# Third Constitutional Convention

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

Saipan, MP 96950

# TRANSCRIPT OF THE PUBLIC HEARING ON ARTICLE XII OF THE CONSTITUTION FOR THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

## COMMITTEE OF LAND AND PERSONAL RIGHTS

Friday, June 16, 1995
Commonwealth Legislature
Capitol Hill

THIRD NORTHERN
MARIANA ISLANDS
CONSTITUTIONAL CONVENTION

PUBLIC HEARING ON ARTICLE XII OF THE CONSTITUTION FOR THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

Committee on Land and Personal Rights

Friday, June 16, 1995

The Public hearing of the Committee on Land and Personal Rights as to possible amendments to Article XII of the Constitution was convened pursuant to the notice issued June 13, 1995, and delivered by fax to members of the Commonwealth Bar, government agencies, and other interested persons. The Committee also made available a summary of the issues with respect to Article XII raised by the delegate proposals and other suggestions for amendments.

**DELEGATE LIFOIFOI**: I would like to call our first witness.

Mr. Mitchell, would you take the witness stand?

**MR. MITCHELL**: I would like to go last, if I may.

**DELEGATE LIFOIFOI**: Who would like to go first?

**MR. MITCHELL**: Or, if everyone prefers, first and last would be fine with me.

**DELEGATE LIFOIFOI**: Would anyone like to make a statement?

Mr. David Sablan.

**MR. SABLAN**: Thank you, Mr. Chairman. I have a very short statement to make, a prepared statement. I would like to

give you the original.

(Mr. Sablan's statement is attached as Exhibit 1.)

Mr. Chairman and members of the Committee. I wish to thank you for the opportunity to appear before you to express my views on land matters here in the CNMI. I hope that my testimony will give you and your committee members some food for thought as you deliberate on Article XII of our Constitution.

The people of the CNMI have acquired properties through various means. Some of us own land through homestead programs, others have ownership of land handed down from our parents and ancestors, purchase of lands, and exchange programs.

Based on these categories, we can determine which categories should have restricted measures -- which should be regulated, and which should not be regulated.

I believe that the ownership through homestead programs should not be sold or change ownership at least for the next 10 years from the date of acquisition. In other words, land acquired through homestead programs should remain in the hands of the homesteader for a period of, say, 10 years. The remaining categories should not be regulated by the government, and the ownership -- the owners should have full control and discretion over his or her land.

Article XII of our Constitution has caused many severe hardships for our people. Article XII undermines the integrity of the land owners. The land owner is perfectly

capable in deciding for himself what he wants to do with his land.

The people of the CNMI are matured and are intelligent enough and have a full understanding of the value of land.

Why should the government continue to be paternalistic towards us on land issues?

Mr. Chairman, no one can tell me to sell my land if I don't want to sell it. Conversely, no one can tell me not to sell my property if I want to sell it.

I know what is best for me and my family. I don't need the government to tell me to sell the property if I don't want to sell the property.

I firmly believe that many of us in the CNMI consider Article XII to be a noble thought, but it is not working. Let's look at the number of land transactions. Look at the number of "For Lease for 55 Years" signs in various parts of the islands.

Most of our people who sell land are those who are land rich and want to improve their life style by selling land they feel they don't need. In some cases, land transactions tend to circumscribe the provisions of the Constitution.

I suggest that this matter be looked at very seriously, because the indications are that the people want to have discretion or full say so on the land they own.

I hope that you and your committee will objectively do your work and delete the restrictions in our Constitution which I feel are stale and discriminatory.

Thank you.

**DELEGATE LIFOIFOI:** Would any committee members like to ask any questions?

If not, thank you, Dave.

Delegate Aldan.

**DELEGATE TOMAS B. ALDAN:** Are we allowed to ask questions?

**DELEGATE LIFOIFOI:** I would rather limit it to members of this committee. I'm sorry.

**DELEGATE TOMAS B. ALDAN:** Thank you.

Thank you, Dave.

The next witness, Mr. Dotts.

**MR. DOTTS:** Mr. Chairman, I wasn't really prepared with any testimony today. I was interested in listening to the other comments.

**DELEGATE LIFOIFOI:** I'm sorry. Thank you.

Any one? If not, I'm prepared to close the -- Mr. Mitchell.

**MR. MITCHELL:** I have a couple of handouts for the committee members and staff.

If you could have someone would take them from here --

(Mr. Mitchell's handouts are attached as Exhibit 2.)

**DELEGATE LIFOIFOI:** Mr. Mitchell, before you proceed, do you have any written testimony?

**MR. MITCHELL:** Mr. Chairman, I do not have a written statement to offer at this time, but I plan to submit one before your deadline of, I believe, the 21st.

If I may be permitted, I would like to speak extemporaneously at this point. Given the paucity of witnesses and the complexity and importance of the issue, I would hope that the committee consider relaxing the extremely limited 10- to 15-minute limit, which I just discovered this morning when this paper was handed out to me. I will endeavor to stay within that time limit.

**DELEGATE LIFOIFOI:** Thank you.

**MR. MITCHELL:** This committee and the members of the Convention are those -- together with their families, their friends, their advisors, the people that they -- particularly the elders with whom they consult, are in a far better position than I to understand and appreciate the underlying purpose and importance of Article XII.

I've lived here a long time. I've read with great care and attention and studied for many years the history of the First Convention and the Second with respect to Article XII.

And as I understand it, in summary, at least, in outline form, the fundamental premise, or premises, are that

land, land itself, its significance in the culture, is of such importance that its possession, its use, its benefits, not only as an economic resource, but as a tangible element of the culture and the life ways of the people is to be preserved; that if the land base is lost, if the integrity of the land base is lost, it will have detrimental effects upon the people. This is individually and as a society as a whole.

I note with interest the pending proposals before the Convention to enlarge the class of persons who can, who will be eligible to own land. It is important -- I think that highlights the importance of enlarging and preserving the land base itself. The extent to which the land is valuable for the larger number of people, the more important it is to have as much land as possible available to present and all future generations.

We do not know. We don't have the data. This committee ought to seek it and obtain it, the data on how much land has passed out of the hands, the control, the ownership of people of Northern Marianas descent since 1978 when the Constitution first took effect.

According to the briefs that have been filed by the Carlsmith law firm in a number of Article XII cases, the transactions of a purchase nature and of a lease nature that violate Article XII are in the thousands.

That argument might seem to you as odd that they

make that sort of argument in opposition to Article XII claims. The basis of the argument, the idea behind it, was there have been so many violations of Article XII, so much land has now passed out of the hands of people of Northern Marianas descent in violation of Article XII, that if the court enforces Article XII now, it will be too disruptive; that the cure is worse than the disease.

This committee should, before it completes its work on Article XII, try to get as much information as it can on just how much land has passed out of the land base, the land inventory of the people of the Northern Marianas.

Article XII is dead thanks to Mr. Dotts, Mr. Kosack, the work of Duty Free Shoppers, Marian Aldan-Pierce. Article XII is absolutely dead.

If this committee and this Convention fail to do anything -- and thanks to the Eighth Legislature, as well. I'll come back to that and explain what I mean.

If this Convention -- this committee and this Convention does not do anything with regard to Article XII, it will remain a blank page in the Commonwealth Constitution.

Why do I say that? Several reasons. The Ninth Circuit Court of Appeals reversed Aldan-Pierce v Mafnas and Ferreira v Borja, the two decisions of our Commonwealth Supreme Court that upheld and enforced Article XII and made it a reality in the lives of the people.

It is fundamental -- there is a fundamental premise here which I will also come back to when I try to explain what happened with Public Law 8-32.

Article XII is only so many words on a piece of paper. It is words that describe rules that set forth laws, rules of conduct, prohibitions, words that try, or have as their purpose, to govern the behavior of human beings in the real world. That's what a constitution is. That's what a law is.

But those words are meaningless and useless unless they are voluntarily obeyed, of course. They're useless unless -- in our system a court of law can undertake a claim, a case, between real human beings in the real world and then decide whether the law has, in fact, been followed or not. And if it hasn't, the court can then issue an order. It can exert the coercive power of the government, the courts, which stems, of course, from the Constitution itself, and force the human beings involved to obey the law as they were expected to do in the first place.

Aldan-Pierce v Mafnas and Ferreira v Borja, the first two decisions construing and applying Article XII, decisions handed down by our Supreme Court, sought to do exactly that.

