IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

JESUS R. SABLAN, Plaintiff, v. FROILAN C. TENORIO, Governor, Commonwealth of the Northern Mariana Islands, NINTH NORTHERN MARIANAS COMMONWEALTH LEGISLATURE, and JUAN S. DEMAPAN, PAUL A. MANGLONA, DAVID M. CING, EUSEBIO A HOCOG, and RICARDO S. ATALIG, Senators, Defendants.	Civil Action No. 94-500 **MEMORANDUM DECISION ON MOTIONS TO DISMISS AND JUDGMENT**

This matter came before the Court on July 13, 1994, in two separate hearings. One hearing concerned motions to dismiss by Defendants Froilan C. Tenorio ("Governor"), Ninth Commonwealth Senate and Ninth Commonwealth House of Representatives ("Legislature"). The other hearing concerned Plaintiff Jesus R. Sablan's motion for a preliminary injunction, which the Court had consolidated with the merits of trial, and cross-motions for summary judgment by Plaintiff and Defendants Juan S. Demapan, Paul A. Manglona, David M. Cing, Eusebio A. Hocog, **and** Ricardo S. Atalig ("Senators").

FOR PUBLICATION

This proliferation of motions arises from **two** controversies. First, Plaintiff claims that his ouster from the presidency of the Ninth Commonwealth Senate on May 13, 1994 is null and void because it violated the Senate's Rules of Procedure and the Commonwealth Open Government Act. Defendants respond that this matter is a non-justiciable "political question."

Second, Plaintiff seeks a declaration that the composition of the Commonwealth Senate is unconstitutional, in that it provides equal representation to the three Senatorial Districts of Saipan and the Northern Islands, Rota, and Tinian, despite large differences in population among these three districts. Plaintiff also requests a mandatory injunction forcing the Governor and the Legislature to reapportion the Senate along population lines. Defendants respond that: 1) the composition of the Senate is a non-justiciable "political question"; 2) the Governor and Legislature cannot provide the relief Plaintiff seeks; and **3)** the composition of the Senate is valid under both the Covenant and the U.S. and Commonwealth Constitutions.

I. PROCEDURAL HISTORY

Plaintiff filed this action on May 16, 1994, requesting an order restraining Senator Demapan from acting as Senate President. The Court denied Plaintiffs motion. *Decision and Order on Plaintiff's Motion for Temporary Restraining Order* (Super. Ct. May 18, 1994). After the Court's denial of Plaintiffs TRO request, Plaintiff amended his Complaint, joining Defendant Legislature and adding a claim that the apportionment of the Senate violates the equal protection provisions of the U.S. and Commonwealth Constitutions. See Amended Complaint (May 20, 1994). Later, Plaintiff filed a Second Amended Complaint, joining Defendant Governor Tenorio and adding claims under 28 U.S.C. § 1983 for attorney's fees. *See* Second Amended Complaint (June 8, 1994). Partly in response to these new parties and

new allegations, the hearing on Plaintiffs motion for preliminary injunction was repeatedly continued by stipulation of the parties.

Defendants filed their motions to dismiss on June 29, 1994 and July 6, 1994, respectively, and the parties' cross-motions for summary judgment were also filed on these dates. On July 5, 1994, the Court ordered that Plaintiffs motion for a preliminary injunction be consolidated with the merits of the case under Commonwealth Rule of Civil Procedure 65(a). On July 6, 1994, the Court ruled that it would hear the motions to dismiss on the morning of July 13, 1994 and the cross-motions for summary judgment (which fully encompassed the merits of the case as presented by the preliminary injunction motion) on the afternoon of that day.[1] The parties submitted evidentiary declarations and briefs prior to the hearing. At the hearing itself, no party elected to present live testimony. Therefore, the Court's rulings here are based on the parties' documentary submissions and the legal arguments presented at the hearings.

II. FACTS

(1) The Ninth Senate's Initial Leadership and Rules.

On January 10, 1994, the Ninth Northern Marianas Commonwealth Senate began its first regular session. At that session, the members elected Plaintiff, a Republican, as President by a vote of eight to one. See Senate Journal, (Jan. 10, 1994) at 19. Of the nine Senators, six are Republicans and three are Democrats. Also at the January 10, 1994 session, the

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[1] The Court's July 6, 1994 Order acknowledged that this hearing schedule was more condensed than would be afforded under normal rules. However, the Court deemed such a schedule necessary given the repeated continuances which had already delayed resolution of the matter. The Court also invited any party to object if it felt that its due process rights would be violated by the schedule. No objections were filed or raised at the July 13, 1994 hearings.

members adopted the ***Official Rules of Procedure*** of the Ninth Senate, by a vote of eight in favor and one abstaining. ***Id.*** at 18. Rule 1, Section 2 of those Rules provides in part:

> The President, Vice President, Floor Leader and Senate Legislative Secretary shall hold office until the next legislature is called to order. [...] This rule shall not be suspended without a unanimous vote of the total membership of the Senate and shall not be amended without the unanimous vote of 'the total membership of the Senate.

Senate Rules, at 1. However, Rule 10, Section 13 requires a vote of only a "majority of membership" for "removal of an Officer." ***Id.*** at 22. Finally, Rule 16 provides that:

> In the event that any ambiguity or conflict should arise regarding these Rules, [...] then such controversy shall be resolved according to the rules and principles set forth in ***Mason's Manual of Legislative Procedure.***

(2) **The May 13, 1994 Special Session.**

In early May, 1994, a shift occurred in the political allegiances of certain members of the Senate, resulting in a new five-Senator majority coalition. On May 11, 1994, four of the five members of that new coalition signed a request that the Governor call a special session of the Senate. Among the topics listed for consideration was "Matters relating to Senate leadership organization." **A** similar request, signed by only three Senators, was sent on the same day to Plaintiff ***as*** Senate President. ***See*** Plaintiffs Exh. 1. Governor Tenorio responded by calling a special session of the Senate to be held at 5:00 p.m. the same day. Plaintiffs Exh. 2.

Also on May 11, 1994, Plaintiff scheduled a special session of the Senate to be held at 1:00 p.m. on May 13, 1994, for the sole stated purpose of "Reconsideration of the Government Reorganization Plan." This call did not list "Senate leadership organization" as an agenda item. Plaintiffs Exh. 3. Four other Senators signed this call, which was distributed to the media. ***Id.*** Plaintiff also wrote to Governor Tenorio, asking that he rescind his call for a May 11 special session. Plaintiffs **Exh.** 4. Plaintiff pointed out that the Governor's call **was** not

supported by a majority of the Senate and suggested that a longer notice period prior to the special session would "better serve the needs of all constituents of the government" and comply with "the notice provisions of the Open Government Act and **[...]** the intent of such Act." ***Id.*** In response, Acting Governor Jesus C. Borja rescinded the call for the May 11, 1994 special session on the grounds of a lack of quorum.

