OFFICE OF THE ATTORNEY GENERAL

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

5TH FLOOR, NAURU BUILDING

SAIPAN, CM 96950

PHONE: 6207-7111

REXFORD C. KOSACK

ATTORNEY GENERAL

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June 28, 1985

Juan T. Lizama, Esq.
Chairman, Committee on
Governmental Institutions
Second Northern Mariana Islands
Constitutional Convention
Saipan, CM 96950

RE: Constitutional Proposals Regarding
the Office of the Attorney General
Proposals Nos. 34, 105, 116 and 138

Dear Mr. Chairman:

Thank you for inviting our comments on proposed amendments to Article III, Section 11 of the Northern Mariana Islands Constitution establishing the position of Attorney General. Our written testimony shall be brief because of the extremely short notice we received before the hearing.

Rather than discuss each proposal individually, it is easier to break them down into central themes and discuss those concepts. The issues posed are:

1) should the office be available to only persons of Northern Mariana Islands descent?
2) should the Attorney General be elected or appointed?
3) should the Attorney General serve a four-year or six-year term?
4) if appointed, shall advice and consent extend to both houses of the legislature?
5) if appointed, how should the Attorney General be removed?

We would suggest that the scope of this hearing be expanded to include these additional concepts:

6) should the Attorney General be immune personally and in his official capacity from lawsuit? (Delegate proposal No. 148-83)
7) should the prosecution function be severed from the Office of the Attorney General, thereby creating a separate prosecutor's office?
8) should the Attorney General have as a tool to be used at his discretion grand jury proceedings?

Northern Mariana Islands Descent

There are two issues presented by this proposal:

1) is it constitutional to limit eligibility to persons of Northern Mariana Islands descent?
2) is it advantageous to make such a restriction?

We believe that the opinions rendered by Assistant Attorney General Joe Guthrie and by Wilmer, Cutler & Pickering are legally correct in its conclusion that a restriction of "Northern Mariana Islands descent" violates the Fourteenth Amendment of the United States Constitution as applied by Section 501 of the Covenant. However, a durational residency requirement may be constitutional.

The question is whether a durational residency requirement accomplishes a legitimate objective. On the one hand, it is an indicator that a person is more likely to be familiar with the culture, the political leadership, the laws, the problems and the problem-solving resources of the Commonwealth. The Attorney General often is required to resolve disagreements and to help formulate policy. Such a background is essential to successful execution of his duties. As to how long it takes to acquire such knowledge, this Committee must draw the line itself. If it helps, the present Attorney General took office after living in the Commonwealth for 2 1/2 years. Presently, he has lived in the CNMI for over 4 years. His predecessor, Peter Van Name Esser, took office after living in the CNMI for less than one year. The first Attorney General, Richard Lassman, took office after living in the CNMI for less than one year.

On the other hand, the Attorney General occupies an important position in government. His abilities prevent the Commonwealth

from going into bankruptcy from civil suits, provide a strong deterrent to the criminal element by providing effective prosecution, and provides advice on policy to the cabinet and in legislative testimony. How much would such a restriction limit the availability of qualified attorneys to assume the position? There are only 10 attorneys of Northern Mariana Islands descent in the Commonwealth. Many of these attorneys may prefer positions of more prestige, such as judge or elected official, or positions that are more lucrative, such as private practice or business, to that of Attorney General. So, the practical field to choose from may be quite small. In fact, it is conceivable that there may be no eligible candidate who desires the position. If this restriction were legislated rather than constitutionally mandated, the legislature could amend the law to provide for a solution. A constitutional requirement may lead to serious disruption of government services.

Our office takes no official position on this proposal, but the above factors have been discussed for consideration. We add the following observations about the 54 Attorney General offices of the U.S.:

- 21 states and territories require residency in the state
- there have been no cases challenging residency requirements of the Attorney General
- Maryland requires 10 years residency
- Oklahoma requires 10 years as an elector
- 10 states require 2 years or less residency
- 9 states require 2-6 years residency
- only 2 states require above 6 years
- no U.S. territory has a specific residency requirement

See the attached Table summarizing state qualifications as of 1977. (Addendum No. 1).