Those two cases were appealed to the Ninth Circuit. The Carlsmith lawyers did an excellent job. They had good luck when the three judges were selected to sit on the panel for both

of those cases, and I had very bad luck.

The Ninth Circuit Court of Appeals did two things: It struck down both of those decisions, and in so doing -- in so doing it did two things: One, it encroached upon the fundamental right of self-government of the people of the Northern Mariana Islands. That's a high-sounding phrase. Let me put it in common sense terms.

The people of the Northern Mariana Islands as an important aspect of their right self-government have the right to determine what the constitutional law will be in this jurisdiction and who will say what those constitutional provisions mean and how they will be enforced.

In other words, the people of the Northern Marianas have the right not only write their own constitution, but determine that their own Supreme Court will have the last word on what it means and how it will be enforced in cases where it has been disobeyed.

The Ninth Circuit rewrote Article XII and rejected the right of the people of the Northern Mariana Islands to have the Supreme Court of the Commonwealth decide what Article XII meant.

They were wrong. The decisions were dead wrong, absolutely dead wrong. It violated the Covenant, violated federal law, and the United States Constitution.

The Ninth Circuit Court does not have any authority

at all to interpret, to have the last word on the constitutional provisions of a local nature of the Commonwealth of the Northern Marianas, the State of California, or any other state of the union. That's fundamental federal constitutional law.

But those three judges did it, and with the stroke of a pen, the two decisions that constituted all of our Article XII law at that time were gone. They're still gone, and they'll stay gone unless you do something about it.

We've appealed Ferreira v Borja back up to the Ninth Circuit, and we are now in the position of arguing to the Ninth Circuit itself that it has violated the Covenant, that it has violated its own Constitution, and that it should reverse itself because its decision in Ferreira v Borja in 1993 was wrong. And we're going to have to convince the entire Ninth Circuit Court of Appeals, all 28 judges that the three made a mistake in 1993. We're going to lose that the case. I don't think there is any doubt about it. We're going to try our best, but for sure we're going to lose it. And then we're going to try to get the United States Supreme Court to review it and reverse the Ninth Circuit, and the odds are probably 10 zillion to 1 that we'll even get the United States Supreme Court to listen to us, to hear the case.

And judging by recent conduct of Supreme Court, even if we get the Supreme Court to take the case, we're very likely to lose it anyway.

Another reason that Article XII is dead, it's a blank page on the Constitution now is that our own Supreme Court has let us down. I don't say that lightly. It's a matter of great professional and personal significance to me to have to say that.

But what happened was this: Our Supreme Court, when Ferreira v Borja, when the Ninth Circuit made the wrong decision and reversed our own Supreme Court and encroached upon the exclusive province of our Supreme Court and that case came back down, our Supreme Court did not fight back. It just bowed down. It let the Ninth Circuit decision stand as if the Ninth Circuit had the right, the power, to tell the people of the Commonwealth how to read and understand their own constitution.

It's this simple. Article XII is not a federal law. The Ninth Circuit and other federal and appellate courts only have a last word on what a federal law means, not what a Commonwealth law means.

In other ways our own Supreme Court has failed to give strict interpretation and enforcement to Article XII. The pressure, the enormous pressure, on the courts to relax, to interpret Article XII in a way that cuts a happy medium or compromise has been a powerful force in the Article XII decisions that have come down.

In the Diamond Hotel case involving leases, the Commonwealth Supreme Court agreed, in effect, with the Eighth

Legislature and said, "All right. What we'll do with a lease, if there is a bad provision in it that would spoil the whole, that would render the entire lease illegal under Article XII, what we'll do is we'll cut that one out. We'll revise the contract to fix it for the benefit of the party who violated Article XII and intended to do so right from the start."

These and other precise issues, this committee, I recommend as strongly as I can, must study. You are chargeable with -- this is another reason why, if you don't do anything, then Article XII will remain dead.

Public Law 8-32 is on the books. All of the decisions that have been made by both Superior Court and Supreme Court of the Commonwealth, and the Ninth Circuit, all of those decisions are on the books.

If you do nothing, those decisions and that legislation in future cases where people try to enforce Article XII, they -- the argument will be used against the land owner who is trying to enforce Article XII, "Well, the Convention, the Third Convention knew about it, Public Law 8-32, and didn't do anything about it, so they must have ratified it, must have agreed with it. They're silenced by their silence. They have agreed."

Public Law 8-32 is another reason why Article XII is dead. A brilliant, brilliant campaign, lobbying campaign was mounted by Duty Free Shoppers, Nikko Hotel, masterminded by Rex

Kosack and Mr. Dotts.

They rounded up a lot of support and they did an excellent job of getting that legislation through the Senate and into the House and into law in 1993.

What Public Law 8-32 -- the argument that was presented at the time was, well, Article XII is great. We love it. We wouldn't want to harm it or amend it or touch it under any circumstances. But, the problem is all this Article XII litigation, all this horrible litigation that is destroying our economy. And so what we have got to do is remedial legislation. What we have to do is just pass a little bit of remedial legislation and Article XII -- we're not amending Article XII. Article XII would then be okay.

Our economy will bounce back and everything will be fine. We'll still have our Article XII and our land and our economy, too.

Well, that was -- I don't know if people -- I don't know if the legislature actually believed that argument or not.

What, in fact, was true, and I can prove it in just a minute, was this: The purpose of that legislation was to destroy Article XII by making it absolutely unenforceable by killing all pending Article XII cases and by preventing any discouraging any and all future cases in the courts to enforce Article XII.

Litigation is a necessary evil. This isn't any way

that this Convention can directly enforce whatever it decides will be the constitutional law of this jurisdiction. It's only through the courts.

This Article XII litigation I would like everyone to realize, too, is -- the original -- the First Convention -- neither the First or the Second Convention -- I'm a little defensive here. I'm about to defend the Article XII claimants and the allegation that all this litigation was so terrible, and horrible and destructive and driven by Mitchell's unbounded greed for money.

The First Convention, the Second Convention, and this Convention will not -- have not and will not give any money or create any staff or any governmental institution of any kind, will it?

It didn't before and it's not inclined to now. Looking at your list of items, you're not going to enforce Article XII. You're not going to help pay for the lawyer to enforce Article XII in the courts in a real lawsuit against a real defendant in a real transaction.

That's been left up to -- the First and Second Conventions left it entirely up to the land owners, most of whom are poor, many of whom are not very well educated. Some of the most appealing and sympathetic have never even understood what was going on in the transaction.

The whole thing was structured and driven by the

lawyers on the other side, whether they were Carlsmith or Mike White or whomever, and the land owner just never -- was not aware of the Article XII to any significant degree.

Now it's those same people who are expected over the years to make Article XII a reality by taking the cases to court to challenge the transactions.

Then, how do they get a lawyer to do that? Well, they find a dumb fool like me who is willing to do it on a contingent fee basis on the chance that, maybe, we'll win the case, and that maybe when they get their land back, they'll be able to lease some of it out, and then maybe they'll be able to pay a fee. Maybe. Some day. After I'm dead and gone.

Well, Public Law 8-32 was intended to destroy Article XII. I can prove that to you. I'll give you a transcript of the argument presented by the Carlsmith law firm in the Nikko Hotel case in the Superior Court just a couple of weeks ago. That's what they said.

"You made a wrong decision," they told Judge Castro, because they came in earlier to throw the whole case out. They moved for summary judgment, which means we win, you lose, as a matter of law. And they relied upon Public Law 8-32, and Carlsmith was right. I said so to the judge, "They're right. If Public Law 8-32 is valid, then the Carlsmith law firm is right. Nikko Hotel is right. They don't have to bomb their hotel down as they threatened to do a couple of years

ago if they lost their Article XII case. They don't have to bomb the hotel and cut off air service to Saipan."

They get to keep their hotel if the Eighth Legislature was right. No question about it. That's what Public Law 8-32 is intended to do. You need your lawyers look at it very, very carefully.

It is just a long, long, long list of every -- every conceivable technical technique for destroying the ability of any lawyer to represent an Article XII plaintiff in the courts.

An example. This is the example from the Nikko Hotel case. According to section 4973 of Title II, that's one of the main -- one of the important provisions of Public Law 8-32.