On May 13, 1994, Plaintiff cancelled the special session that had been called for 1:00 p.m. that day. Plaintiffs Exh. *5*. Five Senators signed another request to the Governor for a special session, again requesting consideration of "Matters relating to Senate leadership organization." Plaintiffs Exh. 7. Governor Tenorio then called a special session for May 13, 1994 at 2:30 p.m. Plaintiffs **Exh. *6*.**

The special session was held at 2:45 p.m. on May 13, 1994; the five Senators of the new majority coalition attended, but the other Senators did not. Declaration of D. Landon Buffington, **Exh.** A. The session was open to the public and was attended by members of the media, which had been closely monitoring each action taken by the Governor and the Senate and had been predicting an imminent Senate "coup" for several days. ***Id.*** Once the meeting was called to order, Pro Tem Floor Leader Senator Manglona made the following motion:

> Mr. President at this point I move to suspend Rule 1 of the Official Rules of the Senate for the purpose of removing the [Officers of the Senate]. Mr. President, Section 5(h) of Rule 9 requires that at least two-thirds vote is required to suspend **a** Rule. I move that such Rule may be suspended by the majority. I reference Section 50 of *Mason's* regarding majority control and also Section 24, which states that failure of a House to conform to its Rules does not invalidate its actions.

Journal of the Senate Fifth Special Session (May 13, 1994), Plaintiffs Third Set of Exhibits at 20. The motion was carried by a vote of five to zero with four Senators absent. ***Id.*** The Senate then proceeded to elect Senator Demapan as Senate President and to nominate and elect new officers and establish new Committee assignments. ***Id.*** at 21-24.

(3) Senate Proceedings Since the May 13 Session.

Since its May 13, 1994 session, the Senate has met on at least five more occasions, acting on numerous gubernatorial appointments, bills and other resolutions. Buffington Decl., **Exh.** A. In particular, the Senate has passed two measures requiring a two-thirds majority: the Judicial Building Finance Act (June 17, 1994) and the Appropriations and Budget Authority Act of 1994 (July 5, 1994).

II. RULINGS ON DEFENDANTS' MOTIONS TO DISMISS

A. MOTION TO DISMISS PLAINTIFF'S CLAJM THAT THE SENATE VIOLATED ITS OWN RULES OF PROCEDURE

In the Commonwealth, courts decide on a case-by-case basis whether a given controversy represents a "political question" best resolved by a coordinate branch of government without the interference of the judiciary. Mafnas v. Inos, Civil Action 90-31, slip op. at 11 (Super Ct. Jan 22, 1990), aff'd, 1 N.M.I. 102 (1990); Marianas Visitors Bureau v. Commonwealth, Civil Action 94-516, slip op. at 10-11 (Super. Ct. June 23, 1994). Defendants contend that the propriety of actions of the Senate on May 13, 1994, and the apportionment of the Senate itself, are both political questions which this Court should decline to adjudicate.

Under Art. II § 14(b) of the Commonwealth Constitution, "[e]ach House of the Legislature shall choose the presiding officer from among its members, establish the committees necessary for the conduct of its business, and promulgate rules of procedure." This provision represents a "constitutionally demonstrable commitment" to the Senate of the power to make its own rules, signalling that a court should "take special care to avoid intruding" into the constitutional prerogatives of the legislature. Vander ***Jagt*** v. O'Neill, 699 F.2d 1166, 1173

(D.C. Cir. 1983) (citations omitted); Mason's Manual, supra, § 24(4) (house's violation of its rules of procedure not subject to judicial review).

In Mafnas the Commonwealth Supreme Court recognized two principal limits on these rulemaking prerogatives of the Senate. First, a court may review Senate rules if those rules violate the Constitution itself. Mafnas, supra, slip op. at 10-11, citing Vander Jagt, supra ("the court had the power and duty to review the [Senate] rule as applied in a constitutional infirmity context"); see also Marianas Visitors Bureau, supra, slip op. at 10-11 (Senate's reconsideration of joint resolution without obtaining House consent raised constitutional issue). Second, judicial intervention is proper when a "stalemate and impasse" has developed within the legislature preventing resolution of the problem. Mafnas, supra, at 11. The Commonwealth Supreme Court found that judicial review of a Senate leadership controversy was proper in ***Mafnas*** because "[a]bsent expeditious resolution of the dilemma, the Commonwealth government would remain crippled. No laws could be passed and the new Governor's executive appointments could not be acted on." 1 N.M.I. at 105.

Here, no constitutional issue is raised by Plaintiffs ouster at the May **13,** 1994 special session. Plaintiff argues that Art. II, § 14(b) itself imbues the Senate's Rules of Procedure with constitutional significance; this assertion turns the plain meaning of the constitution on its head and flies in the face of applicable authority. See Vander Jagt, supra, 699 F.2d at 1173; Moffitt v. Willis, 459 S.2d 1018, 1021 (Fla. 1984) (constitutional provision giving legislature power to make rules also gives it power to "interpret, enforce, waive or suspend" rules by any means within constitutional limits); Malone v. Meekins, 650 P.2d 351, 355-6 (Alaska 1982) (failure to follow applicable house rules in removing speaker raised no constitutional issue);

Cliff v. Parsons, 57 N.W.599, 600-601 (Iowa 1894) (under constitution, legislature has power to remove officers without notice).[2/]

Moreover, the Senate's activities since the May 13, 1994 special session show that no "impasse" or "stalemate" has resulted from the change of leadership. See generally, Buffington Decl., Exh A. Gubernatorial appointments have been confirmed and bills passed. The reconstituted Senate was even able to confer with the House of Representatives and resolve differences over the Fiscal 1994 Budget, an accomplishment which had eluded legislators for the preceding two years. Thus, no judicial intrusion into the Senate's procedure is necessary for the effective function of the Commonwealth government. Defendants aptly cite *Malone,* supra, which considered similar circumstances:

> While the [House leadership] reorganization did disrupt the legislative processes of the House for a few days, the important point is that the crisis passed, the House reorganized, and has since been engaged in legislative activity all without judicial intervention. Intervention by a court at this point would be apt once again to disrupt the legislative processes of the House. Nor is it at all clear that judicial intervention during the reorganization would have shortened it or otherwise been of benefit.

650 P.2d at 357.

Despite the weight of this authority, Plaintiff nevertheless insists that the Commonwealth Supreme Court authorized judicial review of alleged violations of Senate rules outside of the exceptions described above when it stated in *Mafnas* that "such rules are not only binding and enforceable, but a senate member may be expelled for violating the rules." 1 N.M.I. at 105, n. 1. Plaintiff misreads this statement; its plain meaning is that under Art. II, § 14, Senate Rules are enforceable by the legislature, not by the courts. Under the

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[2/] Plaintiffs attempt to claim a violation of his "speech and debate" rights likewise fails. There is no evidence that Plaintiff was in any senseprevented from attending the May 13, 1994 special session. Rather, from the record before the Court, it appears Senator Sablan voluntarily failed to attend, thus choosing not to debate his removal.

