

MEMORANDUM

TO : Governor and Lt. Governor

FROM : Special Legal Advisor

SUBJECT: Constitutional Amendments

DATE: DEC 16 1985

Following our recent informal discussion concerning the Constitutional Amendments recently adopted, I have quickly reviewed them in an effort to identify problem areas. In addition, Eric Smith, of the Office of the Attorney General, believes that there is no legal requirement that the Board of Elections certify the election results immediately. Several will seriously strain the limited resources of the Office of the Attorney General and provision should be made to recruit additional staff as promptly as possible. My comments on individual amendments follow.

No. 1 amends Section 9 of Article I relating to clean and healthful environment and prohibits noise pollution, storage of nuclear or radioactive material or dumping or storage of nuclear wastes within the surface or submerged lands of the Northern Mariana Islands, except as provided by law. COMMENT: Presents no immediate problem but could, if enforced, present a potential problem to the United States should it proceed to develop Tinian and store nuclear materials within the CNMI.

No. 2 adds a new section to Article I relating to victims of crimes and provides that the right of the people to be secure in their persons, houses and belongings shall be recognized at sentencing (I thought it already was), and further provides that restitution to the crime victim shall be a condition of probation and parole, except upon a showing of compelling interest. COMMENT: If enforced, some families will be buying paroles to bail out their errant family members, while others less fortunate will languish in jail because they lack sufficient assets to make restitution. It is nice to insist on restitution but this amendment will be difficult to enforce and may result in horrendous inequities.

No. 3 adds a new section to Article I making abortion illegal in the CNMI except as provided by law. COMMENT: Violates a long-standing decision of the United States Supreme Court and could expose our government to a multitude of lawsuits if our government doctors refuse to perform abortions during the first trimester. Immediate action should be taken by the AG's Office to have this declared invalid.

No. 4 amends Sections 2 and 3 of Article II to require that candidates for the Senate or House be registered voters in their respective senatorial districts or precincts. COMMENT: Poses no problems to the Executive Branch.

No. 5. adds a new Section 5(d) to Article II to prohibit legislation which increases the class of non-aliens beyond the persons defined in Section 506(c) of the Covenant; i.e., immediate relatives. COMMENT: I have no idea what the term "non-aliens" encompasses! This proposal may curtail the powers of the Legislative Branch to pass corrective legislation dealing with "white cards",

"green cards", certificates of identity, permanent residency, etc. Also, amendments such as this give the U.S. Congress incentive to make all or a portion of U.S. Immigration and Naturalization laws applicable upon termination of the Trusteeship Agreement, as the Covenant reserves this power to the United States Congress. Requires immediate action by the AG's Office and Division of Immigration and Naturalization.

No. 6 amends subsections (a) and (c) of Section 7 of Article III and adds a new subsection (d) to Section 7 of Article II, relative to action on legislation by the Governor and to prohibit certain types of bills during the period of a lame-duck legislature. COMMENT: This amendment would limit the authority of a governor to item or section veto an administrative provision in an appropriation act without also vetoing the appropriation itself. At the present time, a governor can item or section veto an administrative provision and retain the appropriation. The power of the Legislature is severely curtailed, as a lame-duck legislature cannot pass an appropriation bill or bill affecting spending authority, government financial management or organization of the government unless three-fourths of the members of both houses vote affirmatively. This amendment doesn't help anybody but no immediate action is anticipated or required.

No. 7 amends Section 11 of Article II relating to other government employment of members of the legislature, and Section 14(a) of Article II regarding the vote required to expel a member of the legislature. COMMENT: This amendment limits the Legislative Branch only and should have no impact upon the Executive Branch. I question whether the limitation on employment is enforceable, due to the fact that a member may have excused himself from voting or participating in any way in a decision to establish a new position.

No. 8 amends Section 13 of Article II relative to legislative sessions. COMMENT: This amendment has no impact upon the Executive Branch and preserves the power to call special sessions.

No. 9 adds a new section to Article II establishing a budgetary ceiling of \$2,800,000 for the Legislature. COMMENT: The people have spoken but no provision is made for adjusting the amount to account for inflation. The ceiling will become obsolete and inadequate within a relatively short period of time.

No. 10 amends Article II by adding a new section establishing a legislative bureau. COMMENT: This amendment has no impact upon the Executive Branch.

No. 11 amends Section 2 of Article III relative to qualifications of the governor. COMMENT: Increases minimum age requirement from 30 to 35 and minimum residence and domicile requirement from 7 to 10 years.