A corporation in an Article XII case, the plaintiff cannot, has no right -- this is telling the court what it can and cannot do. This is the Eighth Legislature.

A court cannot look at -- look behind what is called the record proof of whether that corporation was, in fact, a legitimate Article XII corporation of Northern Marianas descent. You can't looked beyond the records. The court is not allowed to. The plaintiff is not allowed to try to present any proof of what actually happened and whether these are real shareholders or whether the directors are really directors or whether in the case of the Blanco Vende, Ltd., corporation, the

place where the Japan Airlines parked the title of the property that it bought, whether that company is really, in fact, a person of Northern Marianas descent. You can't do that.

All the court can do is look at the documents that the corporate lawyers prepared for belong Blanco Vende, Ltd., and put in the Registrar of Corporations office.

That does not make any sense, and it's not good law. It's not good law for two reasons, and this is the thought on 8-32 that I would like to leave you with.

Because it treats Article XII corporations and Article XII land owner plaintiffs differently, it discriminates against them and leaves all other corporations of any other kind whatsoever alone.

If the Bank of Hawaii loans $10 million to a corporation, and the corporation falsifies its assets and presents phony financial statements and phony corporate records, and then it turns out that the borrower can't pay the money, the Bank of Hawaii, sure as the world, can go right through that phony veil of corporate identity and go right after the human beings behind it. Nothing to stop the Bank of Hawaii from doing that. The law does not treat of Bank of Hawaii the way it treats an Article XII plaintiff. That's a denial of equal protection of laws.

Another more important issue is this: This is a question that is going to be of great importance to you in this

connection and others. It's called the term, the rubric, the label for it, is self-executing.

Is a constitutional provision self-executing or not? You need to have that concept in mind when you are doing whatever you are going to do with Article XII, when you are reviewing it, evaluating it as it now stands, and deciding what, if anything, you are going to do with it in the course of this Convention.

What it means is this: If the provision -- this is stated in just somewhat what oversimplified terms to be sure. Your lawyer will explain it all to you in great detail.

If a provision of a constitution is written in such a way and intended by the framers to be self-executing, then that means that the courts apply it, construe it, and enforce it directly. The legislature can't touch it.

The legislature can't dilute it. The legislature can't change its meaning. The legislature has to keep its hands off. It is powerless to change that fundamental constitutional law which the framers intended to be self-executing.

This is the crucial issue involved in the litigation now over Public Law 8-32. It is our view, and we urge it with, I think, powerful, powerful evidence, that Article XII was intended in the beginning, and even after some rather odd amendments in 1985, it was still intended to be self-executing so the legislature can't touch it.

This leads me -- Mr. Chairman, with your indulgence, one last topic that I want to touch upon.

I notice in some of your records, some of the papers, and in some -- I've been following your proceedings on television, this notion of "legislative v constitutional." It is, of course, a fundamental question that you have to resolve with respect to Article XII and other provisions of the Constitution.

That is the question. To what extent do you want to make the constitutional provision you are trying to write more or less detailed, more or less directive, more or less specific as opposed to general?

I don't mean to imply criticism of anyone. The references to this concept that I've seen are rather superficial.

I would like to suggest the following: What -- it makes no difference whatsoever to the people of the Northern Marianas and should make no difference to you despite what differences it may make to some law professors in the States or law review writers or whatever about whether your particular Constitution is written up in a way that follows some model from California or wherever.

What is important is this: You will decide what objectives, what goals, what conditions, what things are most important for you and people of the Northern Mariana Islands.

You will decide, for example, with respect to Article XII, what limitations you believe are right and necessary and best. And, then, the only way that you will be able to accomplish that purpose is to write it down in so many words. Words. That's all they are.

You will eventually walk away from this Convention leaving behind you so many words on a piece of paper. And standing alone, they are useless and powerless. They will only have meaning -- they will only achieve the expectations that you have, that you have from your own mind, your own heart, and the people who you listen to, those expectations will become reality only if the courts enforce them, the public understands them, the Executive Branch understands them.

And when you think about that range of possibilities, you have to also think about the enormous -- you have to evaluate this. I'm suggesting to you there are enormous forces in opposition to Article XII. There are vast sums of money.

Find out, if you can, how much Duty Free Shoppers, Ltd., holds illegally in the way of Commonwealth real property. How much would they lose if Article XII is really enforced in the Commonwealth through the courts with decisions that take the land away from them if it has been obtained illegally. How much money will they lose? Tens of millions to be sure. Ask Mr. Kosack. He's here. Ask Mr. Dotts.

Where are the Carlsmith lawyers? Ask -- Nikko Hotel will lose $100 million worth of property. That's how much they'll lose. You think they are not willing to spend money to save that, to hang on to that?

You have to take into account -- I'm accusing no one of anything -- but two main problems that you have to keep in mind when you are writing words on a piece of paper to accomplish this purpose that you have in mind, potential misunderstandings and potential misconduct.

It would be cheap. It would be a good investment. I suggest this to you. Disprove it with the facts, if you can. I'll give you whatever facts I've got. It would be cheap for those who have violated Article XII to -- they're organized already. They're allied. They've got the same lawyers or lawyers working in concert with one another.

There are so many millions and millions and millions of dollars at stake here that it would be a good investment for them to buy the whole Commonwealth government, to buy you.

And to buy the Commonwealth government next year and the next and next year and the next for all time to come. It's easy to do.

Look at that article that I gave you from the Herald Tribune. Gifts, bank accounts in Japan, Manila, wherever. I'm not accusing anybody of anything. This is the

way it's done, and this is the way -- there is the possibility. And that's all you have to take into consideration, that enormous powerful forces will be marshalled to prevent the enforcement of Article XII if you intend to keep it and strengthen it and give it new life.

How do you write the words in order to overcome or in order to increase the likelihood, the probability, that your own expectations, your own hopes for Article XII will ultimately prove to be reality. That's a tough question. That's a tough question.

But I think, in general, what you need to do is make Article XII as crystal clear and detailed -- it does not matter if it's 100 pages long. That does not matter. It makes no difference. But you need to make it clear that you've identified every single debate over the meaning of every term. You've identified because you have a laboratory to work with here. There has been a lot of litigation. Your lawyers will give you a list of all the litigation, will give you a stack of all the decisions.

There has been enormous intellectual energy devoted to twisting and turning and squeezing and the meaning of these words.

What is the meaning of the word "transaction"? These kinds of things. You need to define the terms and you need to write Article XII in a way so that --

**DELEGATE LIFOIFOI:** Mr. Mitchell, we need to pause for a minute.

**MR. MITCHELL:** I'm finished. I'm wrapping it up right now. Thank you.

**DELEGATE LIFOIFOI:** We're changing the tapes.

**MR. MITCHELL:** I'm sorry.

**DELEGATE LIFOIFOI:** You have two minutes for your closing argument.

**MR. MITCHELL:** Thank you very much.

You have got to look at all the decisions. This Article XII, the words on that paper have been -- the meaning of all those words has been struggled with terrifically in this litigation. You need your lawyers to look at that, and then you need to try to come up with words, and enough words, enough of the right words, in whatever you do with Article XII in order to make sure that neither the legislature -- well, on the question of the legislature, it seems to me that if on a matter of such importance as this, looking at the history, the lesson we've learned already from the Eighth Legislature, should you should make it crystal clear in an amendment to Article XII that the legislature can't touch it, no legislature can touch it. They can't amend or define or have anything to say about Article XII.

You can only trust the courts. And then when it comes to the courts, you need to make sure that you expressed in words in enough detail what you mean and what you want so that

the courts cannot make any mistake about what the law is.

**DELEGATE LIFOIFOI:** Thank you very much, Mr. Mitchell.

I would like to ask if any members of the committee have any questions.

**DELEGATE QUITUGUA:** Thank you, Mr. Mitchell, for sharing your comments with regard to Article XII.

I have a few questions to ask you. You have mentioned about some violations of the Constitution being a blank page on the Constitution.

With your experience and a lot of work in Article XII, what do you think -- you mentioned that we should correct it.

I would like to ask you what do you think and what language should we change in Article XII to insure that the courts respect the wishes of the majority of the CNMI people and also to prevent the legislature from tampering or trying to go around the real intent of Article XII?

**MR. MITCHELL:** What I would like to -- I would like to respond in this way, if I may.

By the 21st, I will provide you a written answer to that. I want to try to respond to the extent I can to the many, many very, very important and good issues that were raised and listed in the issues paper that you provided. I would like to answer exactly that question.