Commonwealth Constitution, it is the legislature that has the exclusive power to "compel the attendance of absent members, discipline its members and [...] expel a member [...] for violation of the rules of that house." Art. II, § 14(a). Moreover, each house of the legislature is the "*final* judge of the election and qualifications of its members." *Id.* (emphasis added). Finally, the Senate's decision to incorporate Mason's Manual into Senate Rules of Procedure provides strong evidence that the Ninth Senate itself intended these Rules to provide orderly procedures without restricting the Senate's fundamental ability to act by majority vote when necessary. See Mason's Manual, supra, §§ 2, 3, 22, 23, 24, 50. The reference to Mason's Manual during the floor debate at the May 13, 1994 special session underscores this intention. To impute a contrary meaning to the Supreme Court's dictum in *Mafnas* would run counter to the Commonwealth Constitution, the expressed intention of the Senate, and the logic of the *Mafnas* decision itself.[3/]

For these reasons, Defendants' motion to dismiss Plaintiffs claim that the Senate violated its own rules is GRANTED.

B. MOTION TO DISMISS CLAIM THAT THE SENATE VIOLATED THE OPEN GOVERNMENT ACT

A different question is raised by Defendant's motion to dismiss as a political question Plaintiffs claim that the May 13, 1994 special session violated Public Law 8-41, the Open Government Act. The Act is not a Senate Rule of Procedure, but rather a validly enacted piece of legislation. In Marianas Visitors Bureau, supra, slip op. at 11, n. 5, this Court declined on political question grounds to adjudicate a claimed violation of the Open Government Act at this

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[3/] Plaintiffs attempt to draw an analogy between Senate rules and court rules fails for the same reason. Court rules are enforceable by the courts. Legislative rules are enforceable by the legislature.

same May 13, 1994 special session; however, the Court expressed the intention of revisiting the issue more thoroughly in this action, where the claim is more factually developed and is more central to the litigation.[4/]

Other than Marianas Visitors Bureau, no Commonwealth authority treats the precise issue raised here. However, *Mafnas,* supra, implicitly suggests that violations by the legislature of procedural statutes, as opposed to procedural rules, are not immune from judicial review. While the *Mafnas* decision did not interpret or construe any Senate rule, it did interpret both the Commonwealth Constitution and the Commonwealth Code. Specifically, the Court looked to 1 CMC § 6423 in defining the term "members." 1 N.M.I. at 109.

Mainland jurisdictions are split over whether a legislature's failure to abide by a "sunshine law" represents a political question. In Abood v. League of *Women* Voters, 743 P.2d 333, 337 (Alaska 1987), the Alaska Supreme Court held that an open government statute could not restrict the legislature's constitutional power to make its own rules. Conversely, in Cole v. State, 673 P.2d 345, 349 (Colo. 1983), the Colorado Supreme Court held that the legislature's action in passing the sunshine law represented an affirmative intention to be bound by its provisions which could be enforced in court. See also Mason's Manual, supra, § 10 (mandatory procedural statutes applicable to legislature "must be complied with to give validity to the actions of the bodies," citing *Zemprelli* v. Scranton, 519 A.2d 518, 520 (Pa. 1986)).

Examining this authority in its totality, the Court finds that Plaintiffs Open Government Act allegations are justiciable. As the product of the collective judgment of both houses of the Legislature and the Governor, statutes are fundamentally different from the internal rules of a House. *Zemprelli,* supra. Moreover, by enacting § 14 of the Open Government Act, the

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[4/] Adjudication of the Open Government Act claim was also not necessary to the final resolution of *Marianas* Visitors Bureau.

Legislature expressly bound itself to follow the Act's procedures.[5/] A ruling by this Court that the Senate need not follow applicable statutes comes uncomfortably close to a statement that members of the legislature are in some sense "above the law." Such a suggestion, even by implication, does not serve the ultimate best interests of the legislature, the judiciary, or the public.[6/] Defendants' motion to dismiss Plaintiffs Open Government Act claim is DENIED.

C. MOTION TO DISMISS CLAIM THAT THE SENATE APPORTIONMENT IS UNCONSTITUTIONAL

Defendants also claim that the issue of Senate apportionment is a non-justiciable political question, by virtue of the fact that the Covenant guarantees equal representation of the island groups in the Senate. ***See Covenant to Establish a Commonwealth of the Northern Manana Islands in Political Union with the United States of America,*** § 203(c). Defendants argue that the bicameral structure of representation in the Legislature was essential to the political compromises which allowed for the creation of the Commonwealth. The public interest in preserving this fundamental compromise, Defendants argue, creates "an unusual need for unquestioning adherence to a political question already made," which is one of the criteria for application of the political question doctrine as set forth in *Baker* v. *Carr*, 82 S.Ct. 691 (1962). Defendants also point to ***Hillblom*** v. ***United States,*** 3 CR 295, 303-305 (D.N.M.I.

[5/] This intention was short-lived. On May 23, 1994, Public Law 9-2 repealed § 14 of Public Law 8-41, rendering the Act no longer applicable to the Legislature.

[6/] Defendant's motion to dismiss also claims that the Act's applicability to special sessions called by the Governor, as opposed to the Senate President, is a "political question." The Court finds no reason to treat the Governor differently from the Senate with regard to the political question doctrine. However, this does not mean that special sessions called by the Governor are "special sessions" within the meaning of § 12 of the Act. That is a question of statutory construction for the Court to determine on the merits, as it will do below.

1988), in which the District Court dismissed a similar challenge to the apportionment of the Commonwealth Senate on political question grounds.

The Court sees merit in these contentions. However, they are directly at odds with the fundamental fact that it is the primary role of the courts to interpret the Constitution. Marianas Visitors Bureau, supra, slip op. at 10, citing Baker, supra. In this regard, a well-developed body of constitutional interpretation exists to aid this Court's consideration of Plaintiffs claim, both regarding legislative apportionment (see *Reynolds* v. *Sims*, 84 S.Ct. 1362 (1964) and its progeny) and regarding the application of rights guaranteed by the U.S. Constitution to the Commonwealth (see Commonwealth v. Atalig, 723 F.2d 682 (9th Cir. 1984) cert. denied, 104 S.C. 3518 (1984); Wabol v. *Villacrusis*, 958 F.2d 1450 (9th Cir. 1992) cert. denied, 113 S.C. 675 (1992)). In the past, courts have not hesitated to review the constitutionality of key provisions of the Covenant. Atalig, supra; Wabol, supra. The resulting decisions have strengthened the Commonwealth's political foundations rather than weakening them. In contrast, the District Court's decision in *Hillblom*, to decline to review the constitutionality of the structure of the Senate, effectively allowed legal doubts over this critical issue to remain embedded in the Commonwealth's body politic. Such unresolved questions have a corrosive effect upon the very political compromise the Hillblom decision sought to respect. These questions are once again raised here, and the Court is of the opinion that they must be resolved.

