SECOND NORTHERN MARIANAS CONSTITUTIONAL CONVENTION
HOUSE OF TAGA
SAIPAN, CM 96950

Date: June 25, 1985

MEMORANDUM

LEGAL OPINION NO. 18

TO : Attorney General

FROM : Chairman, Committee on Governmental Investigations

SUBJECT: Delegate Proposal No. 15-85

An issue is presented whether a preemption provision should be added to Section 1 of Article II.

To wit: Should it be necessary to include in Section 1 of Article II provision to the effect that the U.S. Constitution and U.S. Laws preempt Commonwealth Laws? Please provide your recommendation and rationale.

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CLIFFORD C. KOSACK
ATTORNEY GENERAL

TO : Chairman, Local Government Committee DATE: 6-28-85

FROM: egal Counsel

RE : Need for Provision in Legislative Article Stating that Federal Law Made Applicable to Commonwealth Pre-empts Enactments of Commonwealth Legislature
Opinion No. 18

You have asked whether a provision should be inserted in Article II, section 1, stating that federal law made applicable to the Commonwealth pre-empts enactments of the Commonwealth. The short answer to this question is that the full extent of federal laws' pre-emptive effect is defined in Section 102 of the Covenant. The Commonwealth could not increase the pre-emptive effect of federal laws unilaterally because the concurrence of the federal government would be required under section 501. Consequently, any constitutional amendment increasing or changing the pre-emptive effect of federal law would be inconsistent with the Covenant.

The term "pre-emption" refers to the displacement of state law by federal law which occurs in the event of an express or implied conflict between state and federal laws.

A state statute is pre-empted to the extent it conflicts with a federal statute -- if, for example, "compliance with both federal and state regulation is a physical impossibility", Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143, 10 L.Ed. 2d 248, 83 S.Ct. 1210 (1963), or where the law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress". Hines v. Davidowitz, 312 U.S. 52, 85 L.Ed. 581, 61 S.Ct. 399 (1941).

State enactments may be impliedly pre-empted by federal laws as well. Such a purpose (to displace state law) may be evidenced in

several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it. Pennsylvania R. Co. v. Public Service Comm'n., 250 U.S. 566, 569, 63 L.Ed. 1142, 40 S.Ct. 36; Cloverleaf Butter Co. v. Patterson, 315 U.S. 48, 86 L.Ed. 754, 62 S.Ct. 491. Or the Act of Congress may touch a field in which the federal system will be assumed to preclude enforcement of state laws on the same subject. Hines v. Davidowitz, 312 U.S. 52, 85 L.Ed. 581, 61 S.Ct. 399. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. Southern R. Co. v. Railroad Commission, 236 U.S. 439, 59 L.Ed. 661, 35 S Ct. 304; Charleston & W.C.R. Co. v. Varnville Co., 237 U.S. 597, 59 L.Ed. 1137, 35 S.Ct. 715; New York Central R. Co. v. Winfield, 244 U.S. 147, 61 L.Ed. 1045, 37 S.Ct. 546; Napier v. Atlantic Coast Line R. Co., 272 U.S. 605, 71 L.Ed. 432, 47 S.Ct. 207. Or the state policy may produce a result inconsistent with the objective of the federal statute. Hill v. Florida, 325 U.S. 538, 89 L.Ed. 1782, 65 S.Ct. 1375.

Local or state law will not be displaced by federal law unless a constitutional provision authorizes the displacement. In the absence of a supremacy clause, the state, and federal enactments are of equal dignity; even an intent on the part of Congress to displace state law will not be given effect in the absence of a supremacy clause.

"While federal pre-emption of state statutes is, of course, ultimately a question under the supremacy clause, U.S. Constitution, Article VI, cl. 2, analysis of pre-emption issues depends primarily on statutory and not constitutional interpretation", Philadelphia v. New Jersey, 430 U.S. 141, 51 L.Ed. 2d. 224, 226, 97 S.Ct. 987 (1977).

Thus, whether a local or federal statute is explicitly or implicitly in conflict is a matter of statutory construction, but the actual pre-emptive effect is derived from the constitutional provision.

Section 501 of the Covenant specifies which provisions of the U.S. Constitution are applicable to the Commonwealth. The federal supremacy clause, Article VI, Cl. 2 of the U.S. Constitution, is not among those provisions made applicable to the Commonwealth by section 501 of the Covenant. Moreover, the supremacy clause cannot be considered to apply to the Commonwealth under a theory of territorial incorporation, since under that theory, federal power vis-a-vis the Commonwealth is circumscribed, rather than expanded;

> "the doctrine of territorial incorporation . . . is designed to limit the power of Congress to administer territories under Article IV of the Constitution". Commonwealth of the Northern Mariana Islands v. Daniel Atalig, No. 83-1094 at p. 11.*

Therefore, since the supremacy clause of the U.S. Constitution is not applicable, under what authority does federal law supercede Commonwealth enactments under current arrangements? The answer is section 102 of the Covenant, which reads:

> The relations between the Northern Mariana Islands and the United States will be governed by this Covenant which, together with those provisions of the Constitution, treaties and laws of the United States applicable to the Northern Mariana Islands, will be the supreme law of the Northern Mariana Islands.

The inclusion of words making the Covenant the "supreme law" of the NMI gives laws of the United States made applicable by section 501 to the Northern Mariana Islands pre-emptive effect (see use of the words "supreme law" in the federal supremacy clause, Art. VI, cl. 2 of the U.S. Constitution).

Therefore, the supremacy of federal law over Commonwealth law derives from Section 102 of the Covenant. Since the supremacy of federal laws over Commonwealth law derives from of the Covenant, section 102 defines the full extent and breadth of the pre-emptive

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* Some have questioned whether the doctrine of territorial incorporation applies to the CNMI, and argue that no federal power may be exercised unless acquiesced to by the Commonwealth. See Commonwealth of the Northern Mariana Islands v. Daniel Atalig, No. 83-1094 at p. 20, note 28.

effect of the federal law in the Commonwealth. Section 202 of the Covenant requires that amendments to the Constitution must be consistent with the Covenant. Consequently, the Commonwealth could not increase the pre-emptive effect of federal law unilaterally through amendment to the Constitution because the concurrence of the federal government would be required under section 202.

Therefore, since pre-emptive effect of federal law could not be affected by amendment to the Constitution, there is no need for the proposed amendment to Article II, section I.

Joseph A. Guthrie

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