What I want to try to do is this: I want to try to

draft an Article XII based -- I would like to start, basically, with the first Article XII because that particular Article XII was extremely well written and internally consistent. It didn't have any internal problems in it.

The only problem with the original Article XII is that no one at that time could have anticipated what the courts would do and what the legislature would try to do and the enormous boom in the land market here that created such -- no one could anticipate what the private lawyers would do with Article XII.

They devised various schemes for circumventing Article XII. I would like to start with the original Article XII and then draft for your consideration an Article XII that I think deals with all these problems.

**DELEGATE QUITUGUA**: One question.

**DELEGATE LIFOIFOI**: Okay.

**DELEGATE QUITUGUA**: I don't know if you got a copy of the summary issues with regard to Article XII. If not, would you examine the issues here in this summary document and also include in your written testimony to the committee that we're going to submit later on your response to the questions that are on this summary?

**MR. MITCHELL:** Yes. I'll be happy to do that. I was provided a copy of this yesterday afternoon. It's an impressive list of issues relating to Article XII.

There are a few others that I have in mind, and I would -- I'll be happy to respond, to give my views on each item in that issues list.

**DELEGATE LIFOIFOI:** Delegate San Nicolas.

**DELEGATE SAN NICOLAS:** Thank you, Mr. Chairman.

Mr. Ted Mitchell, first of all, I would like to commend you. I notice you first started out with the significance of land to the culture should be preserved. I took note on that. I will remember that.

My question to you is: After detailing all of the violations that have occurred in the past, how Article XII is dead, how certain cases have been sent up to the Ninth Circuit Court and have ruled against what we have in the Supreme Court, you said that a possible solution to that is something -- you said, "Creating Constitutional provisions which are self-executing."

I have to admit that I am not a lawyer. I know very little about that. But according to you, a self-executing Constitution leaves it up to the courts, and the legislature really cannot amend or touch it; is that correct?

**MR. MITCHELL:** That's in general terms. That's what the term means. In other words, the particular provision of the Constitution does not have to be carried into effect or executed -- "execution" in this case does not mean chopping your head off. It means carrying it into effect.

It does not need any legislation, any action by the legislature, to carry it into effect. It means that, for example, that an individual person whose who has rights immediately enforceable in the courts under that kind of self-executing provision, and you don't have to wait for the legislature to create a right to go to court. You don't have to wait for the legislature to define the terms or say what can be done with that kind of provision.

In other words, you cut the legislature out of the whole process. It's direct from the people acting through you to the courts.

**DELEGATE SAN NICOLAS:** Thank you. That leads me to my next question.

In your opinion, our Constitution, as it stands today, is not a self-executing Constitution, and if it is not, in your opinion, how could we rectify that?

**MR. MITCHELL:** Well, what you will do, you will find yourself doing in the course of the Convention is looking at each Article and each part of each Article with this, along with other questions in mind.

There will be some matters on which you decide that it is better to state a general purpose, a general concept, and then direct the legislature to carry it into effect and leave the details, in other words, up to the legislature.

In that case, that's your judgment to make. You

would make that kind of judgment as you go -- as you put the Constitution together piece by piece.

What I'm suggesting is for something like Article XII, given its importance, given the very low probability that it will be -- the people will voluntarily comply and given the extensive violations of Article XII to date, under those circumstances, I'm suggesting that what you ought to consider is making Article -- make it clear that Article XII is going to be self-executing; that that particular provision will be self-executing and that you define it and then you leave it up to the courts to enforce it as you define it in accordance with your expectations.

**DELEGATE SAN NICOLAS:** I guess my bottom line question is this: After reviewing the Constitution, there are many provisions that say "as provided by law," which leaves it up to the legislature.

Would you be in favor of -- I don't know how to put it -- putting "as provided by the courts" or "leaving it up to the courts"?

That's what I'm trying to get at.

**MR. MITCHELL:** I'll try for come up with some language --

**DELEGATE SAN NICOLAS:** Okay.

**MR. MITCHELL:** -- that deals with this very issue.

And so that there won't be any debate on that issue, as well as the meaning, the substantive meaning, of

Article XII on questions like "What is a transaction?" "What is an acquisition?" "What is a freehold interest?" "What is a long-term interest?" "What is a short-term interest?"

This -- ordinarily, what commonly occurs in cases involving this question is you -- the court will take a look at the way the provision is written and look at the history, the Constitutional history, the debates, committee reports, and so on to try to determine what the intent of the Convention, you in this case, what your intent was with respect to the self-executing nature or not of the particular provision. So the court ends up deciding that issue, as well.

And I what I'm suggesting to you is this: Given the state of our judiciary, and I don't want to go beyond that except to say, if you want a certain result to occur in our courts, you better make it crystal clear. You better write words, words on the paper that leave absolutely no way out for the judges.

Let me just emphasize it this way: There has been one and only one decision in the Superior Court by a Superior Court judge that enforced Article XII, in my view, consistent with the intent of the original framers. That was the decision in Ferreira v Borja, February 13, 1988, by present Justice Ramon G. Villagomez.

There have been a number of Article XII decisions in the courts since then. They're all wrong except that one.

The two decisions in the Supreme Court that were right on Article XII, as I mentioned, they were wiped out by the Ninth Circuit.

You need -- in other words, you need to communicate. I guess that's really the key word here. You are trying to -- once you form your ideas about what is important and valuable and necessary and fundamental, then you have to communicate that with some words on a piece of paper. When that paper goes out of your hands, it's up to the court.

**DELEGATE SAN NICOLAS:** Thank you.

**DELEGATE LIFOIFOI:** The Chair recognizes Delegate Manglona.

**DELEGATE MANGLONA:** Thank you, Mr. Chairman.

First, let me say that I'm quite impressed with your testimony, Mr. Mitchell. You have been so blunt and open in discussing Article XII.

If someone has to value Article XII, I am one. I'm a founding father of our Covenant and also a founding father of our Constitution. I value Article XII deep in my heart.

The question that I'll be asking you is prompted from what you just said. You said that Article XII is dead.

Can you tell this committee why Article XII is dead? And if it is dead, why do we have to continue to discuss the issue when it's dead?

**MR. MITCHELL:** It's dead in this sense, Governor: It's

because -- unless the people -- let me back up just a little bit.

There was no -- in the first convention, as you know, there were a number of means considered for the enforcement of Article XII.

One of the thoughts was have the Attorney General's office do it, set up a special agency to do it. Those means were not chosen.

In fact, Article XII itself is silent as to how and who will actually have the right and the means to enforce it, who will have, as they say, a cause of action for any violation of Article XII.

That was one of the first issues we had to litigate, and the position that we took was that the land owner, what we call the original land owner, is the only person who has the right to go to court and tell the court this particular transaction that took my land away from me is invalid, void ab initio because it violates Article XII.

What I'm really trying to say this: The language of Article XII is dead because the only way it can come alive and be alive is if, and only if, it is enforced by the courts. Unless, of course, you have voluntary compliance.

If you have voluntary compliance, everyone reads it, understands it, everyone from the lawyers in the private practice to the lawyers in government to the international

investors that come here. If anyone reads it and understands it all the same way and then voluntarily obeys, it's alive.

It's alive and well because people obey it voluntarily. But they have not done that. So I say it's dead because the courts have not enforced it.

**DELEGATE MANGLONA:** May I ask you another question?

Do you mean to say that the court is killing Article XII?

**MR. MITCHELL:** They're failing to give it life. That is, unless and until the courts take a case involving a real actual transaction, evaluate it and decide -- apply Article XII and decide that the transaction is invalid, then Article XII has no life to it.

It does not -- it's there and everyone can profess to be in favor of it and to embrace it. But out there in the world, the land is still owned by the people who purchased it illegally, and it will remain owned by them for all time to come.

I think that is one of the fundamental problems here. So much land -- when it goes out of the hands, the literal real ownership of people -- of the people, it will never come back.

When it goes into Blanco Vende, Ltd., paid for by Japan Airlines, that land is never going to come back. Your children, grandchildren, and great grandchildren will never be

able to buy that land. It's gone.

**DELEGATE MANGLONA:** The other question I would like to ask you is: I'm quite alarmed by your statement that you tend to say that you are concerned that the Ninth Circuit Court or the Supreme Court of the United States may not sustain or uphold Article XII; is that correct?