Defendants also point out that § 902 of the Covenant provides the exclusive mechanism for changing § 203(c), mandating that any such change must occur through bilateral agreement of the United States and the Commonwealth in order to be effective. Thus, Defendants argue, this Court has no power to order a remedy even if it finds the Senate's apportionment to violate the equal protection clause. However, the existence of a political remedy does not relieve a

court of the duty to determine whether constitutional rights are being violated. *Lucas* v. Forty-Fourth General Assembly of Colorado, 84 S.Ct. 1450, 1473 (1964) (presence of non-judicial remedy may justify court staying its hand to allow political system to correct constitutional violation, but it does not justify refusal to determine whether violation occurred). The issues at stake in Atalig, supra, and Wabol, supra, are also subject to the bilateral consent requirements of the Covenant; yet this fact did not prevent the federal courts from ruling on the merits.

In sum, the Court holds that the constitutionality of the Senate's apportionment represents a justiciable question. Defendants' motion to dismiss on this ground is DENIED.

D. MOTION TO DISMISS § 1983 CLAIM AGAINST THE GOVERNOR AND SENATE

Forty-two U.S.C. § 1983 creates a cause of action against any "person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory," deprives anyone within a U.S. jurisdiction of his or her constitutional rights. Here, Plaintiffs Second Amended Complaint claims that the alleged malapportionment of the Senate gives him a cause of action against the Governor and the Legislature under § 1983 in addition to his causes of action under the U.S. and Commonwealth Constitutions. Plaintiff asks the Court to issue a mandatory injunction forcing the Legislature and the Governor to submit a reapportionment plan for the Senate, providing equal representation based on population. Second Amended Complaint, ¶¶ 82-85.

Defendants Governor and Legislature move to dismiss on the ground that they are not "persons" under the meaning of § 1983, citing *DeNieva* v. *Reyes*, 966 F.2d 480, 483 (9th Cir. 1992) ("Neither the CNMI nor its officers acting in their official capacity can be sued under § 1983"). However, as Plaintiff correctly points out, *DeNieva* explicitly did not rule out suits

against state officers for injunctive relief. *Id.* at 483, n. 3. The United States Supreme Court held in Will v. Dep't. of State Police, 109 S.Ct. 2304, 2312, n.12 (1989) that "a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983."[7/] Therefore, the Governor is still a "person" under a §1983 suit for injunctive relief.

Defendants also claim legislative immunity from suit. This argument succeeds. The Legislature, acting in its legislative capacity, is immune from § 1983 suits regardless of the relief sought. Supreme Court of Virginia v. Consumers Union, 100 S.Ct. 1967, 1974-5 (1980). Legislative immunity under § 1983 is also accorded to state governors when their actions take the character of a legislative activity. *Eslinger* v. Thomas, 476 F.2d 225 (4th Cir. 1973); *Saffioti* v. Wilson, 392 F. Supp. 1335 (S.D.N.Y. 1975); Annotation, 57 A.L.R. Fed. 504, 515.[8/] Here, formulating and enacting a reapportionment plan such as the one sought by Plaintiff as a remedy in this case is clearly a legislative activity, making both the Legislature and the Governor immune from suit under § 1983. Thus, Defendants' motion to dismiss Plaintiffs claims under 42 U.S.C. § 1983 is GRANTED.

E. MOTION TO DISMISS PLAINTIFF'S REQUEST FOR MANDATORY INJUNCTION AGAINST GOVERNOR AND LEGISLATURE

[7/] At oral argument, counsel for Defendant Governor cited Sable Communications of California v. *Pacific* Telephone and Telegraph Co., 890 F.2d 184, 191 (9th Cir. 1989) for the proposition that this exposure to § 1983 claims for injunctive relief is restricted to prohibitory injunctions and does not extend to suit. for mandatory injunctions. But this case contains no such discussion. Indeed, Sable involved an injunction prohibiting the California Public Utilities Commission from enforcing an administrative decision.

[8/] Plaintiff argues that governors and legislatures are not immune from § 1983 reapportionment suits, but has cited no specific authority for this proposition. The Court has located one case, Dyer v. *Kazuhisa* Abe, 138 F. Supp. 220 (D. Haw. 1956) in which a court rejected a legislature's claim of immunity from an apportionment suit under § 1983. It is doubtful, however, that Dyer remains good law in light of Consumers Union.

Defendants' final motion to dismiss asserts that the Governor and Legislature have no power under the Commonwealth Constitution to act in the manner Plaintiff requests. They claim that the reapportionment power granted to them under Art. II, § 4 is limited to reapportioning seats in the House of Representatives. Plaintiff responds that while this is true under the current constitutional framework, if the Court were to find the Senate apportionment unconstitutional, the Governor and Legislature *would* have an affirmative duty to reapportion the Senate.

The Court finds it inappropriate to decide this issue at the stage of a motion to dismiss prior to a consideration of the merits. It is a basic rule that a court should refrain from deciding constitutional issues if a matter may be resolved on other grounds. See *Marianas* Public *land* Trust v. *Marianas* Public *Land* Corporation, 1 CR 974, 977-8 (N.M.I. Tr. Ct. 1984) and cases cited therein. The type of remedy the Court might order if it were to invalidate the current Senate would implicate serious constitutional questions which at this stage remain hypothetical and contingent. Only if the Court reaches the stage where it must fashion such a remedy will these issues be fully ripe for adjudication. Thus, Defendants' motion to dismiss on this ground is DENIED.

IV. RULINGS ON MERITS OF PLAINTIFF'S CLAIMS

As noted earlier, this matter was originally noticed for hearing on a motion for a preliminary injunction only. However, the parties filed cross-motions for summary judgment to be heard at the same time, and the Court consolidated the preliminary injunction motion with the merits. Normally, when ruling on a motion for summary judgment, a court should make all factual inferences in favor of the non-moving party. *Cabrera* v. Heirs of De *Castro*, 1 **N.M.I.** 172 (1990). However, here, the matter was heard on the merits. The parties

submitted evidentiary materials and had the opportunity to present witnesses. Therefore, the Court will treat this matter as a final ruling on all legal and factual contentions presented and will base its factual findings on the preponderance of the evidence.

A. OPEN GOVERNMENT ACT VIOLATION

Under § 12 of the Open Government Act, codified at 1 CMC § 9911, special meetings "may be called at any time by the presiding officer of the governing body." However, notice of these special meetings must be given to the members of the body, the public, and members of the media.

> Such notice must be delivered personally or by mail at least twenty-four hours before the time of such meeting as specified in the notice. The call and notice shall specify the time and place of the special meeting and the business to be transacted. Final disposition shall not be taken on any other matter at such meetings by the governing body.

P.L. 8-41, § 12. Section 14 of the Act expressly makes these provisions applicable to the Legislature.

The parties' dispute focuses on whether the Act applies to special sessions convened by the Governor. By its terms, the Act applies to special sessions convened by "the presiding *officer* of the governing body." Id., § 12 (emphasis added). The Act contains no definition of the term "presiding officer." Art. II, § 13 of the Commonwealth Constitution, in turn, provides that special sessions of a House of the Legislature may be convened "upon request by its presiding *officer* or *by* the Governor." (Emphasis added). This language clearly distinguishes between the Senate President or House Speaker, on one hand, and the Governor on the other.