No. 12 amends Section 4 of Article III so as to limit a governor to two, four-year terms in office rather than three as currently provided for in the Constitution. COMMENT: At least they didn't restrict lieutenant governors or prevent them from seeking the position of chief executive.

No. 13 amends Section 7 of Article III relating to succession to the Governorship and Lieutenant Governorship. COMMENT: Should present no problem to the Executive Branch.

No. 14 amends Subsection 9(a) and (b) of Article III to mandate a balanced budget for the Commonwealth of the Northern Mariana Islands in each fiscal year. COMMENT: The amendment to Section 9(a) is beneficial, in that anticipated revenues cannot be increased without the consent of the Governor. How the Governor consents or withholds consent is not specified. The amendment to Section 9(b) is somewhat troublesome, as the Governor must include "a comprehensive annual financial report prepared in accordance with generally accepted government accounting principles". Would the Public Auditor's annual report or that of the Director of Finance suffice? If not, must the Governor contract with a firm to prepare such a report?

No. 15 amends Section 10 of Article III relating to the Governor's emergency powers. COMMENT: The Legislature must determine what calamities other than invasion, civil disturbance or natural disaster trigger the Governor's emergency powers.

No. 16 amends Section 11 of Article III and imposes a residence and domiciliary requirement of three years for persons seeking to hold the position of Attorney General. COMMENT: Given the high rate of turnover in the Office of the Attorney General and high compensation in private practice, it may be difficult to attract competent attorneys to serve as Attorney General.

No. 17 amends Section 12 of Article III to authorize the Governor, rather than the President of the Senate, to fill vacancies in the Office of the Public Auditor and guarantees the Public Auditor an annual budget of at least \$500,000. COMMENT: It makes sense to have the Governor appoint temporary vacancies, as he has the power to appoint permanent replacements. Current law provides the Office of the Public Auditor a sufficient source of revenues within which to operate. However, this would prevent a Governor from vetoing the Public Auditor's appropriation and crippling the office, as has occurred in the past.

No. 18 adds a new subsection to Section 18 of Article III to require that the salary of the Executive Assistant for Carolinian Affairs be not less than that of an executive department head. At present, the Executive Assistant for Carolinian Affairs is entitled to an annual salary of \$25,000, pursuant to Section 6 of P.L. 4-32. Directors of principal executive departments are entitled to an annual salary of not less than \$30,000 but not more than \$36,000, as determined by the Governor pursuant to the same law. Therefore, the Executive Assistant for Carolinian Affairs cannot receive less than \$30,000 when the constitutional amendment is certified.

No. 19 adds a new section to Article III relating to the retirement system. Subsection (a) provides that membership in the retirement system establishes a contractual relationship and that accrued benefits shall be neither diminished nor impaired. Subsection (b) provides that an employee who elects to retire after twenty years or more of creditable service shall be credited with an additional five years and become eligible to retire. It further provides that he or she may not be employed by the government for more than 60 days within a fiscal year without losing his or her retirement benefits for the remainder of the fiscal year. COMMENT: The Board of Directors of the Northern Marianas Retirement Fund should consult with an actuarial firm to assess the long-term fiscal impact of this amendment. This amendment may adversely affect the proposed agreement to provide financial assistance for the next several years, as we are obligated to make our retirement system financially sound within the

next seven years. Also note that the prohibition against employment ("double dipping") can be circumvented if the employee forms a corporation and provides services to the government as a corporate entity rather than as an individual.

No. 20 (See prior written comments.)

No. 21 and 22 establish an Office of Special Assistant to the Governor for Women's Affairs and Office of Resident Executive to the Governor for Indigenous Affairs. COMMENT: These offices will require funding and it is unclear whether they are within the Office of the Governor, as the persons holding the positions can only be removed for cause, unlike other appointed officials within the immediate Office of the Governor. Some of the prescribed duties and responsibilities (i.e., to monitor compliance of laws and regulations by government agencies and private organizations) may conflict with or duplicate other department's responsibilities.

No. 23. amends Sections 2, 3 and 4 of Article IV dealing with the Judicial Branch. The amendments to Sections 2 and 3 are technical in nature and recognize the fact that the Commonwealth Trial Court's jurisdiction was greatly increased by virtue of P.L. 3-14 and the fact that the Constitution has been in effect more than five years. Section 4 is amended to increase the minimum age from 30 to 35.