**MR. MITCHELL:** We have a very -- legally, in terms of United States law and Covenant law, we have a very odd situation.

As you know, in 1989, the legislature created the Commonwealth Supreme Court. As you know, from that point on, the federal appellate courts no longer had any authority whatsoever to decide on appeal, decide issues involving Commonwealth law from that point forward.

Whereas, before, the appellate division of the district court was our Supreme Court, and they decided everything from divorce to Article XII to federal law, whatever.

But when our Supreme Court was created under the Covenant, it was, I think, completely absolutely clear that the function of the Ninth Circuit would then be reduced and limited to review only decisions by our Supreme Court that touched upon or dealt with an issue of federal law.

But what we found the Ninth Circuit doing, much to our concern, was taking a look, taking Aldan-Pierce v Mafnas and taking Ferreira v Borja and telling our Supreme Court that it

was wrong, this resulting trust doctrine, which everyone made fun about.

They brought Edward Holbrook out here, the reporter for the Third Restatement of Trusts, to testify in this room about how ridiculous our Supreme Court was when it decided Ferreira v Borja.

The point is that what the Ninth Circuit did was none of the Ninth Circuit's business. Let me just state it in the extreme. This is the law. It does not make any difference if a state Supreme Court makes the dumbest decision imaginable on an issue of state law. That's none of the business of the federal courts.

The state -- the Commonwealth is like a state. It has the right and the power to govern itself within the limits of its own Constitution, and it has the right to make all the mistakes it chooses to make and to correct those mistakes. The Ninth Circuit, Judge Bill Norris, has nothing to say about what might even be agreed by all was a mistake of our own Supreme Court. It's none of his business.

**DELEGATE MANGLONA:** I asked you that question because during the negotiations, there was a concern by both sides, the U.S. and our delegation. The issue was raised whether or not that would be discriminatory. I heard from the previous speaker that they view Article XII to be discriminatory.

We asked the United States Representative to make

sure that if we have that provision built into our Covenant that it will be upheld in court decisions in the U.S. system.

I remember Herman Marcuse, who is on the U.S. side, securing a Justice Department opinion on this matter, and he said that he can guarantee the delegation if this case arises in the future that it will be honored by the U.S. courts.

So I would like to just say that I hope that any future case that may go to their court that they have to honor this agreement between the two governments.

There has been a lot of discussion, a lot of debate on this issue, which we have to address this once and for all.

I would like to request you through the Chairman, Mr. Mitchell, if you would be kind enough to look seriously into those provisions under Article XII and assist this committee if it is the desire of this committee to strengthen that article.

I have visited many villages in our Commonwealth and I have heard people speaking. I think a great majority of people wanted this article to be strengthened. I would like to encourage you to help this committee recommend language that will give the cure of what you've just been citing in your testimony.

In order to be fair to the other side, or the opposing side, I would also like to encourage them to submit to us their views, why they are opposing to strengthen Article XII so that in all fairness both sides can be looked at by this

committee.

I wish to thank you.

**MR. MITCHELL:** I'm honored by the invitation, and I accept it.

I would like to add to my previous answer.

With regard to the Ninth Circuit and Article XII decisions, there -- the validity of Article XII, as such, was upheld by the Ninth Circuit. That is the fundamental question, the threshold question of whether the Commonwealth could have restrictions on land ownership like Article XII, whether section 805 of the Covenant was permissible, whether it could be permitted to be an agreement between the Commonwealth and the United States.

That decision was decided in our favor by Judge Pool in Wabol v Villacrusis, and the Carlsmith lawyers tried to get the Supreme Court of the United States to review that decision, and the Supreme Court of the United States declined to do so. That decision stands for now.

We have a rather odd situation here. The Ninth Circuit, if you take both the Wabol decision and also the Aldan-Pierce and Ferreira decisions, what you have the Ninth Circuit saying, "Yes, you can have Article XII, but we're going to tell you what it means." Those are not consistent positions and not permissible under the Covenant as I read it.

Thank you for the invitation. I'll do everything I

can to assist the committee.

**DELEGATE LIFOIFOI:** Delegate Gonzales.

**DELEGATE GONZALES:** A few questions, Mr. Mitchell. Thank you for your presence this morning, and also to the previous speaker, who is not here, be expressed.

Let me reiterate the statement made by our former Lieutenant Governor, Delegate Manglona. If anybody is to apprec and die for Article XII, I'm also included in that category of people.

I think it's a beauty to contrast Delegate Manglona his generation and my generation. I think he has lived to see the legacy of the founding fathers on the direction and protection of Article XII for the indigenous people of the Northern Mariana Islands.

He has seen as much as he wanted, as well as his co-founders, to see the indigenous people protected relative to their lands. There is a lot of -- there were a lot of loopholes that were not expected to have transpired, and he saw that.

Now, I would like to say before I ask my questions, that Article XII, indeed, cuts to the crux and the heart of our identity, our heritage, our race as an indigenous people of the Commonwealth.

I am willing and will be here to see that that is preserved for the future generations.

My first question is: You mentioned something

about the Ninth Circuit Court of Appeals intervening into, as I see, it the internal affairs of the Commonwealth government, the self-government principle.

I also have a problem with that because, No. 1, where do we draw the line between what is internal affairs? My observation of that is that if it's an internal affair, it should be the jurisdiction of the courts of the Commonwealth, both the trial level and the appellate level.

You mentioned that there is just a minuscule amount of hope to reconvince the Ninth Circuit court and, perhaps, at the ultimate level, the Supreme Court.

I would like to see that there is a light of hope at the end of the tunnel. Is there hope still? What do you suggest?

**MR. MITCHELL:** The reason that -- I guess there are two reasons I say I think our chances are very slim. One is simply as sort of a practical procedural one, since Judge Norris made the decisions he did striking down -- essentially striking down our Supreme Court's interpretation of Article XII.

That decision by those three judges cannot be overturned under Ninth Circuit rules cannot be overturned, except by the full court.

There are 28 judges on the court. They choose by computer lot drawing system three to sit on each case. And if, once a decision on particular issue is made by three, a panel of

three in a case, and then you are back up at the court the way we are now asking the court to reverse, you have to get the entire court, represented by 11 chosen by lot, you have to get the entire court to agree to reverse the three.

Once you are there and you lose before three judges, you can't get three more the second time around to reverse the first three. You have got to get 28 represented by a limited en banc panel of 11.

It's that procedural problem, just getting -- that's optional, whether the entire Ninth Circuit court en banc, as they say, will undertake to review this case is optional with them.

What we do is send in what we call a suggestion that they should do it, and then it goes out to all the judges and they read it.

If one judge calls for a vote on that issue, then it's put to a vote and if a majority say "yes," then 11 judges are chosen to hear it. The number of en banc reviews in the Ninth Circuit are very, very limited. It's an enormously busy court, and it's becoming more and more conservative as time goes on, as well.

It's that and other reasons why I think our chances are slim of getting the full court to go to the trouble. It's a big headache for them. It's a hassle to have 11 judges hearing a case. It's difficult. It has to strike somebody. If one

judge calls for a vote, it then goes to a vote, a secret vote. Nobody knows exactly what happens.

If not even one judge says we've got to vote on it, it's dead. You're dead right at the start. For those practical reasons, it's going to be very difficult.

Secondly, even if we get an en banc review, depending on who those 11 judges turn out to be, the court has become more and more conservative over the years. I think our odds, our chances are slim.

The Supreme Court, again, if the Ninth Circuit does not help us out, to get a review in the Supreme Court is very, very difficult. There are 5-, 6-, 7,000 requests a year that are made. It's entirely discretionary, optional, with the Supreme Court to take a case or ignore it.

The odds are staggering against any particular case getting the attention of the U.S. Supreme Court. Those are the practical reasons.

What I would propose in my written submission next week is something. It's a difficult, sort of an awkward problem. How can the Commonwealth -- the Convention, the Third Constitutional Convention of the Commonwealth, speak to the Ninth Circuit?

Ordinarily, you can't do that. But I'm going to try to think of some way so the Convention can consider expressing, and maybe this falls under the jurisdiction of the

Committee on Judiciary, as well.

What can this Convention do to make it clear that it expects the Ninth Circuit to stay within its bounds and leave the Commonwealth free to make and interpret its own laws of a local nature.