While the language of Art. II, § 13 gives rise to an inference that the Legislature intended to exclude sessions called by the Governor from the scope of the Act, this inference

is dispelled by two facts. First, although the Governor has the power to call a special session, it is the presiding officer of a House who convenes such a session. If the Governor's call leaves less than twenty-four hours notice prior to the session itself, it is the presiding officer's duty to attempt to resolve the conflict between the Open Government Act and Art. II, § 13 by requesting that the session be held at a time which affords adequate notice under the Act. This is precisely what Plaintiff did here in his May 11, 1994, letter to the Governor asking that the special session be postponed to May 13, 1994. Plaintiffs Exh. 4.

Second, the general structure of the Act itself points to the conclusion that sessions called by the Governor are within the scope of § 12. On its face, the Act creates only two exceptions to its notice requirements: emergency meetings, involving "injury or damage to persons or property or the likelihood of such injury or damage" (§ 12);[9/] and "executive sessions" called to consider any of an enumerated series of topics (§ 13), none of which are applicable here. The presence of express exceptions to a statutory rule gives rise to a presumption that no other exceptions were intended. Marianas Visitors Bureau, supra, slip op. at 28, citing 2A *Sutherland* Statutory Construction, § 47.11. Here, this presumption is strengthened by § 2 of the Act which provides:

> The provisions requiring open meetings and open records shall be liberally construed; and the provisions providing for exceptions to the open meeting requirements and open records requirements shall be strictly construed against closed meetings and nondisclosure of records.

When interpreting a statute, the overall objective is to give effect to the intent of the Legislature. Commonwealth Ports Authority v. Hakubotan *Saipan* Enterprises, Inc., 2 N.M.I. 212, 221 (1991). Based on the foregoing, the Court finds that the Legislature intended § 12 to cover special sessions called by the Governor as well as those called by the Senate President

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[9/] This provision is consonant with Art. III, § 10 of the Commonwealth Constitution, which grants the Governor the power to declare a state of emergency "as provided by law."

and House Speaker. The May 13, 1994 special session was therefore subject to the requirements of the Open Government Act.

Returning to the facts presented, there is no dispute that the Governor issued his call for the May 13, 1994 special session on the same day that the session was held, violating the twenty-four hour notice requirement. However, it is also undisputed that the various calls for special sessions by both the Governor and by Plaintiff between May 11, 1994 and May 13, 1994, all of which were public, provided effective notice of at least twenty-four hours to the members of the Senate, the media and the public at large that a special session was imminent and that it would involve consideration of a change in the Senate leadership. Moreover, the special session was open to the public and well-attended by members of the media. Buffington Decl. In sum, the facts present a violation of the technical requirements of the Act but not a violation of its spirit or intent, which is to provide open access to government.

While no Commonwealth court has faced this question, a number of Mainland jurisdictions have opted to apply the "substantial compliance rule" in situations where sunshine laws have been technically violated but substantially followed. In Keeler v. Iowa State Board of Public Instruction, 331 N.W.2d 110, 111 (Iowa 1983), the Iowa Supreme Court declined to invalidate an action taken at a town board meeting, stating that in view of the full public participation in the meeting, "we do not believe the public's knowledge and opportunity for input were adversely affected by the style of notice." See also Monroe-Livingston Sanitary *Landfill, Inc.* v. *Bickford*, 486 N.Y.S.2d 566, 567 (N.Y. App. Ct. 1985) (technical violation of open meetings law does not invalidate action taken by Town Board); Stevens v. Board of County Commissioners of Reno County, 710 P.2d 698, 701 (Kan. App. Ct. 1985) (discussion of Board business during forty minute recess constituted "technical violation" of open meetings act and did not invalidate decisions of Board); Williamson v. Doyle, 445 N.E.2d 385, 389 (Ill.

App. Ct. 1983) (failure to post notice of city council agenda thirty-six hours in advance of meeting does not invalidate action taken at meeting); *Arnold* Transit Co. v. City of *Mackinac* Island, 297 N.W.2d 904, 907 (Mich. App. 1980) (failure to post notice of meeting for required time did not invalidate acts of city council); *Stelzer* v. Huddleston, 526 S.W.2d 710, 713 (Tex. App. Ct. 1975), *writ dism.* (Nov. 19, 1975) (notice provisions of open government law subject to "substantial compliance rule"); Annotation, 38 A.L.R.3d 1070, 1085-90.

Based on the clear weight of this authority, the Court finds that despite the technical violation of the notice provisions of the Open Government Act, the various calls for special sessions issued both by Plaintiff and by the Governor beginning on May 11, 1994 constituted substantial compliance with § 12 of the Act.[10/]

B. CONSTITUTIONALITY OF SENATE APPORTIONMENT

Covenant Section 203(c) provides:

> The legislative power of the Northern Mariana Islands will be vested in a popularly elected legislature and will extend to all rightful subjects of legislation. The Constitution of the Northern Mariana Islands will provide for equal representation for each of the chartered municipalities of the Northern Mariana Islands in one house of a bicameral legislature, notwithstanding other provisions of this Covenant or those provisions of the Constitution or laws of the United States applicable to the Northern Mariana Islands.

The essence of Plaintiffs claim is that this bicameral structure departs from the principle of "one person, one vote" mandated by the equal protection provisions of the Fourteenth Amendment to the U.S. Constitution and Art. I, § 6 of the Commonwealth Constitution.

[10/] This ruling is not intended to signal this Court's willingness to excuse all manner of violations of the Act in future. Had notice of a May 13, 1994 special session not been issued on May 11, 1994, and had the members of the Senate, the media and the public not been aware of the May 13, 1994 special session actually held, this Court would have no choice but to invalidate the actions taken during the session. However, under the unique circumstances of this case, the Court finds that the intent of the Act was fully satisfied.

Plaintiff quotes extensively from Reynolds v. Sims, 84 S.Ct 1362 (1964), in which the U.S. Supreme Court held that "the right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." Id. at 1378. Reynolds found that state legislatures which apportion seats based on principles other than population violate this right and are therefore unconstitutional. Id. Since the population of the Saipan and Northern Islands Senatorial District is over ten times greater than either the Rota or the Tinian Senatorial District, Plaintiff claims that Saipan voters' equal protection rights are violated and the Senate must be reapportioned.

(1) Does the Insular Cases Doctrine Apply?

Plaintiff concedes that not every right guaranteed by the Fourteenth Amendment in the fifty States applies in the Commonwealth. However, Plaintiff argues that the "one person, one vote" right protected by Reynolds v. Sims is one of those most fundamental rights which are "the basis of all free government," which are enforced outside the fifty states under the Insular Cases doctrine of *Dorr* v. United States, 24 S.Ct. 808, 811 (1904) and its progeny. See *also* Atalig, supra, 723 F.2d at 690; Wabol, supra, 958 F.2d at 1460.