Election to Office

A major issue is whether the position should be elective or appointive. The Attorney General is the most prevalent elective official in state governments (42 states) other than Governor. Of the 12 jurisdictions which appoint the Attorney General, 6 states and 4 territories require appointment by the Governor. In Maine, the Attorney General is selected by the Legislature and in Tennessee, by the Supreme Court.

Historically, the office has been appointive. In England, he was appointed by the Crown; in the colonies, he was appointed by the Governor. The Attorney General of the United States is appointed by the President and serves at his pleasure. The first state constitutions provided for legislative appointment, but after 1845 the trend turned toward popular election. The two newest states, Alaska and Hawaii, however, provided for gubernatorial appointment in their constitutional conventions of 1950 and 1956.

Proponents of an <u>appointive</u> Attorney General argue the following points:

1. Appointment provides for a strong chief executive. The Council of State Governments in their Model Executive Article for state constitutions limits election to Governor and Lt. Governor.

2. Fragmentation of offices leads to irresponsibility. A single chief executive can be held accountable for his staff by election. This leads to a more responsive administration.

3. The function of an Attorney General is to advise the Governor who should be permitted to choose his advisors. If appointive, then the Governor and the Attorney General are more likely to maintain a close and harmonious relationship.

4. The elective process may not assure professional competence. The pressures of politics and the time involved in campaigning limit an Attorney General's ability to serve. Furthermore, many competent people would not be willing to campaign for the position.

5. The Attorney General's task is a technical task, interpreting the law, and should not become involved in the political process.

The proponents of an <u>elective</u> Attorney General argue:

1. As the attorney for the people, the Attorney General should be elected by the people.

2. The Attorney General has several clients, the Governor is only one of them.

3. The Attorney General should be responsible to the people and responsive to their needs. Election better assures

that.

4. The Attorney General's duties are of the highest order and he should be independent. Like a judge, he renders legal opinions. He is a government watchdog and should not be an advocate for a particular administration. He must be free to oppose policies he believes inconsistent with the law.

5. If the Governor wants attorneys on his staff of his choosing, he can appoint lawyers to his staff.

What weight should be attached to these arguments is the task of the delegates on this committee. One final argument, which applies only to the territories, should be pointed out. All of the territories provide for an appointive Attorney General. Why is this? Perhaps it is because there historically have been an insufficient number of qualified attorneys available to serve in the territories. Election limits the ability to recruit attorneys from outside. The public does not know the candidates. (This election requirement may be a way to effectively limit the office to persons of Northern Mariana Islands descent without running afoul of the United States Constitution.) This Committee must decide if there is now a sufficient number of qualified attorneys available for election.

Addendum No. 2 summarizes the various state procedures. This Committee should chose a procedure which:

1) ensures public confidence in the impartiality of the Attorney General
2) makes the Attorney General responsible to the public
3) assures the selection of a competent Attorney General, and
4) provides for good working relations with the chief executive official.

Term of Office

Every territorial Attorney General is appointed for an indefinite term. As a practical matter, this means a term co-equal with that of the Governor (viz. 4 years). Forty-four states provide for a four-year term. Four states provide for a two-year term. Only two states have a term that exceeds four years; Tennessee has an eight year term and New Hampshire has a five-year term.

The trend has been towards increasing terms from two years to four years in order to allow the Attorney General time to master his duties and not be interrupted by campaigning. But, there is no trend towards expanding the term beyond four years. (See Addendum No. 2.)

The apparent intent of this proposal is to provide for greater impartiality. The term of the Public Auditor is six years, for example. We believe this might be effective. However, it would require an elective, rather than an appointive, Attorney General. And, it would probably increase the reliance of the Governor upon his own legal counsel.

