MEMORANDUM

July 11, 1985

TO: Convention President

FROM: Consultant

SUBJ: Legal Opinions Nos. 7 and 9

The subject legal opinions maintain that Article XVIII, Section 3 of the Constitution restricts the Convention from proposing a constitutional amendment that affects more than one article of the constitution, even though the language of Public Law 4-30 permits such amendments. It is my view that if the Convention is bound by these opinions, the Convention could be hampered in the performance of its constitutional duties and responsibilities. For this reason, I recommend that an opinion be requested from another attorney and the following issues be considered.

Legal Opinion No. 9 notes that Article XVIII, Section 3 restricts the legislature from proposing an amendment that embraces "the subject matter of more than one article of this Constitution." The opinion then extends this restriction to amendments proposed by a constitutional convention and by popular initiative by inference. I do not believe this reflects either the constitutional intent or usual standards of legal construction. First, when a provision is put in one part of a law and left out of another, the presumption usually is that it applies to the first set of circumstances and not to the second, unless there is something in the context or the legislative history that clearly indicates it was meant to apply generally. Second, we should focus on the significantly different purposes of constitutional convention, legislative initiative, and popular initiative. Third, we should note that the constitutional restriction is on embracing "the subject matter of more than one article", not articles per se.

With respect to whether the restriction "A proposed amendment may not embrace the subject matter of more than one article of this Constitution" should be construed as applying generally, I believe there is considerable evidence that it should not, in addition to rules of construction. While Section 4 on popular initiative specifically authorizes the legislature to transform a popular initiative into a legislative initiative, I note that the legislative vote requirement of this section is less stringent that that in Section 3 on legislative initiative. The ability of the

legislature to transform an amendment proposed by constitutional convention or popular initiative into a legislative initiative is obvious even in the absence of this provision, since the legislature is empowered to propose amendments even without a convention or popular initiative simply by meeting the vote requirements of Article XVIII, Section 3. Section 4 simply relaxes the vote requirement.

The purpose of a constitutional convention is comprehensive review of the constitution and proposal of any and all amendments necessary to correct deficiencies in the constitution as they relate to the aspirations of the people and the conduct of their government. To perform this enormous responsibility, the people elect special representatives to address this single purpose. To restrict a convention to proposing amendments article by article would defeat the constitutional purpose. This purpose is quite different from that of legislative or popular initiative, which is to correct a limited, single deficiency. When a broader review is needed, legislative or popular initiative can be used to call a constitutional convention.

The report of the Committee on Finance, Local Government and Other Matters on Committee Recommendation No. 1 as recorded on pages 584-597 of the Journal of the first Constitutional Convention (Vol. II) sheds additional light on the subject. It reads in part:

> The Constitutional Convention process facilitates a comprehensive review of the entire document, or major portions of it, and assures close attention to the experience under the constitution, which often cannot be done by ordinary legislative processes.
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> Legislative Initiative. A constitutional convention typically involves a broad review of the existing constitution and is not a matter to be undertaken frequently or lightly. Based on widespread experience in fifty states and Puerto Rico, however, there is need or desire to consider specific amendments of the constitution, some of a technical nature, others relating to particular constitutional policies or protection of individual liberties. Among the fifty states, the legislature is considered the appropriate forum for proposing individual cosntitutional amendments. . . . To facilitate voter understanding of the issues raised by the amendments, any single amendment would be limited to the subject matter contained in one article of the constitution.
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> Popular Initiative. . . . To preserve the public's ultimate

right to decide the content of its fundamental document . . .

Ratification. . . . The range of changes that a constitutional convention might propose . . . support the higer vote requirement in these instances . . .

Organization of Constitutional Convention. . . . Once a constitutional convention is authorized, it should be free to consider a wide range of potential revisions or amendments, subject of course to provisions of the Covenant and applicable provisions of the United States Constitution. . . . Restrictions on the scope or power of a constitutional convention was not considered warranted.

Legislative initiative, on the other hand, is designed to permit limited, often purely technical, amendments to be proposed, without the extra difficulty of calling a constitutional convention or obtaining signatures on a petition. Since the legislature does not represent the voice of the people specifically with respect to constitutional issues, and to prevent political professionals from confusing or manipulating the voters with respect to a constitutional amendment, the restriction on the scope of amendments proposed by legislative initiative is appropriate.

Popular initiative is likewise very different. Since it represents the direct voice of the people, in whom all right and power of governance reside, a restriction on the scope of a proposed amendment is not only inappropriate but would deprive the people of a fundamental right. However, in recognition of the fact that a popular initiative could be put forth in the heat of the moment or by a special interest group, the framers of the original constitution took the care to include the requirement that the petition must "contain the full text of the proposed amendment." (see also the Analysis, pg. 190) By ensuring that each signatory sees the full text, the framers protected against abuses without infringing on a fundamental right. This particular requirement is not included in the provisions on legislative initiative and constitutional convention; however, the legislature, recognizing the value of this provision with respect to the people's right to know, included it in the provisions of Public Law 4-30 relating to the form of the ratification ballot.

With respect to the constitutional restriction on embracing "the subject matter of more than one article", which applies to legislative initiative, we should note that the focus is on the subject, not articles per se. In the instance of certain subjects, for example, local government, qualifications for office, ethics of

government officials, etc., the subject appears in more than one article. It would be impossible to make an amendment treating the subject in general without amending more than one article. To require several separate amendments in order to address the subject would make no sense. Consequently, I do not believe this was intended to be an absolute prohibition even on the legislature, and to apply it to constitutional conventions as well would effectively prevent the people from changing the constitution to reflect their needs and desires.

We can further ask, "What sort of responsibility is this restriction against embracing the subject matter of more than one article?" One can easily make the case that, particularly with respect to a constitutional convention, if it applies to such a convention, that it is the same sort of responsibility as the legislative responsibility to limit bills to a single subject. That is a responsibility that is not subject to judicial review. That is, the legislature (or the convention) determines, in its judgement, what the subject is.

As the primary drafter of the Senate amendments to House Bill No. 22 (P.L. 4-30), I do not believe the legislative intent was to restrict the authority of the convention to propose amendments in any way. The language in Section 13 of the law, which I drafted, was intended to 1) memorialize in the statute the broad authority to propose amendments which the convention would have, and 2) require that the convention not propose two or more amendments which are inconsistent one with another, nothing more. Indeed, I do not believe the legislature has any constitutional authority to restrict the scope of amendments proposed by the convention. Amendments proposed by the convention are not subject to legislative approval. Further, Briefing Paper No. 9, prepared for the first Constitutional Convention states: "A number of state constitutions that require periodic submission of the convention question to the voters include in the constitution the precise question to be put to the voters with respect to the convention. For example, the Hawaii constitution provides: The legislature may submit to the electorate at any general or special election the question, 'Shall there be a convention to propose a revision of or amendments to the constitution?' This type of provision denies the legislature the opportunity to limit the scope of convention powers." (page 18)

<u>Conclusion</u>. I believe the Convention itself is the sole judge of what a proposed amendment is. When the Convention takes final action stating that something is proposed amendment No. 1, etc., then that is the form it goes to the voters. The Convention, of

course, has a responsibility to submit amendments to the voters in an orderly manner and to give them free and fair choices, but there is no constitutional authority for restricting the freedom of the Convention in proposing amendments, other than that imposed by the Covenant and the Constitution and laws of the United States as applicable to the Commonwealth. The precise language of Public Law 4-30 may pose some problems, but I believe the constitutional principle should override. If not, an amendment to Public Law 4-30 should be sought from the legislature in order to bring the language into precise conformance with the intent as stated above.

Stephen C. Woodruff