Defendants respond that Insular Cases doctrine is inapplicable, because the Covenant expressly renders the "one person, one vote" right inapplicable to the Commonwealth. Defendants point to § 203(c)'s mandate of equal representation by island in the Senate "notwithstanding other provisions of [...] the Constitution or laws of the United States applicable to the Northern Mariana Islands." Covenant § 501(b) similarly provides that:

> The applicability of certain provisions of the Constitution of the United States to the Northern Mariana Islands will be without prejudice to the validity of and the power of the Congress of the United States to consent to [Section] 203 ....

Defendants argue that since "the authority of the United States towards the CNMI arises solely under the Covenant" (U.S. *ex rel.* Richards v. De Leon Guerrero, 4 F.3d 749, 754 (9th Cir. 1993)), this express exemption in the Covenant ends the question. See also Sablan v. *Inos*, 3 N.M.I. 418, 432 n.16 (1993) (departure from rule of *Reynolds* v. *Sims* is "permissible under the Covenant"); Hillblom v. *U.*S., Civil Action No. 87-0015, slip op. at 5 (D.N.M.I. Mar. 18, 1988).

The Court agrees that the drafters of the Covenant intended for Reynolds v. *Sims* not to apply in the Commonwealth. Furthermore, the language of Guerrero, supra, that the relationship between the United States and the Commonwealth is *sui generis* and defined by the Covenant alone does suggest that the express terms of the Covenant should prevail regardless of the Insular Cases doctrine. However, other Ninth Circuit cases on point contradict this view. Indeed, Atalig, supra, expressly rejected the approach that "the Constitution applies in the NMI only to the extent provided for and agreed to in the Covenant" in favor of a "middle way" based on the *Insular* Cases. 723 F.2d at 688. The Ninth Circuit has not resolved this apparent inconsistency among its decisions on this subject, all of which are binding on this Court.[11/]

The Commonwealth Supreme Court's precedents show a similar tension between adherence to the plain language of the Covenant and application of the Insular Cases doctrine.

[11/] Counsel for the House of Representatives asserted at oral argument that this conflict is actually an evolution in the views of the Ninth Circuit over time, ending with the categorical statement of *Guerrero* that the U.S. Constitution only applies to the extent permitted under the language of the Covenant. This argument is unpersuasive. Of the four Ninth Circuit opinions dealing with this issue, Atalig and *Wabol* are far more carefully reasoned on this point than either Guerrero, or Hillblom v. *U.S.*, 896 F.2d 426, 429 (9th Cir. 1990) on which Guerrero relies. Indeed, *Guerrero* also cites Atalig, with approval, even though Atalig rejects the view expressed in *Guerrero* in favor of the Insular Cases doctrine. The final version of Wabol, issued after Hillblom but before *Guerrero*, affirms the Insular Cases approach and makes no mention of Hillblom.

Sablan v. *Inos,* supra, 3 N.M.I. at 432, expresses the view that the plain language of the Covenant should prevail. However, the Court has also approved the Insular Cases-based analysis of Atalig in *Commonwealth* v. Peters, 1 N.M.I. 468, 471-4 (1991) as well as the similar reasoning of Wabol in *Ferreira* v. *Borja*, 2 N.M.I. 514, 533 (1992), *rev'd* on other grounds, 1 F.3d 960 (9th Cir. 1993), *remand* pending (N.M.I. 1994). Based on this binding authority, the Court deems it necessary to examine Plaintiffs claim in light of the Insular Cases doctrine as well as in light of the Covenant's plain language.

In Atalig, supra, the Ninth Circuit examined a claim that the right to a jury trial was "fundamental" under the Insular Cases and therefore applicable to the Commonwealth. The U.S. Supreme Court had held previously in Duncan v. Louisiana, 88 S.Ct. 1444, 1447 (1968), that the right to a jury trial was "fundamental to the American scheme of justice" and therefore incorporated into the Fourteenth Amendment. In finding that such a right did not extend to the Commonwealth, the Atalig court stated:

> To focus on the label "fundamental rights," overlooks the fact that the doctrine of incorporation for the purposes of applying the Bill of Rights to the States serves one end while the doctrine of territorial incorporation serves a related but distinctly different one.

723 F.2d at 689. The Court in Wabol echoed the need to narrow the definition of "fundamental" as used in the context of the fifty states "to incorporate the shared beliefs of diverse cultures. Thus the asserted constitutional guarantee [...] applies only if this guarantee is fundamental in this international sense." 958 F.2d at 1460. In considering whether Art. XII of the Commonwealth Constitution violated the Equal Protection Clause, Wabol provided that a right is not "fundamental" in this sense if circumstances in the jurisdiction at issue are such that application of the right would be "impractical or anomalous." *Id.* at 1461.

In sum, in order to determine whether the guarantee of equal legislative representation based on population is applicable in the Commonwealth, the Court must look beyond the labels

in ***Reynolds*** v. ***Sims,*** supra, 84 **S.Ct.** at 1378, that the right is "fundamental" and "at the essence of a democratic society." Rather, the Court must examine: 1) whether the right is "fundamental in the international sense"; and 2) whether giving force to such a guarantee would be "impractical or anomalous" in the historical context of the Commonwealth. Wabol, supra, 958 **F.2d** at 1461. To that analysis the Court now turns.

(2) Application of the *Insular Cases* Doctrine.

(a) Is the "One Person. One Vote" Rule Fundamental in the International Sense?

In determining whether the right to a jury trial was truly "fundamental" in the international sense, the ***Atalig*** court noted that "a criminal process which was fair and equitable but used no juries is easy to imagine." 723 **F.2d** at 689-90. Here, no imagination is required to envision a system of legislative apportionment based on principles other than population but which is nevertheless fundamentally democratic, since this is the system which currently governs the United States Senate, providing equal representation to States with widely different populations. ***Reynolds*** explained the need for equal representation for each State in the following terms:

> The system of representation in the two Houses of the Federal Congress is one ingrained in our Constitution, as part of the law of the land. It is one conceived out of comprornise and concession indispensable to the establishment of our federal republic. **[...]** **[A]t** the heart of our government system remains the concept of separate and distinct government entities which have delegated some, but not all, of their formerly held powers to the single national government. **[...]** [A] comprornise between the larger and smaller States on this matter averted a deadlock in the Constitutional Convention which had threatened to abort the birth of our Nation.

84 **S.Ct.** at 1388. The implicit teaching of ***Reynolds,*** then, is that a bicameral system where one house gives equal representation to political subdivisions with disparate population levels can be democratic where the apportionment is necessary to form a union among distinct political entities which otherwise would not be willing to concede sovereignty to a central government.

It is true that Reynolds rejected the idea that State governments contain geographic subdivisions analogous to the fifty states and thus merit equal representation.

> Political subdivisions of States -- counties, cities, or whatever -- never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions. [...] The relationship of the States to the Federal Government could hardly be less analogous.

84 S.Ct. at 1388-9. Plaintiff also points to ***Burns*** v. Richardson, 86 S.Ct. 1286 (1966), in which the Supreme Court invalidated Hawaii's state senate, which had been based on representation by island. However, whether the Commonwealth Senate's apportionment would pass muster if the "one person, one vote" right of Reynolds were incorporated in the Commonwealth is not the issue here.