Advice and Consent

The proposal is to extend confirmation to both houses of the legislature, as with the Public Auditor. We believe this would not be consistent with the philosophy behind appointments. Advice and consent is required only for gubernatorial appointments. If you choose to retain the appointive process, then a major purpose it serves is to provide the Governor with an advisor of his own choosing. He is more likely to rely on such a person and maintain a good working relationship with an attorney he selects. The confirmation process, however, has historically worked to deny the Governor his choice of counsel. The first several appointees of Governor Camacho were rejected by the Senate. Only in his fourth year was his final choice confirmed, and then only by one vote. Appointment of former Attorney General Peter Van Name Esser took approximately one-half of a year. To extend this process to a second house would reduce even further the chances of confirmation. Thus, the chief executive officer is denied his choice of legal counsel. This is unfair to the Governor and not in the best interests of good government.

Of the six states where the Attorney General is an appointee:

-- 4 confirm by the Senate
-- 1 confirms by both houses (Alaska)
-- 1 confirms by the Council.

Of the territories:

-- Puerto Rico and Virgin Islands -- Senate
-- Guam -- legislative
-- American Samoa -- no confirmation (Addendum No. 2)

Removal from Office

It would be rather self-serving to give our opinion on this issue. Instead, we will present some background statistics.

Of the ten jurisdictions where the Governor appoints the Attorney General, he may also remove him. However, only two jurisdictions allow for removal at will (Michigan and West Virginia).

Hawaii:	Senate must consent
New Jersey:	only for cause after a hearing
New Hampshire:	both branches of Legislature
Maine:	same
New York:	Senate must consent
Arkansas:	only for good cause, with vote of 2/3 of each house.

Seven elective Attorney General states allow the legislature to recall the Attorney General. Thirty-six elective Attorney General states provide for impeachment. This usually requires the lower house to institute the proceedings by a vote to impeach and a trial in the upper house.

Separate Prosecutor Office

We believe that there has been a delegate proposal to separate criminal prosecutions from the Office of the Attorney General. As the topic is inevitable, we will discuss it at this time.

There is a lot of merit to a proposal that the Attorney General should not prosecute crimes. No matter how honest, ethical, and impartial an Attorney General may try to be, there will always be accusations that a particular prosecution or failure to prosecute was motivated by political considerations. It never ceases to amaze our office at the charges that are leveled at our office solely because the Attorney General is an appointee of the Governor. Obviously, this has motivated the introduction of proposals calling for the election of the Attorney General. Perhaps the answer is to separate out the prosecution function and elect the prosecutor or provide for some other form of impartial selection.

Unfortunately, it may be that the election of a prosecutor would only increase the political considerations in deciding whether or not to charge an individual. So, another form of selection is required. Here are several suggestions for an independent "district attorney":

1. appointment by the Governor to a six-year term
2. appointment by the Attorney General to a six-year term
3. appointment by the Chief Judge upon consultation of the Governor
4. appointment by the Governor, Attorney General, judges, and presiding officers of each house by majority vote to serve a six-year term.

Only three states and three territories (all except Puerto Rico) have the Attorney General serve as the primary prosecutor. Of the other forty-eight jurisdictions, all have local prosecutors. Local prosecutors are elected in forty-four jurisdictions. New Jersey has its Governor, who serves a four-year term, appoint the prosecutor to a five-year term. In Connecticut, the judges appoint the state attorneys.

The majority of jurisdictions still allow the Attorney General to prosecute as well in some circumstances. Only four states have prohibited the Attorney General from initiating prosecutions. A recommended provision is to allow the Attorney General to prosecute in cases where the district attorney has a conflict of interest.

The organization of such a change is complex and we will await further instruction from the Committee before we describe alternatives.

Grand Jury

In recent years, the use of a grand jury in criminal proceedings has taken on an entirely different role than its traditional role. Traditionally, the grand jury was sole means of instituting criminal proceedings. Today, it is still the sole manner of initiating federal criminal cases. The evidence is presented in a closed hearing to the grand jury which votes on whether to return a true bill. A true bill causes an indictment to issue. This use of the grand jury is falling into trouble and as a result becomes obsolete in state courts. Instead, the prosecutor decides whether to file a case and a preliminary hearing is held before a judge. This is an open hearing at which the defendant has the right to cross-examine and confront witnesses. The judge decides whether or not to hold the defendant to answer on the charges.