No. 24 amends Article V relative to representation in the United States. The Representative to the United States becomes the Resident Representative to the United States. Effective January 1990, the term of office is increased to 4 years, unless the United States confers the status of member or non-voting delegate, in which case the term will be changed. The Resident Representative will be required to file a written report in March of each year, rather than January, unless he is vacating his office. The Resident Representative's staff is exempted from the civil service. In the event of a vacancy in the Office of Resident Representative, the Governor shall appoint a successor with the advice and consent of the Senate, unless the United States confers the status of member or non-voting delegate and such status requires a different method. COMMENT: This amendment poses no immediate problems.

No. 25 amends Article VI and Sections 17(a) and (b) relating to local government and decentralized delivery of public services. COMMENT: This amendment is extremely complex and, for purposes of brevity and clarity, I will outline the changes made that affect Rota and Tinian and suggest problems presented.

1. Effective January 1990, the Office of Mayor of Saipan shall cease to exist and be replaced by precinct commissioners (discussed later).
2. Within 60 days following ratification, election of members of municipal councils for Rota and Tinian shall take place. Each municipal council shall consist of three members who serve for two years. The powers of the municipal council extend to all local matters of a predominately local nature not pre-empted by the Commonwealth Legislature and shall include the following:
 - A. Assist the Mayor in formulating an annual budget delineating local needs;

B. At the request of an executive branch department head and in consultation with the Mayor, reprogram funds;

C. Confirm resident department heads;

D. Act as Mayor when he is physically or mentally incapacitated.

3. The chartered municipal form of government is established on Rota and Tinian and local taxes paid to the chartered governments as well as to Saipan may be expended for local public purposes on the island or islands producing the revenues. Presumably, the new municipalities are empowered to levy taxes, impose fees, etc., which are not Commonwealth-wide.

4. The powers of the Mayors have been greatly increased and expanded. For example, a mayor shall administer government programs, public services and appropriations provided by law, coordinate any extension of federal programs, appoint, in consultation with the head of the executive branch department, all resident department heads.

5. The amendments to Subsections 17(a) and (b) leave no doubt that administration of public services and executive of public laws are to be completely decentralized, but the language conflicts with other provisions of the amendment. Public service is an excellent example: (a) The Governor must delegate the administration of public services to the appropriate mayor; (b) As indicated above, the mayor shall administer government programs, public services and appropriations. QUERY: Doesn't that language conflict with 17(b), which states, "Public services on Rota, Tinian and Agrigan shall be headed by a resident department head in the departments providing the services"? It appears that the framers of this amendment desired to decentralize the government yet retain resident department heads at the same time, which makes little or no sense.

Problems will be presented, in view of the fact that neither the Mayor of Rota nor the Mayor of Tinian have adequate legal or technical assistance to operate mini-governments, execute Commonwealth laws, administer programs and appropriations. The role of department heads will, at best, be advisory, as the Mayors will appoint resident department heads who will be confirmed by the municipal councils. Unless staff is detailed to assist the Mayors and the councils, chaos will reign. I would recommend that two additional attorney be hired and detailed from the AG's Office to assist the Mayors and the municipal councils.

No. 26 amends Section 1 of Article VIII to provide that the regular general election shall be held on the first Saturday in November.

No. 27 adds a new section 5 to Article VIII to provide that an elected public official shall resign upon certification as a candidate if the office sought begins before the end of the term of the office held.

No. 28 amends Section 1 of Article X to require the Legislature to define "public purpose".

No. 29 adds a new section to Article X prohibiting the imposition of certain taxes on real property unless approved by three-fourths of the votes cast in the senatorial district in which the tax is to be levied.

No. 30 adds two new sections to Article X. One section requires the Legislature to adopt a plan to retire the government operations deficit through FY 1985 in equal shares over a seven-year period. Failure to do so or to adhere to a plan allows a private person to bring an action to compel adherence. Future deficits must be retired within two fiscal years. COMMENT: The framers did not define the term "deficit". The term is defined by 1 CMC 7103(j) as "the amount by which outlays exceed revenues." Is the unfunded liability of the Retirement Fund a deficit? If not, it is doubtful that the government has any operational deficit and the amendment becomes meaningless. The Director of Finance, when he closes out the books for FY 1985, should be in a position to determine whether a government operations deficit exists.

The second section requires that the Legislature establish personnel ceilings for government entities which are funded by public funds. Provision is made for exceeding the ceilings pursuant to a joint resolution. COMMENT: What effect will this amendment have upon independent contractors, federal programs which have some local matching funds, etc.? The Office of the Attorney General will have to issue opinions on a case-by-case basis.