Rather, the Court's inquiry concerns whether legislative apportionment must be based on population in order to be fundamentally democratic in the broader, "international sense." The Court finds that it need not be, so long as the reasons for the apportionment are reasonably justified on democratic principles such as those which prompted the creation of the Federal Congress, as described in Reynolds. In order to decide whether the Commonwealth satisfies this requirement, the Court must review the negotiating history of the Covenant.

The Northern Mariana Islands parted ways with the rest of Micronesia and requested separate political status talks with the United States on April 11, 1972. Marianas Political Status ***Negotiations:*** Opening Round, at 2 (Dec. 13-14, 1972). To give concrete expression to this desire, the Third Mariana Islands District Legislature created the Marianas Political Status Commission to negotiate with the United States. Act. No. 2-1972 (May 19, 1972), ***reprinted*** in Id. at 21. The Commission included, inter alia, two representatives each from the islands of Saipan, Tinian and Rota. Id., § 2. This equality of representation was a departure from the apportionment of the Mariana Islands District Legislature, a unicameral body which

had provided eleven representatives for Saipan, three for Rota, one for Tinian and one for the Northern Islands. See Charter, Marianas District Legislature, Art. I, § 3. This apportionment in the District Legislature had afforded little power to the smaller islands and bred substantial discontent among their political leaders.[12/]

The political status negotiations continued until December 19, 1974, when the Commission and the U.S. negotiators announced a tentative draft Covenant and abruptly recessed "due to the desire of each party to review carefully certain sections of the Covenant before signature." Marianas Political Status Negotiations: *Fifth* Round, at 38 (Dec. 5-19, 1974). The Senate apportionment provision of this draft Covenant was considerably different from the version eventually enacted. Draft § 203(c) provided only that "[t]he Constitution of the Northern Mariana Islands may provide for distribution of the legislature's membership on the basis of appropriate considerations in addition to population ..." After this recess, a final session was held from February 4 to 15, 1975, at which the language of § 203(c) mandating equal representation by island in the Senate was adopted. Marianas Political Status Negotiations: *Fifth* and Final Session (Second Part), at C-2 (Feb. 4-15, 1975).

The question to be answered is how and why this change in § 203(c) took place in the final stages of the Covenant negotiations. Unfortunately, the official publications of the Political Status Negotiations do not provide the kind of detailed account of the negotiations which would serve as a useful primary source to aid this Court's inquiry.[13/] It is therefore

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[12/] See Donald F. McHenry, Micronesia: Trust Betrayed; Altruism vs Self Interest in *American* Foreign Policy, 163 (recounting sources of inter-island "tension in the Marianas"); Declaration of Joaquin I. Pangelinan, ¶ 7 ("the people of Rota and Tinian felt that they had been discriminated against and treated as a powerless minority during the Trust Territory Administration"); 1 Journal of the *Constitutional* Convention, at 62, 121-123 (1976).

[13/] According to McHenry, supra, this vagueness of the official records resulted from the desire of the United States to gloss over serious disagreements among the parties "so that it (continued...)

necessary to consult secondary sources as to the specific factors which prompted the December 19, 1974 recess. These other sources are clear that one of the few remaining stumbling blocks to final agreement was the insistence of Commission members from Rota and Tinian on a more concrete guarantee of equal representation in a bicameral legislature. *See* Howard P. Willens, *The Constitution of the Northern Manana Islands: Constitutional Principles and Innovation in a Pacific Setting, 65 Georgetown Law Journal* 1373, 1401, n. 113 (1977); Marianas Political Status Commission, *Section by Section Analysis of the Covenant,* at *25* (1975); Marcuse, *Covenant to Establish a Commonwealth of the Northern Mariana Islands: Basic Document and Annotations,* at 18-20 (1976); Pangelinan Decl., ¶ 5-8; Don Farrell, *History of the Northern Mariana Islands,* 597 (1991). The recess was called by Ambassador Williams in order "to discuss this very difficult question with members of the U.S. Congress." *Id.* As a result of those consultations, the United States agreed to the language mandating equal Senate representation for Rota and Tinian. This new provision was unanimously adopted by the Commission prior to signing. *Id.*

The report of the U.S. Senate on the Covenant corroborates this view of the negotiating history, stating that the Senate apportionment provision:

> was inserted at the insistence of the chartered municipalities of Rota and Tinian with the unanimous support of the Marianas Political Status Commission. This

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[13/](...continued)
would not appear that the momentum of the negotiations had stalled." McHenry continues:

> Official reports contained largely formal and ceremonial statements. The Marianas had indeed made complete written reports to their legislature after the second round, and these included position papers exchanged by each side. However, the United States strenuously objected to the release of such detailed information and threatened to cease exchanging position papers if the Marianas made further complete reports.

McHenry, *Trust Betrayed, supra,* at 140.

> departure from the One Man-One Vote rule is thus justified under ***Reynolds v. Sims***. Moreover, the municipalities of Saipan, Tinian and Rota are not governmental subdivisions created by the legislature, but are separate island communities with divergent histories, traditions and problems.

Cited in Marcuse, ***supra.*** The Administration Memorandum on the Covenant echoes this statement and adds: "without the votes of [the] representatives [from Tinian and Rota] in the Marianas Political Status Commission this Covenant could not have been concluded." ***Id.*** at 20. The ***Analysis of the Covenant*** expresses a similar view:

> If [the equal representation clause of § 203(c)] were not included, Tinian and Rota would be limited to representation in the new Commonwealth which is based on population. The Commission concluded that, in the light of past experience of the people of Rota and Tinian and the need for their support of the Covenant, the protection afforded them by Section 203(c) was entirely appropriate and desirable.

Analysis of the Covenant at 25.

This understanding of the genesis of § 203(c) is echoed in the academic literature. As one researcher described:

> This unusual section was inserted in the agreement at the insistence of Rota and Tinian, which feared domination by the more populous Saipan if equality in one house were not guaranteed. Without it, their representatives on the [Status Commission] would not have voted for the covenant, preventing its completion [...] But since the accord could not have been completed otherwise, the U.S. eventually acceded to the NMI demand.

Paul M. Leary, "The Northern Marianas Covenant and American Territorial Relations," ***Institute of Governmental Studies Research Report, 1980-81***, at 26-7 (1980). ***See also*** Willens, ***Georgetown Law Journal, supra,*** at 1401 ("after the December 1974 negotiating session the Rota and Tinian municipal councils instructed their representatives on the [Commission] to obtain a guarantee of equal representation for these two smaller islands in one house"); McHenry, ***Trust Betrayed, supra,*** at 161 ("Tinian and Rota insisted at the last round that a bicameral legislature [...] be made part of the covenant"); Arnold H. Leibowitz, ***Defining Status: A Comprehensive Analysis of United States Territorial Relations,*** at 532, n.39;

Leibowitz, "The Marianas Covenant Negotiations," 4 *Fordham International* Law *Journal* 31, n.49 (1981); James A. Branch, Jr., "The Constitution of the Northern Mariana Islands: Does a Different Cultural Setting Justify Different Constitutional Standards?" 9 Journal of *International Law* and Policy 35, 56 (1980).

