MEMORANDUM

July 20, 1985

TO: Convention President

FROM: Consultant

SUBJ: Committee Recommendations Nos. 35 and 27

It appears that the precise affect and probable impact of adopting either of these two proposed constitutional amendments may not be clear to some delegates. It is the purpose of this memorandum to focus on the issues involved in order to help clarify matters.

CR No. 35 (Qualifications to Vote), as amended prior to filing, would have no effect beyond that already contained in CR No. 27 which changes the word "includes" to "means" and thereby excludes, during the interim period, US citizens who do not meet the requirements of Section 8(a), (b), or (c) of the Schedule on Transitional Matters. Since Article VII, Section 1, Qualifications of Voters, already requires US citizenship and Section 8 of the Schedule on Transitional Matters already defines US citizenship as used throughout the constitution (including Article VII, Section 1), it is meaningless to define it again in Article VII, Section 1. No purpose is served by submitting a meaningless constitutional amendment to the voters.

Prior to amendment, CR No. 35 could have done one or the other of two things. In the absence of CR No. 27, it could have temporarily (until termination of the trusteeship) restricted most US citizens from voting (and from holding public office, since qualification to vote is a requirement of holding public office). However, the language is not clear and implys a permanent restriction; the actual affect would have to be determined in court. Given the existence of CR No. 27, CR No. 35 is either meaningless as noted above if the intent is temporary (and consequently no purpose is served by submitting it to the voters), or it is designed to permanently restrict most US citizens from voting. A court would most assured determine that the intent was permanent exclusion for the simple fact that there is no other reason to put this language in Article VII, Section 1, given the existence of CR No. 27.

Both CR No. 35 and CR No. 27 would very likely have highly undesirable consequences, many of which could occur even if the voters never ratify either of the proposed amendments. First, both amendments, if ratified, would certainly be overturned by the

courts, if not in their entirety at least in their application to particular cases, as violations of the due process, equal protection, and privileges and immunities clauses of the Covenant and the US Constitution. Under federal 1983 civil rights law, any person whose rights have been violated can sue the government and recover damages and attorney's fees as well as overturning the amendment. In other words, the amendment would not stand and it would also cost the Commonwealth government a lot of money.

Secondly, and probably most importantly, is the likely adverse reaction in Washington, DC to adoption of CR No. 35 and/or CR No. 27. The Commonwealth's negotiating team is presently in Washington, DC to lobby the US Congress for approval of the recently signed new multi-year financial assistance package. That package, and all the negotiating efforts that went into it, could be jepoardized. A backlash could be created to repeal US Public Law 98-213 and/or rescind the subsequent Presidential Proclamation which allowed the people of the Northern Marianas to become officers in the armed forces of the United States and made it clear that the citizenship and nationality provisions in US laws relating to federal employment, protection and services in foreign countries, commerce, political and civil rights, and federal programs and benefits do not apply to the people of the Commonwealth. This represents literally hundred of rights, benefits and privileges.

Finally, the subject committee recommendations would not only disenfranchise most US citizens, they would deprive many local people of their rights. Any local person who is a US citizen for any reason (naturalization, birth on Guam, etc.), whose domicile in the Northern Marianas was interrupted prior to January 1, 1974 and not reestablished until after that date would lose their rights. This is because continuous domicile is required. A person can have only one domicile at a time. Naturalization as a US citizen requires domicile outside the Northern Marianas. Voting outside the Northern Marianas requires domicile in the other place. Consequently, anyone who ever voted someplace else or was naturalized a US citizen has had their domicile interrupted.

Stephen C. Woodruff

SUPPLEMENTAL MEMORANDUM

July 20, 1985

TO: Convention President

FROM: Consultant

SUBJ: Committee Recommendations Nos. 35 and 27 (Supplemental)

There were several matters with respect to the subject committee recommendations which I was unable to address in my earlier memo due to the limited time available for its preparation. These additional considerations will be covered by this memo.

Concern has been raised about the affect of establishment of a large military base on Tinian, with large numbers of military personnel registering to vote and influencing local politics in favor of their own narrow interests. One of the purposes of the subject committee recommendations is to respond to this concern. It is also a very legitimate concern, one which we all share. It is not a concern about the military *per se*, but a concern that people who vote here are people who really care about the future of the islands, understand the problems and needs of the islands, and understand the unique local culture and indigenous way of life.

