

November 23, 1976

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Howard P. Willens, Esq.  
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P.O. Box 1029  
Saipan, Mariana Islands 96950

Dear Howard:

Your letter of November 17, 1976, asking me to review the draft of the Constitution for the Northern Mariana Islands, arrived yesterday. The short time limit you set required me to go over the draft much faster than I would have liked to. On the whole I found a very careful and mature document, far more pleasant to read than the draft constitution for the rest of Micronesia. Of course, I have some nits to pick as shown in the attachment to this letter. You will appreciate that they are strictly my personal views and not those of the Department of Justice, and furthermore they must be evaluated in the light of the deadline you gave me, so please do not hold me in the future to something that I overlooked or misunderstood.

✓ As you will see, most of my comments are of a technical or drafting nature. The only potential obstacle to U.S. approval of the Constitution of which I am aware now is the reference to international law in Article XI, section 1, and Article XIV, section 1. But, of course, I may completely misjudge the future attitudes of the Executive and Congress.

I leave it up to your judgment whether you want to disclose the source of the attached comments. But if you do, please make it clear that they are only my private views.

I envy you your stay on Saipan although I know that it must be hard work. I just spent ten days in Bermuda, a pleasant but inadequate substitute for the Marianas.

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Please give my best regards to my friends on Saipan.

I hope that we will get together after your return to cold and gray Washington.

All the best.

Sincerely yours,



Herman Marcuse

Room 5230  
Office of Legal Counsel

Attachment

Comments on Northern Mariana Islands  
Draft Constitution

*Done in analysis*  
Article I, section 6, and possibly section 5. In view of the departure from <sup>the</sup> equality in representation principle in Article II, section 2, and of the discriminatory provisions in Articles XI and XII, there should be a reservation such as "unless otherwise provided in this Constitution."

*Yes?*  
Article I, section 9. Is the omission of a provision for a grand jury intentional?

*Fixed*  
Article II and throughout Constitution. The Constitution makes reference to the Commonwealth but not to the period preceding it. This may cause difficulties during the period in which the Constitution is in effect but the Commonwealth has not been established, and also with respect to the qualification of officers. See, e.g., Article II, section 2(c). It may be that there should be in the Constitution a provision analogous to section 1005(b) and (c) of the Covenant.

*Flawed*  
Article II, section 4(b). The last sentence may present difficulties. If the "application" of the qualified voter is viewed to be a case or controversy, the Constitution may not be able to foreclose a right of appeal, especially if it is based on federal constitutional grounds. If the application is viewed as a proceeding of an administrative nature, someone might question whether the Constitution may confer such functions on the federal district judge.

*Fixed*  
Article II, section 7. What happens if the legislature has adjourned or expired by the time of the return of a disapproved bill? Can the next session or the next legislature override the veto?

*Done*  
Article II, section 9. a. Make it clear whether 2/3 of its members means of the members elected, or the members present. This problem exists throughout the Constitution.

b. Should removal be the only result of impeachment? In that event impeachment could be defeated by resignation. Should conviction not also provide disqualification from holding office or for some lesser sanction?

Article II, section 10. Filling a vacancy with a defeated candidate may cause trouble.

*England*  
Article III, section 2. Legislation may provide for a different period of residence. Article II, section 2(c) and section 3(b) provide for a longer period of residence. Any reason for that difference?

*Done*  
Article III, section 3. The catalogue duties to be performed by the Lieutenant Governor should include those provided for in the Constitution.

*Out*  
Article III, section 6. Should this section not provide that while the Governor and Lieutenant Governor may seek any public office during their term, they must resign the Governorship or Lieutenant Governorship when they accept that office, or is a "not" missing?

✓  
Article III, section 8(b). This subsection presents problems similar to the one alluded to in Article II, section 4(b).

*Left open*  
Article III, section 16. Who appoints the members of the Civil Service Commission?

*no matter*  
Article III, section 17. Does "other elected officials" include members of the legislature? If yes, this should be clarified in view of the U. S. precedent. If not, who are the other elected officials other than the mayors? This clause would preclude impeachment of Department heads because they are appointed. Is corruption or neglect of duty sufficient? There may be malfeasance in office out of spite or other malicious motives which may not necessarily be corrupt but still warrant removal.

*Final*  
Article IV, section 4. I have serious doubts as to whether this section is appropriate. The jurisdiction of the District Court is a matter of federal law and taken care of in the Covenant. Moreover, it is not covered by the mutual consent requirements. This is particularly true of the second sentence of the section.

✓  
Article IV, section 7. Judges shall be subject to impeachment in the same manner as are other civil officers. According to Article III, section 17, only elected officers are subject to impeachment. The alternative removal procedure of judges seems to be rather easy and could seriously undermine the independence of the judiciary.

Done  
Article IV, section 9. This section refers to the Northern Mariana Islands and not to the Commonwealth. Is there any reason for this change in nomenclature?

Fixed  
Article V, section 3. Why do the qualifications for this office require that the person may not have been convicted of a felony. This requirement does not exist for members of the legislature, Governor and Lt. Governor.

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Article V, section 5. The salary freeze may work serious hardship, especially if the term is extended to four years, since cost of living may vary much more sharply in Washington than in the Northern Mariana Islands.

Done  
Article VIII, section 1. Somehow make clear that these elections do not take place every year but only where required by the expiration of terms.

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Article IX, section 2. Should there be a way of suspending a law pending a referendum or should the legislature or a substantial minority thereof be able to provide that a law should not become effective unless approved in a referendum?

Fixed  
Article IX, section 3. This section provides that all elected officials should be subject to recall. As in Article III, section 17, does this include the members of the legislature and exclude the department heads? Section 3(b), however, seems to assume that the Attorney General is subject to recall although he is an appointed official. Article III, section 11.

Fixed  
Article X, section 4. Some commas seem to be missing in this section.

Article XI, section 1; Article XIV, section 1. Reference to ownership or jurisdiction "pursuant to international law." I assume that this clause is connected with the "transitory clause" of the LOS Convention or its successor with respect to the rights of non-self-governing territories. If this is so, these provisions may well cause an obstacle to the approval of the Constitution. In view of the spirit expressed in the preamble to the Constitution it may be wiser to be satisfied with the rights of the Northern Mariana Islands under U.S. law.

Article XI, section 4(b). This section sets forth the qualification for eight of the nine directors. Is that intentional?

Article XI, section 5(e). The Corporation may not transfer any interest in public lands that are located within 150 feet of the high water mark, etc. Is it intended that such land be completely frozen by the Constitution or can someone else transfer an interest if it should become necessary? E.g., could such land be transferred by, or with the consent of, the legislature?

Article XII, section 2. The exception in case of foreclosure may lead to evasion, especially in view of the mandatory "shall not."

Article XVIII, section 2, second sentence. Does this sentence mean that the question whether there shall be a constitutional convention is to be submitted to the voters even in the absence of a resolution of the legislature? If so, how is it to be done?

Article XVIII, sections 4(b) and 5. These provisions are somewhat confusing, and probably could be rearranged. Section 5 refers to the three municipalities: (a) The municipalities are abolished by Article VI, section 6(a); (b) What happens when the Senate is increased pursuant to Article II, section 2(b)?