CONGRESS AS A CONSTITUENT ASSEMBLY*

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The decision of Congress to act as a constituent assembly in order to change the government into a federal system raises anew a vexing problem that has been with us since the coming into force of the Constitution in 1987. Article XVII, Section 1 states that "[a]ny amendment to, or revision of, this Constitution may be proposed by [t]he Congress, upon the vote of three-fourths of all its Members." But how should the two Houses of Congress, the Senate and the House of Representatives, sit: separately as when it legislates, or together in joint session? And if the two Houses are to sit together in joint session, how should they vote: jointly or separately? The meager provision of the Constitution is silent on these questions. Our task is to interpret the sound of silence. In the performance of this task we must never forget that "it is *a constitution* we are interpreting."[1]

On the manner of voting, Article XVII, Section 1(1) literally means that the total number of members of the House of Representatives and of the Senate must be considered in determining the three-fourths vote required, because this provision says "The Congress," not "Each House." It is quite clear, however, that unless the two Houses vote separately, the Senators can easily be outvoted by the more numerous Representatives. On the manner of holding sessions, Article XVII, Section 1 says it is Congress, not the two Houses separately, that can propose amendments to, or revisions of, the Constitution.

The brevity of the provision is not due to any notion of brevity as a quality of a good written constitution[2] but to oversight, if not haste, in the closing days of the sessions of the Constitutional Commission.

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[1] Chief Justice John Marshall's statement in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819), considered by Justice Felix Frankfurter as "the single most important utterance in the literature of constitutional law." *John Marshall and the Judicial Function*, in GOVERNMENT UNDER LAW 6, 8 (Arthur Sutherland ed., 1956).

[2] In American law brevity, clarity, and comprehensiveness are valued as qualities of a good written constitution. Wrote Chief Justice Marshall in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819): "A Constitution, to contain an accurate detail of all the

The Record shows that in the beginning, the Committee on the Legislative Department of the Constitutional Commission unanimously voted to adopt a unicameral National Assembly.[3] Accordingly, the Committee on Amendments and Transitory Provisions apparently copied the pertinent provision of the 1973 Constitution, which likewise provided for a unicameral legislature. This was Article XVI, Section 1(1) of the 1973 document which simply read: "Any amendment to, or revision of, this Constitution may be proposed by the Batasang Pambansa upon a vote of three-fourths of all its Members or by a constitutional convention."

However, when the question of unicameralism or bicameralism was put to a vote before the Constitutional Commission, the proponents of bicameralism won. The voting was a very narrow one: 23 to 22.[4]

Changes were therefore made in the Articles on the Legislative Department and the Executive Department. Among other things, it was provided that when performing non-legislative functions, the two Houses of Congress must sit in joint session but vote separately. But for once, Homer nodded. The Framers failed to adjust the procedure in the Article on Amendments as well as the provision on the composition of the Judicial and Bar Council, which had earlier been adopted on July 9, 1986.[5] The result was that a bicameral legislative body was finally adopted but the Article on Amendment was that for a unicameral legislature.

Given this background of the Proposal Clause, how should it be construed?

First, by considering the design of the Constitution. The interpretation of an incomplete constitutional provision may be likened to the job of an architect who is asked to finish a structure left undone by the

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subdivisions of which its great powers will admit, and of all the means by which they may carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves."

[3] II RECORD CONST. COMM'N 35 (July 21, 1986).

[4] *Id.*

[5] I RECORD CONST. COMM'N 29 (July 14, 1986). Actually, another committee, that on the Judicial Department, also failed to provide how "a representative of the Congress" in the Judicial and Bar Council should be chosen now that there are two Houses composing the Legislative Department of the government. This was finally decided by the Supreme Court in Chavez v. Judicial and Bar Council, G.R. No. 202242, 676 SCRA 579, July 17, 2012.

original builder. The architect must discern the design and construction of the building by carefully studying its features. He must, in Justice Holmes' phrase in describing the process of constitutional interpretation, consider "the origin of [the words] and the line of their growth."[6]

An examination of the present Constitution shows that, whenever Congress is to perform non-legislative functions, the two Houses are required to meet in joint session, but to vote separately, namely:

(1) To declare the existence of a state of war;[7]
(2) To confirm the President's nomination of the Vice President of the Philippines in the event of a vacancy in that office during the term of the Vice President;[8]
(3) To decide whether to revoke the President's proclamation of martial law or suspension of the privilege of the writ of habeas corpus;[9]
(4) To canvass the votes for President and Vice President and, in case of a tie, to break the tie;[10] and
(5) To decide a dispute between the President, who has once declared himself unable to discharge the duties of his office but later claims to be fit to resume, and the majority of his cabinet which holds otherwise.[11]

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[6] Gompers v. United States, 233 U.S. 604, 610 (1914).

[7] CONST. art. VI, § 23(1). "The Congress, by a vote of two-thirds of both Houses, *in joint session assembled, voting separately, shall have the sole power to declare the existence of a state of war.*" (Emphasis supplied.)