**DELEGATE GONZALES:** Section 805 of the Covenant touches on the issue of land alienation that after 25 years of the official termination of the Trusteeship Agreement, then the conferring upon citizenship, 25 years thereafter, the issue of Article XII land alienation will be reopened on the bargaining table for renegotiation.

I spoke to one of our legal counsel, and I am really alarmed. I am fearful of the thought of land alienation Article XII slipping out of the hands, or slipping out of the page of section 805 of the Covenant.

Is there a way -- 2011 would be that date.

**MR. MITCHELL:** That's right.

**DELEGATE GONZALES:** Is there a way that we can -- is there a mitigating measure for us to start now in addressing this issue before we wait until the last minute for that to be resolved or protected?

**MR. MITCHELL:** I think the way section 805 reads, it mandates the restriction on land ownership for that 25-year period beginning in November of 1986 and ending in November of 2011.

But it provides that those restrictions can continue thereafter, but it's optional. It is up to -- so long as it's a constitutional provision as it is now, it would be up to a convention, a future convention, to decide whether to continue the restrictions beyond the year 2011.

The question what would then happen, if there is -- if there is still an incentive out there in the real world to do so, there would be a new lawsuit filed to challenge Wabol v Villacrusis.

That lawsuit would be an effort to revisit all the basic issues that were raised and decided in Wabol v Villacrusis -- whether Article XII is really important, whether it violates equal protection laws of the United States, equal protection clause of the U.S. Constitution, and so on.

In other words, there would be a new challenge to striking down section 805. It would initially be up to the Commonwealth itself acting through a Constitutional Convention to decide whether to continue Article XII beyond the year 2011.

**DELEGATE MANGLONA:** I have a proposal which I introduced in this Convention calling for the continuation of that restriction after the 25 years.

In your view, can this Convention deal with this problem now or do we have to wait until the 25 years expired? It's my view that we have to address this problem now, since maybe we can still address it and continue that restriction

after the 25 years.

**MR. MITCHELL:** I think the answer to that is yes, you could do that now. I know of provisions and, for example, one comes to mind in the Constitution of the State of Kansas where a generation ago everybody was extremely concerned about the corrosive, corruptive effect of lotteries. The Constitutional Convention developed a provision that there shall never be lotteries, ever, never, never, in the history of this State.

I think this Convention has the power to do that sort of thing, but I think it's equally as true that a future convention could reverse you. But only a Convention in the future could reverse you. I believe that's right.

**DELEGATE LIFOIFOI:** The Chair recognizes former Governor, Delegate Camacho.

**DELEGATE CAMACHO:** Thank you, Mr. Chairman.

I have only one simple question, and then I have some comments, if you will allow me.

**DELEGATE LIFOIFOI:** Yes.

**DELEGATE CAMACHO:** Mr. Mitchell, I don't think that people of the Northern Marianas realize the enormous amount of effort and money that is being put in defeating or for that matter, passing the law that the legislature passed recently. I'm not sure that we have the subpena power to find out how much money actually, if not the accurate amount, at least an estimate.

You mentioned $100 million for the Nikko Hotel. Do you have any idea how we can get this information from Mr. Kosack or Mr. Dotts or Mr. O'Connor or any of the other lawyers that are defending or that is pushing for the destruction, if not the watering down, of Article XII?

I don't want to put you in a spot. If you don't feel like you want to answer or you don't want to answer, just simply say "no."

**MR. MITCHELL:** No, I don't mind trying to answer. I don't -- I know that just by observation of everything that happened they invested a fair amount of money in bringing Everett Holbrook out here and some other completely forgettable Constitutional law professor from Southern California somewhere, and they put on a -- they put on a great lobbying show.

Absent some statutory restrictions on lobbying, offhand, I'm not -- I'm not inclined to say that they did anything wrong. If they spent $500,000 or whatever they spent on their effort, they had a right to do that. It's simply a question of, you know, what is does it all mean?

Well, what it all means to me is that they know, "they," meaning their lawyers and their clients, they know that they have violated Article XII and that the best way to save themselves, realize that at the point where that legislation started taking fire and gaining force was at the point before this was -- before the Ninth Circuit did them all a big favor

and knocked out our own Supreme Court's two decisions on Article XII.

They were running scared at that time. This little one-horse operation that Mitchell was running without any money where the Carlsmith lawyers are making enormous sums of money by the hour to defend, we beat them hands down in the litigation. They were scared to death. They were terrified of our Commonwealth Supreme Court.

I can only give it as my opinion I don't think they had any hope of getting the Ninth Circuit to give them the decisions they ultimately got because the law was against them.

So they hustled the legislature and they won. It was a campaign. Unless there were some members paid or bribed or something of that sort, and I have no indication that there was, absent something like that, they exercised their constitutional rights to freedom of speech and to seek redress of their grievances from their government, and they got it.

The question was: Was the legislature right to do what it did? I think the answer to that is clearly no, and the only solution to the mistake the legislature made is you or the court. But so far, we are right now, there are pending cases in the court where we're telling the court, "please strike down Public Law 8-32." But so far, there is no indication that the court is going to do that.

**DELEGATE CAMACHO:** Thank you, Mr. Mitchell.

Mr. Chairman, the reason I asked this question --

**DELEGATE LIFOIFOI:** Excuse me. We need to pause for a moment.

**DELEGATE LIFOIFOI:** All right, Governor.

**DELEGATE CAMACHO:** Thank you, Mr. Chairman. I won't ask any more questions. I'm going to just comment.

The reason I asked about the aspect of money is because of the enormous amount that I've heard not only at the Article XII itself, but at some of the delegates who ran in the last election in an attempt to make sure that I'm defeated because my known position on the Article XII issue.

I would like the public to know that these people are not doing this thing for the fact that they love the people of the Northern Marianas or the islands or for that matter, for no selfish interest, but they are doing it for money.

Mr. Mitchell, I'm glad you're here, because now we see the other aspect of Article XII. I, also, like the Lieutenant Governor, am not only the founding father, because I'm a member of the First Constitutional Convention, but I'm also the first elected Governor here.

I'm glad to say that a lot of these things didn't happen during the short term that I had as head of the Commonwealth government.

I would like to ask you to continue to appear at succeeding hearings that will be held by this committee on land

alienation, or any other one.

I look forward to your submittal when you are ready to submit it. It will be of great interest to us to see how we can not only maintain, but possibly, like the Lieutenant Governor said, Delegate Manglona said, to strengthen the Article XII. I look forward to seeing that submitted.

The Article XII issue is of great, great, great importance to the people of the Northern Marianas. It touches on basic culture and customs and wishes of the people of the Northern Marianas.

The issue whether it is discriminatory is something that we may have to look into. If the Indian government, the American Indian can reserve land in the United States, the Hawaiians and the Eskimos are able to do it, why can't we do it here in the Northern Marianas to protect our own people?

Mr. Chairman, this is procedural now, not comment, but there are 27 delegates in this Constitutional Convention. 14 of them are members of this committee. The remaining members are asking to be allowed to participate in asking questions of people who have presented testimony.

I was late in coming, and so I am not aware that a decision has been made to bar the additional delegates who are here and who may want to appear in future hearings.

May I ask you to please relax that rule so that we can allow the delegates who want to ask questions to do so?

If I may say, I think that if we are to get as much information on this issue so that we can make an intelligent decision that will be lasting, we need the input and the participation of every delegate here in the Con-Con.

So may I, if not urge you, beg you, to please reverse your decision and allow the other delegates to speak or ask questions?

Thank you, Mr. Chairman.

**DELEGATE LIFOIFOI:** Any other members of this committee that would like to ask questions.

Delegate Igitol.

**DELEGATE IGITOL:** Thank you, Mr. Mitchell, for taking your time to come to this committee this morning.

My only question is with regard to Public Law 8-32. It was said that Public Law 8-32 would somehow solidify or strengthen Article XII.

My question is: If, like you said, Public Law 8-32, destroys or kills Article XII, I wonder how the legislature did not see this when they passed Public Law 8-32?

Can you tell this committee what is the key point of 8-32 that you mentioned that indicated that killed Article XII?

**MR. MITCHELL:** The entire statute and every provision in it was intended individually and collectively to kill all pending litigation and discourage and prevent any future

litigation brought -- that might have been brought for purposes of enforcing Article XII.