Today, grand juries are used by many prosecutors to initiate their sensitive cases. In child molestation cases, the victim does not have to undergo the traumatic ordeal of cross-examination or seeing her or his assailant. In the CNMI, there is a particularly valuable use for the grand jury. It can be

used to shield the Attorney General from charges of political partiality in prosecutions Where facts are reported to the public indicating possible criminal conduct by a department director, a congressman or senator, etc., then the Attorney General, after investigation, can present the evidence to the grand jury to make the decision on prosecution. This is a significant tool in defining two types of decisions back to the community:

1. those which will cause adverse consequences to the Attorney General upon their filing, and
2. those which the Attorney General is willing to make but will not satisfy some faction in the community who will allege political factors entered into the decision.

The grand jury can be selected by the Chief Judge from the community. It should have about twelve members and sit for a least two years. It is only an alternative and need not be used by the Attorney General.

Civil Immunity

Proposal 148-85 requires discussion which does beyond the scope of this brief testimony. However, we strongly believe that it will shortly be impossible to attract qualified Attorney General's unless they receive personal as well as official immunity. As long as one makes difficult decisions and is personally liable for them, too high a price tag will be placed on the office.

This testimony is only intended to open discussion into these subjects and if the delegates address areas of further interest of concern to us, we would be pleased to provide further comments.

Very truly yours,

Rexford C. Kosack

REXFORD C. KOSACK
Attorney General

TABLE 7: QUALIFICATIONS REQUIRED FOR ATTORNEYS GENERAL

	Age	Residence and Citizenship	Admission to Bar
Alabama	25	U.S. citizen--5 yrs. in state	No
Alaska	None	U.S. citizen	No
Arizona	25	10 yrs. U.S.--5 yrs. in state	Yes
Arkansas	21	1 yr. in state--Elector, US Cit.	No
California	None	U.S. and state citizen	Yes--5 yrs (stat.)
Colorado	25	U.S. citizen--2 yrs in state	Yes
Connecticut	None	Elector	Yes--10 yrs.
Delaware	None	U.S. citizen--elector	Yes
Florida	30	U.S. citizen--elector	Yes--5 yrs.
Georgia	25	U.S. citizen--elector	Yes
Guam	None	No requirements	No
Hawaii	None	Elector--1 year in state	Not required
Idaho	30	U.S. citizen--2 yrs. in state	Yes
Illinois	25	U.S. citizen, 3 yrs in state	Yes
Indiana	21	State citizen	Yes
Iowa	None	Elector	No
Kansas	None		Yes--(case law)
Kentucky	30	U.S. citizen--2 yrs. in state	Yes--8 yrs.
Louisiana	25	Elector, U.S. & state cit. 5 yrs.	Yes--5 yrs.
Maine	None		Yes
Maryland	None	U.S. citizen--10 yrs. in state	Yes--10 yrs.
Massachusetts	None	None	Yes
Michigan	21	Elector--6 months in state	Yes
Minnesota	21	U.S. citizen 3 mos.--Elector	Not statutory
Mississippi	26	U.S. citizen--elector	Yes--5 yrs.
Missouri	None	U.S. citizen--1 yr. in state	Not required
Montana	25	U.S. citizen--2 yrs. in state	Yes--5 yrs.
Nebraska	None	No requirements	No
Nevada	25	U.S. citizen--2 yrs. in state	No
New Hampshire	None	No requirements	Yes
New Jersey	None	None	No--(but implied)
New Mexico	30	U.S. citizen--5 yrs. in state	Yes
New York	30	Elector	Not required
North Carolina	21	Elector	No
North Dakota	25	Elector--state resident	No--(but implied)
Ohio	21	Elector	Yes
Oklahoma	31	U.S. citizen--10 yrs. elector	No
Oregon	None	None	Yes
Pennsylvania	None	No requirement for office	No
Puerto Rico	21	U.S. citizen--elector	Yes
Rhode Island	21	Elector	Yes
Samoa	None	U.S. citizen	No
South Carolina	None	U.S. citizen--elector	Not statutory
South Dakota	25	--1 year in state	Yes--(case law)
Tennessee	None	None	Yes--(implied only)
Texas	None	None	No
Utah	25	U.S. citizen--elector	Yes
Vermont	21	U.S. citizen--elector--Vt. Cit.	No
Virgin Islands	None	U.S. citizen	Yes
Virginia	30	U.S. citizen--state resident	Yes--5 yrs.
Washington	21	Elector	implied
West Virginia	25	U.S. citizen--5 yrs. in state	No
Wisconsin	None	U.S. citizen--elector	Yes
Wyoming	21	Elector	Yes--4 yrs.

