, *Cooley's Constitutional Limitations*, 8th ed. (Boston: Little, Brown, and Co., 1927), vol. 1, p. 270.) In reality, it is difficult to imagine anything more disruptive of legislative business than an election contest, and many years ago the Texas Legislature wisely devised statutory procedures to keep ineligible candidates for election to that body off the ballot in the first place. (See Election Code art. 1.05.) Naturally a candidate so kept off challenged the statutory procedure as unconstitutional because of usurping the legislature's prerogative to judge the qualifications of its members, but the supreme court had little difficulty in sustaining the procedure. (*Burroughs v. Lyles*, 142 Tex. 704, 181 S.W.2d 570 (1944); accord, *Kirk v. Gordon*, 376 S.W.2d 560 (Tex. 1964).) Thus in practice qualification for the legislature is determined before the first primary election, and the legislature is spared the unrewarding task of determining who is and who is not qualified to be seated.

State constitutional provisions like Section 8 are not dead-letter, however, as a recent decision of the United States Supreme Court demonstrates. In *Bond v. Floyd* (385 U.S. 116 (1966)), the Georgia Legislature asserted that its power to determine its members' qualifications was exclusive and thus shielded from judicial review. The court disagreed, holding that no state law infringing a federal constitutional right (here freedom of speech) was shielded from review. (*Cf. Powell v. McCormack*, 395 U.S. 486 (1969) (court may review congressional refusal to seat house member).)

Curiously, the Texas Legislature has not taken full advantage of the second clause of Section 8 that allows it to provide by law for settling contested elections. It has provided by law all right (see Election Code arts. 9.20-9.26), but the statute gives the job to the legislature concurrently with the courts as to contested primary elections (see art. 13.30) and arguably as to general elections as well. (Art. 9.20 of the Election Code, which is the first of the series of seven articles dealing with contested legislative elections cited above, begins: "A candidate for State Senator or Representative *may* initiate election contest proceedings [by filing notice, etc.]" (Emphasis supplied.) Article V, Section 8, of the constitution gives the district court original jurisdiction "of election contests." Article 9.01 of the Election Code gives the district court *exclusive* original jurisdiction of election contests for all offices except legislative and a few in the executive branch. No judicial or attorney general opinion resolving this ambiguity was found, probably because most contests are taken to court to avoid waiting until the legislature convenes for disposition.)

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Comparative Analysis

All 50 state constitutions have some provision for deciding contested elections or determining the qualifications of legislators, but several variations exist. Thirty-four states give the house concerned the power to judge the "election and returns" of its members. Twelve states speak only to "elections," and four states refer to "election returns." The United States Constitution speaks of "Elections, Returns and Qualifications," while the *Model State Constitution* deletes the word "returns."

The last clause of Section 8 requires that contested elections be determined as provided by law, an exception that permits the legislature to place election contests before the courts. This exception exists in only a few constitutions.

Author's Comment

Traditionalists will no doubt urge retention of Section 8, but it is difficult to justify in face of the fact that qualification for the legislature is determined initially by party officials (and ultimately by the courts in case of disagreement) months before the legislature convenes. This is as it should be: the courts are designed to adjudicate this kind of dispute and, to turn around Judge Cooley, the legislature should "proceed with its legislative functions without liability to interruption and confusion."

Sec. 9. PRESIDENT PRO TEMPORE OF SENATE; SPEAKER OF HOUSE OF REPRESENTATIVES. The Senate shall, at the beginning and close of each session, and at such other times as may be necessary, elect one of its members President pro tempore, who shall perform the duties of the Lieutenant Governor in any case of absence or disability of that officer, and whenever the said office of Lieutenant Governor shall be vacant. The House of Representatives shall, when it first assembles, organize temporarily, and thereupon proceed to the election of a Speaker from its own members; and each House shall choose its other officers.

History

The Constitution of the Republic contained a comparable provision, but it applied only to the senate and provided only for a president pro tempore (for the time being) in the absence of the vice-president. The 1845 Constitution added a similar provision for electing the house speaker.

From 1861 to 1869, Texas constitutions specified that "The House of Representatives, when assembled, shall elect a Speaker and its other officers, and the Senate shall choose a President for the time being, and its other officers."

The present constitution added the requirement that the senate at the beginning and close of each session, and at such other times as may be necessary, choose a president pro tempore to perform the duties of the lieutenant governor in case of his absence or disability or when the office of lieutenant governor is vacant. The summarized *Debates* do not reveal the reason for this addition.