Finally, the court decisions of the Commonwealth accord with this view. *Hillblom* v. U.S., 3 CR at 297 (without the political compromises in the Covenant over jury trials and Senate apportionment, "the accession of the Northern Mariana Islands to the United States would not have been possible"); Marianas Visitors Bureau, supra, slip op. at 36 (like Federal government, Commonwealth was founded on a "Great Compromise" between three main islands).

The distrust and friction among representatives of the three islands did not end with the signing of the Covenant, but continued during the drafting of the Commonwealth Constitution, as delegates to the Constitutional Convention debated the structure of the Legislature and the powers of the Municipal Mayors. Indeed, Delegates from Rota and Tinian indicated they would walk out of the Convention if their proposals in this area were not agreed to. See 1 *Journal* of the Constitutional Convention, 121-123 (Nov. 12, 1976). When the Convention finally voted against the wishes of the Tinian and Rota Delegates on the structure of the House of Representatives, five of those Delegates did leave the Convention and did not sign the final document. Id. at 260-274 (Dec. 1, 1976); Farrell, History of the Northern Marianas, supra, at 622.

Examining the negotiating history of the Covenant and Constitution as a whole, it is evident that the Commission Delegates from Tinian and Rota were not willing to accept a continued political relationship with Saipan that did not afford them the political leverage necessary to secure their future economic and political development, rather than a continuation

of the peripheral status they had suffered during the Trust Territory. The compromise chosen by the drafters of the Covenant was based on this need to protect minority rights in a manner consonant with democratic traditions analogous to the founding of the Federal government. Under these circumstances, the Court finds that the Commonwealth need not adopt a strictly population-based Senate apportionment in order to be democratic "in the international sense."[14/]

(b) Would the "One Person. One Vote" Rule Be Anomalous or Impractical in the Commonwealth? *Wabol* stressed that a court's inquiry into whether incorporation of a given right into the Commonwealth is "impractical and anomalous" cannot be based "on unsubstantiated opinion; it must be based on facts" regarding the Commonwealth's political circumstances. Wabol, supra, 958 F.2d at 1461 (citation omitted). Here, once again the relevant facts are found in the negotiating history of the Covenant and Constitution, recounted above. Both Rota and Tinian entered the Commonwealth carrying a historical burden of mistrust and resentment towards Saipan. Tinian in particular made considerable sacrifices to satisfy the military requirements which represented bargained-for consideration in the Covenant negotiations. Had the compromises reflected in Covenant § 203(c) and Art. II, § 2 not been possible, the Commonwealth may not have been formed.

One may ask whether the Commonwealth would disintegrate if, after nearly twenty years of Commonwealth status, this Court were now to impose a population-based apportionment in the Senate. It is possible that trust and cooperation among the islands have

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[14/] Counsel for the Governor asserts that this Court's finding that the Reynolds rule is not fundamental "in the international sense" should end the inquiry, obviating the need to consider the second step of the Insular Cases test. But this is not what occurred in Atalig, where the Court clearly found the right to a jury trial not fundamental and yet proceeded to find that imposition of a jury trial right in the Commonwealth "would be difficult if not impossible." 723 F.2d at 690. As Atalig is binding authority, this Court is constrained to continue its analysis here.

reached levels that such a structure would now be acceptable to all. But this inquiry is necessarily a hypothetical one. The fact is that, just as the apportionment of the United States Senate "is one ingrained in our Constitution, as part of the law of the land," Reynolds, supra, 88 S.Ct. at 1388, the apportionment of the Commonwealth Senate is one of the foundations on which the political structure of the Northern Mariana Islands rests. The U.S. Supreme Court has never seen fit to apply the rationale of Reynolds to the U.S. Senate, despite the fact that the "Great Compromise" which created the Senate is perhaps no longer necessary to keep the States within the Union. Likewise, this Court does not believe that the Insular Cases doctrine requires it to perform such a potentially destabilizing experiment in the Commonwealth, without the consent and approval of the people of the Northern Mariana Islands themselves.[15/] For these reasons, the Court finds that the application of Reynolds to the Commonwealth would indeed be "impractical and anomalous."

In sum, the Court finds that under the doctrine of the Insular Cases, the strict requirements of Reynolds v. *Sims* are inapplicable in the Commonwealth, and the composition of the Commonwealth Senate offends neither the Fourteenth Amendment to the U.S. Constitution nor Art. I, § 6 of the Commonwealth Constitution.

[15/] At least one academic observer foresees dire consequences if such an action were ever forced by judicial interpretation:

> If the federal courts hold that the principle of population alone must apply to the apportionment of the Northern Marianas Legislature [...] then the entire Northern Marianas Agreement will be thrown into disarray. If one of its fundamental parts is invalid, then the very basis for the compact is imperiled.

Leary, "The Northern Marianas Covenant," supra, at 27.

V. SUMMARY

This decision embodies both the Courts' rulings on Defendant's motions to dismiss Plaintiffs claims and the Court's Judgment on the merits.

As to the Motions to Dismiss, the Court finds:

1. Plaintiff's claim that the Senate violated its own procedural rules on May 13, 1994 is a political question which the Court will not adjudicate.

2. Plaintiff's claims that the May 13 session violated the Open Government Act and that the composition of the Senate is unconstitutional are ***not*** political questions. Therefore, the Court decides these claims on the merits.

3. The Governor's and the Legislature's power to reapportion seats in the House of Representatives is a legislative power. Therefore, the Governor and Legislature enjoy legislative immunity from suit under 42 U.S.C. § 1983 over the apportionment of the Senate.

As to the merits of Plaintiffs claims, the Court finds:

1. The Open Government Act applied to the May 13, 1994 special session called by the Governor. However, because notice of a special session on May 13 was given on May 11, 1994, and the session was open and attended by the public and media, the Court finds that the special session was in substantial compliance with the Act. Therefore, the actions taken at the May 13, 1994 special session were valid, and Defendant Senator Demapan is the lawful President of the Senate.

2. As for Plaintiff's claim that the distribution of seats in the Senate is unconstitutional, the court must determine whether this right under the Fourteenth Amendment to the U.S. Constitution should be applied in the Commonwealth. According to the ***Insular*** Cases, such a right is applicable only: 1) if it is "fundamental in the international sense," and 2) if its application in the Commonwealth would not be "impractical or anomalous."

3. Based on the history of the Covenant negotiations in which Rota and Tinian insisted on equal Senate representation in order to join the Commonwealth, the Court finds that the right to a legislature based on population is not fundamental in the international sense, and that changing the structure of the Senate by judicial order would indeed be "impractical and anomalous."

VI. JUDGMENT

For the foregoing reasons, the Court renders Judgment in favor of **DEFENDANTS.** Each party will bear its own costs.

So **ORDERED** this 18 **day** of July, 1994.

ALEXANDRO C. CASTRO, Presiding Judge