No. 31 adds two new sections to Article X relating to expenditure of public funds. The first section requires the Department of Finance to promulgate regulations regarding expenditure and to require public officials to provide full and reasonable documentation that public funds are expended for a public purpose. COMMENT: Public officials are presumed to expend public funds only for public purposes and comply with the Constitution. This amendment could become burdensome.

The second section gives taxpayers standing to bring actions against the government to enjoin the expenditure of public funds for other than public purposes or for a breach of fiduciary duty and the court is mandated to award costs and attorney fees to any person who prevails. QUERY: What if the government prevails? Should it not also be awarded attorney fees and costs? This amendment could lead to many lawsuits against the government.

No. 32 amends Section 4 and 5 of Article XI. The amendments to Section 4 reduce the number of MPLC directors from 9 to 5, requires that one director shall be a resident of the first senatorial district, requires that one director shall be a resident of the second senatorial district, requires that at least one director shall be a woman and requires that at least one director shall be a person of Carolinian descent. Directors must have at least two years management experience. The term of office is reduced to four years (initial terms of some directors may be less) and no director may hold a paid position in the corporation. The prohibition against serving more than one term is deleted and the corporation can only be dissolved after the Constitution has been in effect 12 years, rather than 10. COMMENT: There exists a potential conflict with Amendment No. 20 which limits the authority of the Governor to remove members of boards and commissions. It appears to be the intent of this amendment to remove all 9 and re-appoint 5, but there is no specific language to that effect.

The amendments to Section 5 are somewhat complex. The corporation may not transfer or freehold interest in public lands for 20 years after the effective date of the Constitution, but it can transfer a freehold interest to a government agency or for land exchange purposes. The Legislature must approve extensions of more than 15 years. (No requirement that approval requires a joint session.)

However, the Legislature must meet in joint session to approve a transfer of more than 5 hectares for commercial purposes. The corporation is empowered to authorize the construction of facilities for public purposes within 150 feet of the high water mark of a sandy beach. The corporation, prior to turning funds over to the Marianas Public Land Trust, may deduct expenses related to management, land surveying, homestead development and any other expenses reasonably necessary for the accomplishments of its functions and the corporation's annual budget shall be submitted to the Legislature for information purposes only. COMMENT: MPLC is being given broad discretion to expend funds as the current provision only authorizes the corporation to deduct administrative expenses which were defined by the Commonwealth Trial Court.

No. 33 amends Sections 6(a) and (f) of Article XI to provide that, after the Constitution has been in effect for 10 years, the number of MPLC trustees increases from 3 to 5. Trustees must have the same qualifications as members of MPLC (except two years management experience) and shall serve 6-year terms. Initial terms may be less. Trustees shall file an annual report disclosing their financial affairs as provided by law.

No. 34 amends Section 2 of Article XI relating to acquisition of land. This amendment provides that a transfer to a mortgagee by means of a foreclosure is not an acquisition if the mortgage is a full service bank, federal agency or governmental entity of the Commonwealth and does not hold the permanent or long-term interest in real property for more than ten years beyond the period of the mortgage. COMMENT: Adds the requirement that the mortgagee be a full service bank, federal agency or CNMI government entity and "ten years beyond the term of the mortgage". Present law provides "5 years". What if the mortgage is 30 years? This amendment would allow qualified mortgagees to hold property for 39 years if the mortgagor defaulted in the first year.

The current provision in the Constitution provides "A transfer to a spouse is not an acquisition under this section". This amendment adds two new requirements; i.e., that the owner dies without issue, or without issue eligible to own land. QUERY: What is wrong with a husband leaving property to his wife if he so desires. This amendment precludes that choice if he has issue eligible to own property. What happens if he does give property to a wife? Does the Court reform the will and give it to his children against the will of the testator? Which children take or is it divided between all eligible issue? What if the property is income producing and the wife's only source of income? COMMENT: The problems presented are unlimited.

No. 35 amends Section 3 of Article XII. The first change allows leasehold interests of 55 years (including renewals) rather than 40 years. An interest acquired above the first floor of a condominium would be exempt. COMMENT: The first change will serve to increase the market value of future leases, as they will be more attractive to outside investors. I do not understand the second change.

