

HERN MARIANAS CONSTITUTIONAL CONVENTION
HOUSE OF TAGA
SAIPAN, CM 96950

MEMORANDUM

Date: June 25, 1985

Legal Opinion No. 14

To : Attorney General

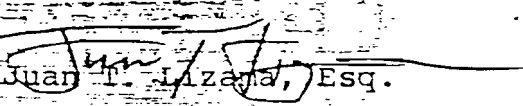
From : Chairman, Committee on Governmental Institutions

Subject : Request for Legal Opinion on Delegate Proposal
No. 58-85.

The subject Proposal calls for a provision on bribery and corrupt solicitation. This will define either a new section or Article as proposed.

Please review and provide us with your recommendations and rationale for Committee interpretation of this Proposal.

Thank you for your assistance.


Juan T. Lizana, Esq.

xc: Con-Con President

TO : Chairman, Committee on Governmental
Institutions

DATE: 6-27-85

FROM: Legal Counsel

RE : Bribery or Corrupt Solicitation
Opinion No. 14

You have asked for our comments regarding delegate proposal No. 58-85 -- a proposal regarding bribery or corrupt solicitation. I have two observations.

First, the proposal provides that

any person may be compelled to testify in any lawful investigation or judicial proceeding against any person who may be charged with having committed the offense of bribery or corrupt solicitation, or practice of solicitation, and shall not be permitted to withhold his testimony on the ground that it may incriminate himself or subject him to public infamy, but such testimony shall not afterwards be used against him in any judicial proceeding . . .

In short, this proposal would allow the Commonwealth, in investigations and prosecutions of certain crimes, to compel a person to give self-incriminating testimony in exchange for a grant of immunity from use of the testimony against him in any judicial proceeding. The scope of the grant of immunity is too narrow, and thus violates the 5th Amendment of the U.S. Constitution, made applicable to the Commonwealth by section 501 of the Covenant.

The Supreme Court has consistently rejected the view that under the 5th Amendment guaranty against compulsory self-incrimination, a grant of immunity is never an adequate substitute for a person's right to refuse to testify against himself. Pillsbury Co. v. Conboy, 459 U.S. 248, 74 L.Ed. 2d 430, 103 S. Ct. 608 (1983). However, the court has emphasized that in order for a grant of immunity to be adequate, the scope of the immunity must be co-extensive with the scope of the 5th Amendment privilege against self-incrimination. U.S. v. Calandra, 414 U.S. 338, 38 L.Ed. 2d. 561 94 S. Ct. 613; Baxter v. Palmigrano, 425 U.S. 308, 47 L.Ed. 2d 810, 96 S. Ct. 1551.

Rec'd 6/28/85 - am/ef

The Supreme Court has upheld the constitutional adequacy of grants of full "transactional immunity," that is, immunity from criminal prosecution for or on account of any transaction matter, or thing concerning which a witness testifies. Brown v. United States, (1959) 359 U.S. 41, 3 L.Ed. 2d 609, 79 S.Ct. 539, reh. den. 359 U.S. 976, 3 L.Ed. 2d 843, 79 S.Ct. 873 (overruled on other grounds Harris v. United States, 382 U.S. 162, 15 L.Ed. 2d 240, 86 S.Ct. 352). The Supreme Court has also upheld the constitutional adequacy of grants of "use and derivative use immunity," that is, immunity from the use in any criminal case of the compelled testimony or any evidence derived therefrom. Lefkowitz v. Turley, 414 U.S. 70, 38 L.Ed. 2d 274, 94 S.Ct. 316 (1980).

However, the court has held that it is not constitutionally adequate to grant mere "use immunity", that is immunity from the use in any criminal proceeding of the compelled testimony, the court emphasizing that a grant merely of use immunity would not prevent prosecuting authorities from making derivative use of the fruits of a witness' compelled testimony, for example, by obtaining investigatory leads. Counselman v. Hitchcock, 142 U.S. 547, 35 L.Ed. 1110, 12 S.Ct. 195 (disapproved on other grounds Kastigan v. United States, 406 U.S. 441, 32 L.Ed. 2d 212, 92 S.Ct. 1653 reh. den. 408 U.S. 931, 33 L.Ed. 2d 345, 92 S.Ct. 2478).

The proposed amendment provides only that "such testimony shall not afterwards be used against him in any judicial proceeding" -- thus, it appears to be constitutionally inadequate under the 5th Amendment. Thus, this proposal should be redrafted to provide for a constitutionally adequate grant of immunity to persons compelled to testify under its provisions.

I should note that prior to 1964, some courts had held there where the immunity provision was in a state constitution, as opposed to a statute, use immunity was constitutionally sufficient. Use immunity was sufficient prior to 1964 because the right to self-incrimination derived from the state's constitution, rather than the federal constitution, prior to that year. Only in 1964 did the U.S. Supreme Court, in Murphy v. Waterfront Com. of New York Harbor, (1964) 378 U.S. 52, 12 L.Ed. 2d 678, 84 S.Ct. 1594 and Malloy v. Hogan, 378 U.S. 1, 12 L.Ed. 2d 653, 84 S.Ct. 1489 (1964) hold that the 5th Amendment privilege against self-incrimination applies to the states under the due process clause of the 14th Amendment. Consequently, prior to the decisions making the 5th Amendment applicable to the states, a provision granting only use immunity was adequate if appearing in the state constitution because the immunity provision was viewed as a limitation of the self-incrimination guaranty in the state constitution; e.g. State v. Dominguez, 82 So.2d 12 (1955), Commonwealth v. Harnes, 90 A.2d 842 (1952), and Commonwealth v. Cameron, 79 A.169 (1911). Now that the 5th Amendment has been made

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applicable to the states however, in order for a state grant of immunity to be adequate, the immunity must comply with the requirements of the 5th Amendment. Therefore, these cases are no longer good authority for inserting a use immunity provision in a state constitution.

My second observation concerns the appropriateness of inserting this kind of substance in the constitution -- is it properly the subject of a statute? There are no limitations on what may be in a constitution; however, details defeat flexibility of later interpretation. This is a decision that only you as delegates can decide. I would note, however, that my research leads me to believe that the constitutions of Louisiana and Pennsylvania have provisions similar to delegate proposal 58-85.

JOSEPH A. GUTHRIE
Assistant Attorney General