[8] Art. VII, § 9. "Whenever there is a vacancy in the Office of the Vice-President during the term for which he was elected, the President shall nominate a Vice-President from among the Members of the Senate and the House of Representatives who shall assume office upon confirmation by *a majority vote of all the Members of both Houses of the Congress, voting separately.*" (Emphasis supplied.)

[9] § 18, par. 1. "The Congress, *voting jointly*, by a vote of least a majority of all its Members in regular or special session, may revoke such proclamation or suspension, which revocation shall not be set aside by the President." (Emphasis supplied.)

[10] § 4, par. 4-5. "Upon receipt of the certificates of canvass, the President of the Senate shall, not later than thirty days after the day of the election, open all certificates in the presence of the Senate and the House of Representatives *in joint public session, and the Congress*, upon determination of the authenticity and due execution thereof in the manner provided by law, [shall] canvass the votes.

"The person having the highest number of votes shall be proclaimed elected, but in case two or more shall have an equal and the highest number of votes, one of them shall forthwith be chosen by *the vote of a majority of all the Members of Congress, voting separately.*" (Emphasis supplied.)

[11] § 11, par. 4. "If Congress, within ten days after receipt of the last written declaration, or, if not in session, within twelve days after it is required to assemble, determines by a two-thirds vote of both Houses, *voting separately*, that the President is unable to discharge the powers and duties of his office, the Vice-President shall act as President;

In all these cases, except when considering the proclamation of martial law or suspension of the privilege of the writ of habeas corpus—in which case the two Houses vote jointly—the two Houses are required to meet in joint session and vote separately. Evidently, these provisions were patterned after the 1935 Constitution which read:

> The Congress, in joint session assembled, by a vote of three-fourths of all the Members of the Senate and of the House of Representatives voting separately, may propose amendments to this Constitution or call a convention for that purpose. Such amendments shall be valid as part of this Constitution when approved by a majority of the votes cast at an election at which the amendments are submitted to the people for their ratification.

It stands to reason that, when it sits as a constituent assembly to propose amendments to, or revisions of, the Constitution, Congress must likewise meet in joint session with the two Houses voting separately.

Second, the Record of the Constitutional Commission shows the following meaningful exchange between Commissioner Jose Suarez, the Chairman of the Committee, and Commissioner Florenz D. Regalado:

> MR. REGALADO. I also notice that both Sections 1 and 2 are premised on the anticipation that the Commission, not only the Committee, will opt for a unicameral body. In the event that a bicameral legislative body will carry the day, has the Committee prepared contingency proposals or resolutions?
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> MR. SUAREZ. Yes, in that situation, we would provide to include the words IN JOINT SESSION ASSEMBLED.
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> MR. REGALADO. But still maintaining the same number of votes?
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> MR. SUAREZ. The Commissioner is right.
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> MR. REGALADO. Thank you.[12]

Third, we can make a choice between competing theories by weighing the benefits of one construction against those of another construction. By

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otherwise the President shall continue exercising the powers and duties of his office." (Emphasis supplied).

[12] I RECORD CONST. COMM'N 25 (July 8, 1986).

meeting in joint session, Senators and Representatives can discuss matters together and argue face to face. The idea is not to have one House check the action of the other, which is the purpose for adopting a bicameral system for legislation, but rather to make the members of the two Houses of Congress come together to break bread and take counsel from each other. As the Supreme Court has pointed out, in such a case the "*[s]enators and members of the House of Representatives act, not as members of Congress, but as component elements of a constituent assembly.*"[13]

It is argued in some quarters that what is not prohibited by the Constitution is deemed allowed, and so a procedure similar to that for passing ordinary legislation is proper, namely, for each House to propose amendments or revisions for concurrence of the other House and, in case of differences between the two, to settle the matter in a conference committee. If a special procedure is required to be observed by Congress in performing non-legislative functions, there is greater reason to believe that no less was intended be observed by the framers in amending or revising the fundamental law. The great lesson of *Marbury v. Madison*[14] is that the Constitution is "the fundamental and paramount law" of the land and, as such, is "not on level with ordinary legislative acts alterable when the legislature shall please to alter it," but is "unchangeable by ordinary means."[15]

Charter change, it has been said, should be "possible, but not easy."[16] A procedure for amending or even revising the Constitution no different from that for amending an ordinary statute not only demeans a fundamental law, but allows partisan and passing considerations to prevail over what are truly felt necessities for change. We must never forget that it is *a constitution* we are dealing with.

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[13] Gonzales v. COMELEC, G.R. No. L-28196, 21 SCRA 774, Nov. 9, 1967; Tolentino v. COMELEC, G.R. No. L-34150, 41 SCRA 702, Oct. 16, 1971. (Emphasis supplied.)

[14] 5 U.S. 137 (1803).

[15] *Id.*

[16] *See* William W. Van Alstyne, *Does Article V Restrict the States to Calling Unlimited Conventions Only?—A Letter to a Colleague*, 1978 DUKE L.J. 1295, 1298-1299.