TABLE 6: SELECTION AND TERM OF ATTORNEYS GENERAL Addendum 2

	Elected	Appointed by	With Consent Of	Length of Term	May succeed Himself
Alabama	x			4	Yes
Alaska		Governor	Legislature	4	Yes
Arizona	x			4	Yes
Arkansas	x			2	Yes
California	x			4	Yes
Colorado	x			4	Yes
Connecticut	x			4	Yes
Delaware	x			4	Yes
Florida	x			4	Yes
Georgia	x			4	Yes
Guam		Governor	Legislature	Indefinite	Yes
Hawaii		Governor	Senate	4	Yes
Idaho	x			4	Yes
Illinois	x			4	Yes
Indiana	x			4	Yes
Iowa	x			4	Yes
Kansas	x			4	Yes
Kentucky	x			4	No
Louisiana	x			4	Yes
Maine		Legislature		2	Yes
Maryland	x			4	Yes
Massachusetts	x			4	Yes
Michigan	x			4	Yes
Minnesota	x			4	Yes
Mississippi	x			4	Yes
Missouri	x			4	Yes
Montana	x			4	Yes
Nebraska	x			4	Yes
Nevada	x			4	Yes
New Hampshire		Governor	Exec. Council	5	Yes
New Jersey		Governor	Senate	4	Yes
New Mexico	x			4	Yes
New York	x			4	Yes
North Carolina	x			4	Yes
North Dakota	x			4	Yes
Ohio	x			4	Yes
Oklahoma	x			4	Yes
Oregon	x			4	Yes
Pennsylvania		Governor	Senate	4	Yes
Puerto Rico		Governor	Senate	Indefinite	Yes
Rhode Island	x			2	Yes
Samoa		Governor		Indefinite	Yes
South Carolina	x			4	Yes
South Dakota	x			4	Yes
Tennessee		Sup. Court		8	Yes
Texas	x			4	Yes
Utah	x			4	Yes
Vermont	x			2	Yes
Virgin Islands		Governor	Senate	Indefinite	Yes
Virginia	x			4	Yes
Washington	x			4	Yes
West Virginia	x			4	Yes
Wisconsin	x			4	Yes
Wyoming		Governor	Senate	4	Yes

SECOND NORTHERN MARIANAS, 1985
SAIPAN, NORTHERN MARIANA ISLANDS

CONSTITUTIONAL AMENDMENT PROPOSAL NO. _____

A PROPOSAL

To amend Article I of the Constitution of the Northern Mariana Islands by adding Section 11 to create a grand jury system.

BE IT ADOPTED BY THE CONSTITUTIONAL CONVENTION:

Section 11. GRAND JURY

a) All criminal actions in Commonwealth Trial Court, except those on appeal, shall be prosecuted either by complaint, information, or by indictment.

b) A grand jury shall be empaneled and enquire into all indictments.

c) A grand jury shall consist of 12 persons, of whom two-thirds must concur to find an indictment.

d) The chief judge of the Commonwealth shall draw twelve jurors by lot from a list of at least 20 prospective jurors nominated by the judges of the Commonwealth trial court.

e) A grand jury shall be summoned only at the discretion and order of the Attorney General.

f) The legislature may by law regulate a grand jury system.

Date:_____ Introduced by:_____
Delegate