No. 36 amends Sections 5 and 6 of Article XII to require that corporations must be 100% owned by persons of Marianas descent to acquire property, prohibits minors from serving on boards, prohibits trusts from owning property (presumably if the beneficial ownership is not of Marianas descent) and prohibits proxy voting by persons not of Marianas descent. The amendment to Section 6 takes away any right of a corporation which ceases to qualify to redemption. The

Registrar of Corporations is mandated to issue regulations and the Legislature may enact enforcement laws and procedures. COMMENT: This amendment will have a chilling effect on foreign investors and will preclude local persons from contributing land as capital investment in corporations owned in part by persons who are not of Marianas descent in return for stock.

No. 37 amends Section 2 of Article XIV by deleting Sariguan and adding Uracas, Asuncion and Guguan to the list of uninhabited islands to be protected and preserved. Also, this amendment deletes reference to fish as currently included in the Constitution as protected species.

No. 38 repeals Section 13 of Article III and amends Article XV relating to education. It provides for an elected Board of Education to consist of 5 members. One shall be from the first senatorial district and one shall be from the second senatorial district. The Governor shall appoint three ex-officio members. Note: Elected members will take office on the second Monday of January following the regular general election at which they were elected; i.e., January 1990. It provides that public elementary and secondary education shall be guaranteed a budget of not less than 15% of the general revenues of the Commonwealth and prohibits reprogramming.

It provides that the Board of Regents shall be appointed by the Governor and the Board shall appoint the President of the Northern Marianas College. The Board shall have autonomy in the administration of its affairs and shall be guaranteed an annual budget of not less than 1% of the general revenue of the Commonwealth. Reprogramming is prohibited. COMMENT: The Governor will have to appoint the Board of Regents within a reasonable period of time following certification. The budgets for the Department of Education and the College will have to meet the minimums guaranteed. The question of autonomy will have to be addressed on a case-by-case basis. For example, can the College establish separate salary scales and personnel regulations for its professional and clerical staff? To what extent must it follow the Planning and Budgeting Act, and adhere to legislative policy?

No. 39 amends Section 2(a) of Article XVIII to require that voters be asked within ten years (rather than seven) whether there should be another constitutional convention. It also amends Section 5(a) of the same Article to allow ratification at a special election established by law.

No. 40 adds an Article relating to a Code of Ethics and amends Section 15 of Article II relating to conduct of members of the Legislature and amends Section 6 of Article III relating to "other government employment" by the Governor or Lt. Governor. The proposed Code of Ethics shall apply to appointed and elected officials of the Commonwealth and its political subdivisions, boards, commissions, etc. It shall, inter alia, define the offense of corrupt solicitation of public officials. COMMENT: This crime is already defined as bribery in our Code.

The amendment to Section 15 of Article II provides that a legislator must disclose a personal or financial interest in a bill and may not debate or vote if he or she has a personal or financial interest. COMMENT: It could be argued that every legislator who desires to remain a legislator in the future could not vote on a bill to increase benefits, salaries, etc., even if they don't take effect during his term of office.

The amendment to Section 6 of Article III is a technical, non-substantive amendment made necessary because of the new Article dealing with a Code of Ethics.

No. 41 repeals Section 16 of Article III and adds a new Article relating to civil service. This amendment places the Civil Service Commission outside the Executive Branch, specifies the number of Commissioners, establishes initial terms and provides that Commissioners can only be removed for cause. Exemption from civil service shall be as provided by law, but the Commission shall be the sole authority authorized by law to exempt positions. COMMENT: This amendment would require the Governor to appoint new members within a reasonable period of time.

No. 42 adds a new Article to prohibit gambling except as provided by Commonwealth law or as established through initiative in the Commonwealth or in any senatorial district. COMMENT: This amendment represents a radical departure, as the Analysis at page 44 cites, as an example, gambling as a non-local matter. This amendment would allow any senatorial district to have gambling if it complies with the initiative process and is favorably acted upon.

No. 43 adds a new Article relating to the official seal, flag and languages of the Northern Mariana Islands. COMMENT: The section dealing with languages presents some problems, as "the legislature may provide that government proceedings and documents shall be in at least one of three languages". At the present time, some notices must be published in three languages. The purpose of this requirement is to protect persons who may only be able to read in their native language. Further, the amendment provides that this section shall not be subject to judicial review.

No. 44 amends Section 8 of the Schedule on Transitional Matters relating to the Interim Definition of Citizenship. COMMENT: Two actions have been filed in the District Court challenging the constitutionality of this amendment.



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