I will try to provide to you in the written statement a brief answer to that very question section by section of Public Law 8-32 so that you can look at each one.

There is everything in there from restricting attorney's fees to changing the rules of evidence and the burden of proof, all kinds of very technical things that affected -- that affects the pending litigation. All of it is very clever. Some of it is rather obvious. Some of it very clever written why Mr. Kosack and Mr. David Nevitt, lawyers who are familiar with the techniques and the technicalities of litigation.

They designed these various provisions to -- let me give you an example. The provision that relates to corporations. There is one section that says the court can't look behind whatever documents the corporation and its lawyers provide with respect to who the directors are and who the shareholders are, for example, the various criteria under section 5 of Article XII that determine -- the four criteria that determine whether a corporation is eligible to own land or not.

Then, it goes on to provide that if that particular issue is litigated and if the plaintiff, the land owner in a case, tries to bring that issue up, the plaintiff has to prove with clear and convincing proof that the corporation was really

a sham, or a dummy.

And, as if that were not enough -- ordinarily, you prove it with a preponderance of evidence, whatever that means, maybe 51 percent. But clear and convincing evidence raises the difficulty of proving it substantially. It makes it more difficult.

Then, that same section that I referred to earlier goes on to provide that if the lawyer, any lawyer, tries to raise this issue and loses, then the lawyer has got to pay the fees of the lawyer of the other side. Public Law 8-32 was written by lawyers with a vengeance, who want to scare away any lawyers who would even think of representing an Article XII plaintiff and make it impossible to win the case even if you bring it.

I will try to describe section by section in my written submission why I think that is true.

You raised another intriguing question to which I do not have an answer. Why in the world -- if what I'm saying to you is true, why in the world did the Eighth Legislature pass this law?

I thought about it at the time. I sat in hearings in this room. I talked to staff members. I talked to members of the Eighth Legislature.

The whole thing got rolling with Paul Manglona's support in the Senate, and then it gained momentum that it never

lost all the way through the Eighth Legislature.

I didn't understand it at the time, and I still don't understand it to this day how anyone who understands Article XII or anything about it, anyone who understands the basic concept, Article XII can only have meaning if it's enforced by the courts.

If you understand that basic principle and you understand anything about the content of 8-32, I don't understand how a legislator could have voted for it and made a glowing speech in support of Article XII: "I love Article XII. We're not amending Article XII. I want everyone to know that I'm in favor of it; I'm voting for this legislation." It doesn't make any sense. Either they didn't know what they were doing or they knew what they were doing, and they did it anyway.

Either way, I don't understand it. The only one that got up and spoke out and made sense and opposed it was Pedro Guerrero, Representative Pedro Guerrero. That's the only one.

**DELEGATE IGITOL:** Do you feel that Public Law 8-32 should be stricken entirely or just amended?

**MR. MITCHELL:** I think it should be stricken, repealed by this Convention for two reasons: One, because its bad; and, two, because the legislature has no power to amend, construe, enforce, or otherwise touch Article XII. And that should be made crystal clear by this Third Convention.

I don't think -- I'm not talking about any particular legislature when I say that. I'm thinking about the political process and human nature and human beings and the next 10, 15, 20, 30, 50 years, however long this is going to be on the books.

You don't want to trust the legislature by its very nature. It's subject to all kinds of forces and influences. You don't want that institution to be entrusted with something this important.

The courts are more stable. As time goes on, our courts will become more and more stable and more and more scholarly. And in your work on the court, you will try to make the Supreme Court, for example, permanent.

You will want to do everything you can to make that an institution of stability, of knowledge, of wisdom, and integrity. Integrity. Inviolable integrity. If you don't have a good strong, honest, smart Supreme Court, there is no hope on the most important issues ever.

**DELEGATE IGITOL:** Thank you, Mr. Mitchell.

We look forward for your testimony to be submitted to this committee.

At this time, Mr. Chairman, I would also request the proponents of 8-32 to submit testimony so we can see both sides on the 8-32 legislation.

Thank you, Mr. Chairman.

**DELEGATE LIFOIFOI:** Thank you, Delegate Igitol.

The Chair recognizes Delegate Maratita.

**DELEGATE MARATITA:** Thank you, Mr. Chairman.

I just wanted to ask a question of Mr. Mitchell. When he said that Public Law 8-32 appears to be something that goes far beyond Article XII. As I understand the Public Law 8-32, it went to a tremendous public hearing in the legislature.

My question is: If it goes far beyond Article XII, did anyone point it out, whether Article XII had been violated by this Public Law 8-32?

**MR. MITCHELL:** Delegate Maratita, in testimony both before the Senate and House, I did that, tried to do that.

As I have said before, I remain to this day mystified by what happened.

I would make this -- this would be my best guess, that there was a failure, not intentional, but a failure to understand the connection, the vital connection, between Article XII, the law, the Article XII law that is written in the article itself in the Constitution, and the restrictions set forth there, and the necessity of having those rules and restrictions enforced in the courts.

It may have been no appreciation of the connection, the vital connection, between the two.

So the Eighth Legislature, perhaps, thought we're

not amending Article XII, so we're not doing anything to it. We're not harming it in any way.

I couldn't convince anybody that if you pass this law and render Article XII unenforceable in the courts, Article XII is useless. Everybody was denying that that was their intent until, of course, we're now in court.

I did make the prediction at the hearings, "You wait and see. As soon as you pass the law, the Carlsmith lawyers and everybody else on the defendants' side of Article XII litigation will be in court filing motions in court for summary judgment citing this law as their basis."

That is exactly what happened. That is exactly what we're litigating now in the Nikko Hotel case and the Wabol v Villacrusis.

So I take it that may have been the lack of understanding, the connection between how Constitutional rules and restrictions only have meaning when they're enforced by the courts in real cases.

**DELEGATE MARATITA:** Is Public Law 8-32 unconstitutional?

**MR. MITCHELL:** I believe it is.

Here, again, the reason I say that is that if a particular constitutional provision is self-executing, that is, it's written in such a way and intended by the framers to be -- to create immediate rights, enforceable rights for individual persons, that can be enforced in the court without any

interference or aid from the legislature.

If that is true, which I believe to be the case for Article XII, then any legislation that monkeys with a self-executing constitutional provision or is inconsistent with it, is unconstitutional because it infringes upon the self-executing nature of the provision. That's my opinion.

**DELEGATE MARATITA:** Thank you, Mr. Mitchell.

You mentioned, also, the fact that the First Constitutional Convention that was conducted in 1976, wrote provisions of Article XII that seems to be more effective than what was done in the amendments in 1985.

Since the problem occurred right after, during the 1985 period, and that was the time when the economy was booming in the Northern Marianas, so if the amendment was necessary in 1985, then, obviously, with that amendment, it provided more incentive to assure that the people owning land were given adequate protection, and at the time it spurred economic development in the Northern Marianas.

I just wonder whether the transactions that were done during that period, 1985 up to the present, if these were to be undone, as what I've heard in the previous comments, that would create a tremendous economic hardship.

Don't you think that if this transaction was done in good faith -- if there was some conspiracy theory on that, obviously, someone has to be prosecuted. But it seems that if

the transactions were done in good faith and for those people who happen to be caught in the middle saying that they didn't agree and then they want to get back their land because it was sold or leased to non-CNMI descent, it would create a tremendous hardship to people who invested, those who came here in good faith and tried to invest in the economic development of the Northern Marianas.

The question that I just posed to you is if Public Law 8-32 is unconstitutional, I just wonder whether all the people that reviewed this law, the legislature that passed it, the governor that signed it into law, the legal counsel that advised the legislature that it's legally sufficient, I don't know how you are going to address this issue if this were to be, indeed, ruled unconstitutional in the beginning.

Thank you.

**MR. MITCHELL:** Delegate Maratita, it will be part of your deliberations, I'm sure, to take careful detailed look at Public Law 8-32.

I will give be glad to give you my views on it and by all means, you should obtain the views of those who wrote it. Rex Kosack, David Nevitt. Those who promoted it include those two gentlemen and Mike Dotts and others.

I would like to comment briefly on some of the other issues that you touched upon.

There is another document I have here, which I

would like the committee to consider an exhibit to my testimony.

(The document is included in Exhibit 2.)