Explanation

The house rules authorize the speaker to appoint a speaker pro tempore, and most speakers have done so in recent times. Unlike the president pro tempore of the senate, however, the speaker pro tempore is not a constitutional officer, and probably it was for this reason that he was not named in the Executive Succession Act, which, incidentally, ranks the president pro tempore ahead of the speaker in succession order for the governorship. (Tex. Rev. Civ. Stat. Ann. art. 6252—10.)

The other "officers" (who are actually employees) of the legislature are

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identified in the *Explanation* of Section 41; suffice it here to note that these other "officers" need not be elected (although the senate does so) but may be hired like any other employee.

In response to abuses occurring during recent speakership campaigns, the legislature in 1973 enacted a separate statute requiring each speaker candidate to report his campaign contributions and expenditures. (Tex. Rev. Civ. Ann. art. 5428a.) The statute is similar to the general campaign financing act (Election Code ch. 14) and comprehensively regulates speakership campaign financing by limiting categories and amounts of campaign expenditures, barring contributions from certain individuals and entities, etc.

Articles 5423-5429 of the civil statutes provide for organizing each new legislature. The secretary of state presides while the clerk calls the role of newly elected and returning legislators, the former of whom present their certificates of election and take the oath of office. Once a quorum of members has qualified or answered present, article 5428 provides that the house shall elect a speaker; after the speaker takes the chair, article 5429 directs the further organization of the house and the selection of other necessary "officers." There are no comparable statutes for the senate, but as noted in the *Explanation* of Section 41 that body's rules provide for electing a president pro tempore and other "officers."

Comparative Analysis

Most state constitutions direct each house to choose its own officers. In two states the provision is drafted with precision by stating that such officers shall be so chosen except as otherwise provided in the constitution. This takes care of the fact that normally a senate does not choose its presiding officer. Some states specify what officers must be chosen. In one state, Minnesota, it is provided that each house shall choose its own officers as prescribed by law, a formulation that theoretically permits the governor to participate in the process of creating legislative offices.

The United States Constitution states that the house of representatives shall choose "their Speaker and other officers"; and that the senate shall choose "their other officers, and also a President pro tempore." The *Model State Constitution* states that the unicameral legislature shall choose "its presiding officer from among its members and it shall employ a secretary to serve for an indefinite term The secretary of the legislature shall be its chief fiscal, administrative and personnel officer and shall perform such duties as the legislature may prescribe." (Sec. 4.09.) The comment on this section states:

The only novel feature of section 4.09 is the reference to a "secretary of the legislature" who is to be employed for an indefinite term to manage fiscal and personnel matters. The purpose is to fill the need for better housekeeping in the legislative branch with its increased career staffs in legislative reference, bill-drafting and other services. The need for improved personnel and fiscal administration has become evident. It might be added that reference to the secretary of the legislature is not a constitutional necessity, for such an office could be established by a legislature entirely without such express authorization. Its inclusion, however, may prove useful. (p. 53.)

Twenty-eight states besides Texas require that the senate elect a president pro tem to preside in the absence of the lieutenant governor. In those states that have a lieutenant governor but do not provide specifically for a president pro tem there still will be such an officer elected pursuant to the usual provision that each house of the legislature shall choose its own officers.

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Author's Comment

Each house of the legislature would have power to elect its officers and employ staff without Section 9. Because two of the officers mentioned are traditionally picked for gubernatorial succession, it may be desirable to preserve the names of the president pro tempore and speaker in the constitution. If so, the much simpler 1845 version should be further simplified and substituted for the present text: "When organized the House shall elect a speaker, and the Senate a president pro tempore, from its membership."

Sec. 10. QUORUM; ADJOURNMENTS FROM DAY TO DAY; COMPELLING ATTENDANCE. Two-thirds of each House shall constitute a quorum to do business, but a smaller number may adjourn from day to day, and compel the attendance of absent members, in such manner and under such penalties as each House may provide.

History

The present wording has remained virtually unchanged since the Constitution of the Republic, with the 1845 Constitution merely adding the concluding phrase "in such manner and under such penalties as each House may provide."