Unfortunately, CR No. 35 and CR No. 27 are not likely to be able to resolve this problem. As noted earlier, it is virtually certain that these provisions, if they became a part of the constitution, would be overturned by the courts, even in the interim period. Unfortunately, also, there is no solution that is absolutely certain to work. Fortunately, however, there are several approaches that have a much better chance of working than do these two committee recommendations, none of which require adoption of a constitutional provision by the Convention.

One possibility is the establishment of a two year residency requirement to vote. Legal opinions rendered the convention have said that such a residency requirement would probably be found unconstitutional by the courts, but such a requirement might stand. Those legal opinions were based on court cases in the states. The unique political status of the Commonwealth under the Covenant, the geographic isolation and special developmental problems of the CNMI, and the need to protect indigenous culture could very possibly provide sufficient "compelling state interest" or "rational basis" to uphold a two year residency requirement. Further, it is not necessary to change the constitution to

establish a two year residency requirement. Article VII, Section 1 requires residency in the Commonwealth "for a period of time provided by law." The legislature could enact a two year residency requirement. One advantage of this approach is that if it fails to withstand constitutional scrutiny, only a law and not the Constitution of the Commonwealth is challenged. Another advantage of the two year residency requirement approach is that it is less likely to be challenged in court in the first place.

Another possible approach to the problem is the use of the domicile requirement. Domicile is a statutory requirement for voting in the Commonwealth, as it is almost everywhere else. Domicile is much stronger than residency. A person can have more than one residence but only one domicile. Domicile is that place where a person maintains a residence with the intention of continuing such residence for an unlimited or indefinite period, and to which such person has the intention of returning whenever he is absent, even for an extended period (see Covenant Section 1005(e)). If the Commonwealth is strict, it would be exceedingly difficult for any person in the CNMI on a limited tour of duty to claim domicile. The Convention has been provided with several legal opinions which outline the constitutional limitations of residency requirements; none of these opinions have addressed the subject of domicile.

The final approach, which is related to the domicile approach, is strict enforcement of by the Board of Elections or the voter registrar of the legal qualifications for voting. I can speak from personal experience that the strict enforcement approach works. As an out-of-state college student in Virginia, I sought to register to vote where I was going to school. It took three years of repeated efforts before I was permitted to register to vote, and I would never have been allowed to vote if I had been going home during the summer to work, instead of staying in Lexington, VA. This was because Virginia strictly enforced the residency and domicile requirements for voting.

It would be well for the Convention to also be aware of how CR No. 35 and CR No. 27, if they were to become part of Constitution, would be challenged in the interim period prior to termination of the trusteeship. In the first seven years of Commonwealth status, a number of persons who would be disenfranchised by these proposed ammendments as now worded, both local and from the states, have been allowed to exercise citizenship rights in the Commonwealth. These provisions would take away those rights without due process of law, and that is in violation of the Covenant, the US Constitution, and the CNMI Constitution. It may be true that the CNMI can restrict citizenship rights in the period up to

termination of the trusteeship. It may be able, legitimately, to prevent any additional persons who do not qualify under Section 8(a), (b) and (c) of the Schedule on Transitional Matters from exercising citizenship rights, but those people who have already exercised those rights have a vested right which cannot be taken away legally.

An argument has also been made that the people of the NMI do not have full citizenship rights in the United States and, consequently, US citizens should not have full citizenship rights in the CNMI. It is my belief that the people of the NMI do have those rights by virtue of Covenant Section 304, which is in effect, but they have often had difficulty getting those rights recognized by ignorant federal and state bureaucrats. It is my view that the people of the NMI have a legally enforceable right to be treated in the United States and by US government offices exactly as if they were US citizens. The fact that many local people have been allowed to vote in the states is evidence of this. US Public Law 98-213 and the subsequent Presidental Proclamation were major steps forward to ensure that that right is recognized. Progress is being made and CR No. 35 and CR No. 27 seem to run in the opposite direction. Further, these committee recommendations affect Americans, and local people, in the Commonwealth without having any affect on the stubborn and ill-informed bureaucrats that are the cause of the problem.

Stephen C. Woodruff