Explanation

A quorum of the house is 100 members, and of the senate 21, unless either house does not have its full complement of members because of vacancy, failure to qualify, etc. In the latter event two-thirds of the members holding office constitute a quorum, so that, for example, at a time when only 30 senators had qualified, the president ruled that 20 senators constituted a quorum. (See Tex. S. Rule 1, comment at p. 2 (1973).)

A house without a quorum may not conduct any business other than that necessary to secure a quorum. This usually takes the form of sending out the sergeant-at-arms to bring in absent members, and the house rules make clear that he may arrest them for this purpose.

Each house calls the roll of its membership at the start of a legislative day. Thereafter a call of the house or senate may be moved (by 16 representatives or 6 senators, respectively) to ascertain whether a quorum is present. If the motion carries by a majority vote the doorkeeper bars all exits from the chamber and the roll is called. If there is no quorum, the absent members are sought and the house may recess until a roll call discloses the presence of a quorum. (See Tex. H. Rule 16 (1973); Tex. S. Rules 1-4 (1973).)

Comparative Analysis

Forty-four states set the quorum at a majority of all the members and four states set it at two-thirds. Vermont requires a majority except on bills raising taxes, in which case two-thirds of the members of the lower house must be present. New Hampshire requires a majority for a quorum, but if fewer than two-thirds of the members are present, then a measure must receive a two-thirds vote to pass. A majority constitutes a quorum in congress and under the *Model State Constitution*.

Forty-three states provide that fewer members than a quorum may adjourn from day to day and compel the attendance of absent members. Both the United States Constitution and the *Model State Constitution* also contain this authorization.

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Author's Comment

As pointed out in the *Comparative Analysis*, the Texas Legislature is one of only four subject to the two-thirds quorum requirement. One scholar suggests the two-thirds requirement reflects distrust of the legislature, a distrust not arising from the Reconstruction experience as one might assume, but traceable to the Republic and its constitution. (See 1 *Interpretive Commentary*, pp. 571-72.) One may only speculate about the abuses real or imagined in the minds of the 1836 delegates that led them to reject their well-worn model, the United States Constitution, and require a two-thirds quorum. Whatever their reasons, however, our longstanding acceptance of and commitment to majority rule suggest that a majority is also adequate for a quorum.

Sec. 11. RULES OF PROCEDURE; EXPULSION OF MEMBER. Each House may determine the rules of its own proceedings, punish members for disorderly conduct, and, with the consent of two-thirds, expel a member, but not a second time for the same offence.

History

The present section resembles that in the Constitution of the Republic, except that the latter prohibited disorderly "behavior" instead of "conduct."

The 1845 Constitution changed "behavior" to "conduct," while the Constitution of 1869 restored the earlier wording, except for the phrase "but not a second time for the same offence." The Constitution of 1876 reincorporated this phrase, so that the wording is as it reads today.

Explanation

Legislative Rules. Every deliberative body needs rules of procedure to ensure the orderly conduct of its business. Each house of the Texas Legislature has had such rules from the beginning, and they have recently become available in loose-leaf form periodically updated by the Texas Legislative Council. (Legislative rules should be distinguished from the various constitutional procedural rules, such as those specifying the enacting clause of bills and requiring their reading on three separate days (see the Annotations of Secs. 29 and 32 of this article), and from a more recent phenomenon, standing committee rules (see the *Explanation* of Sec. 37)). Legislative rules of the two houses deal with everything from order of business and the traditional parliamentary maneuvers to decorum and house-keeping to selection of honorary mascots. There are also joint rules, governing relations between the two houses such as the creation and operation of conference committees. When the rules are silent on a point, or when their application is unclear, resort is had to the rules of congress, interpretations of those rules collected in *Hinds' Precedents of the House of Representatives* and *Cannon's Procedure in the House of Representatives*, and to interpretative commentary such as Paul Mason, *Mason's Manual of Legislative Procedure* (New York: McGraw-Hill Book Co., 1953).

Traditionally in Texas each house has adopted its rules by simple resolution each biennium at the beginning of the regular session. (Joint rules are adopted by concurrent resolution.) The house rules may be amended by majority vote but amendment of the senate rules requires a two-thirds vote; suspension of the rules in either house requires a two-thirds vote. (See Tex. H. Rules 23, 31 (1973); Tex. S. Rule 32 (1973).) Each house employs a parliamentarian to help interpret the rules, but parliamentary rulings by the presiding officer are appealable to the members who may vote to overrule him.