This is a document that is internal, a top secret document of Japan Airlines. You read the English translation that is provided by Mr. Horiguchi, and what you will see here is that Japan Airlines knew from the beginning that it came to Saipan and sent its representatives to Saipan to buy, to purchase land in the Northern Marianas to develop their hotel, condominium complex just like Japan Airlines goes all over the world.

Nikko Hotel Corporation develops their whole worldwide network of hotels interlocking with Japan Airlines' air service and so on. They knew exactly what they were doing, and they got the lawyers to help them do it.

This is -- I'm not suggesting that there was a conspiracy here. It is simply this: They were in business to do business. The management of Japan Airlines wanted to come here just like they go everywhere else and get the maximum amount of benefit for the money that they were spending the corporate funds.

They got lawyers to work with them to help them do exactly that. They structured -- as we say, they papered the transaction to make it look like it complied with Article XII.

We think this document and other evidence that we're going to present in the Nikko Hotel case, if we are ever

allowed to do it, proves that Japan Airlines knew from the beginning what they were doing, namely buying Commonwealth land and setting up a corporation called Blanco Vente, Ltd., to park the title in the name of that company.

There is a problem, which you touch upon with Article XII.

Article XII by its very nature, relating as it does to the importance of the land to the society as a whole and to individuals and families, Article XII, the enforcement of Article XII presents problems.

The way it was originally conceived individuals only could bring lawsuits to challenge particular transactions that were alleged to be violative of Article XII for the benefit of the individual and for the benefit of all.

What happens, the way it was set up from the beginning, is that the general common benefit of protecting the society's land base, so there is always land and Chamorros and Carolinians do not become landless strangers in their own islands, the enforcement -- achievement of that important goal was left up to individuals, individuals filing individual lawsuits and fighting them out for years after year after year as litigation always does where a lot is at stake, and this Convention might want to consider what other means might be appropriate for achieving both the individual goals and the common good, the common benefit.

Every Article to a plaintiff has a more or less different reason why they brought the lawsuit, why they came to me to ask me to represent them.

But the fact is, under Article XII, the only way up to now that it can be enforced at all is if the individual land owners who have lost their land take the case to court. It's the only way.

Now, what happens, you touch, also, and this -- I will finish after this.

You touch upon an extremely difficult problem. What is to be done in a case or in cases where, let's assume the plaintiff prevails, that the plaintiff is right, that Article XII is violated.

What do you do in a case like Nikko Hotel where they have invested -- they change their numbers to some extent ranging from $60 to $100 million. That is their investment. If the Article XII plaintiff wins, what happens? The whole transaction is void ab initio.

What happens to the improvements that have been put on the property in the meantime? It would take a room full of Solomons to try to sort this out, and you are the Solomons that would have to grapple with this.

There is nothing in Article XII, as it now stands, that really answers that question. We have taken the position, it may seem harsh to some, if you -- you, Japan Airlines --

violated Article XII and you had these brilliant lawyers at Carlsmith advising you, then you knew what you were doing and you were not in good faith. If you put improvements on the property and you lose the Article XII case, you lose it all, because you never had color of title and you did not put those improvements there in good faith because you knew that the law said you couldn't own that land, and you took the risk. So you bear the burden of the loss. That's -- that's our side of it.

Japan Airlines says, "We'll bomb the building. We'll bomb it down. We'll destroy it and we'll cut off air service and walk away if we lose the case."

There are -- there are other ways to deal with this. It's a difficult question. I don't want to try to engage the committee in a discussion of it at this point, except to say that you raise a very difficult question.

One way, one thing, one scenario that one can imagine is this: If the Camacho sisters win the Article XII case, and if the court finds that Nikko Hotel knew what they were doing, they had the most brilliant lawyers west of Hawaii, west of the Pecos for that matter, advising them, so they had no excuse. They were not in good faith. They invested the money knowing they might lose it, and so they lose it.

The Camacho sisters own the hotel and they own the land upon which it sits. What would then happen I have no doubt is this: It would be like turning the clock back to the

beginning. The Camacho sisters would say to Japan Airlines, "Tell you what. We have a nice hotel property. How would you like to lease it?".

A lease would be negotiated. That is what they should have gotten in the beginning, just a lease. The terms of that lease would be worked out and Nikko Hotel would be, would go merrily on its way managing that hotel and the land owners would then derive direct economic benefit from the land, which they were supposed to get in the first place.

That's what I think --

**DELEGATE LIFOIFOI:** Mr. Mitchell, the committee would like to take 15-minute break, and then we'll resume. There are other delegates that would like to ask further questions.

Is that okay?

**MR. MITCHELL:** I'm happy to stay, yes.

**DELEGATE LIFOIFOI:** The Chair recognizes Representative Mahlua Peter.

**REPRESENTATIVE PETER:** May I make a statement before you go? It is a short statement.

**DELEGATE LIFOIFOI:** Okay. All right.

**REPRESENTATIVE PETER:** (Statements in Chamorro.)

**DELEGATE LIFOIFOI:** Thank you, Representative Peter. (Statements in Chamorro.)

Thank you. 15-minute recess.

(A recess was taken from 11:09 to 11:38 A.M.)

**DELEGATE LIFOIFOI:** The hearing will resume.

The Chair will now allow the delegates to ask questions of Mr. Mitchell.

Delegate Aldan.

**DELEGATE TOMAS B. ALDAN:** Thank you, Mr. Chairman.

I do have several questions for Mr. Mitchell, and I beg the condolence of the Committee, as well as Mr. Mitchell for my ignorance on the issue, so please be patient with me.

My first question is, Mr. Mitchell: What actually can we look at when you make your recommendation to see that it is not biased or self-serving -- since we have been informed that local attorneys are basically biased or have conflicts -- in order for the delegates to deliberate on your recommendations?

Can you enlighten me how can I objectively look at it and say that it is, in fact, genuine and it be worthwhile for the committee to look at?

**MR. MITCHELL:** That's a very good question.

Delegate Aldan and all the other delegates, your role is in some ways as that of a judge. You need to inform yourself fully on all of the relevant issues.

I've offered to give you my views, and it will be up to you to evaluate those views. You will receive the views of others that take a different position or arrive at different conclusions than I do. And, then, with your own independent

counsel, you will then have to make a decision about who is right, who is wrong, what is right, what is wrong, and what is best to do.

I do not -- let me try to describe my own -- what you need to try to do, I think, is this: You need to try to obtain full, what I would call full disclosure, candid, complete information from each person who is advocating a particular view upon you.

I will describe in my written statement exactly what my interests are. I'm biased. I don't -- I'm not ashamed to say so.

I think, because of what I see and what I read and what I think I understand, I have a particular point of view that I urge upon you and I will give you my reasons for that.

My bias, I will try to disclose, but the bias will or will not in your judgment affect the credibility or the persuasive effect of what I tell you, and you have to do the same for everybody else.

I don't think there is anybody who is neutral, if there is ever such a thing, on this Article XII issue.

**DELEGATE TOMAS B. ALDAN:** Thank you, Mr. Mitchell.

My second question is: If we allow Public Law 8-32 to continue, is it, in your opinion, that we may as well follow the recommendation of Mr. David Sablan that we let every one decide to do with his or her property?

**MR. MITCHELL:** You will need to seek the advice of your counsel and colleagues on the fundamental question that lies behind Mr. Sablans's question.

Section 805 of the Covenant, which was, as you all know, was negotiated over a long period of time with full knowledge on both sides, resulted in an agreement, a mandatory agreement, between the Commonwealth and the United States that land ownership restrictions would be instituted and that they would be maintained for a minimum of 25 years following termination of the Trusteeship Agreement.

I don't think that the Commonwealth has any option or discretion in that regard. One can debate and discuss what kind of restrictions, such as are those found now in Article XII, complied with or carried out or fulfilled the promise that was made by the Commonwealth to institute and maintain those restrictions.

You can debate within certain limits about just what compliance -- what constitutes compliance with section 805. This is one of the issues in Ferreira v Borja that's now in the Ninth Circuit.

Here is what we are saying to the Ninth Circuit: Our own Supreme Court has violated the Covenant. I would concede that the Ninth Circuit could wipe out Aldan-Pierce and Ferreira v Borja, so there is no Article XII; hence, section 805 has been violated.

That is the kind of question you will have to grapple with. That same question relates to this issue of what should be the percentage, the definition of Northern Marianas descent.

As you approach zero, you are reducing the limitations and restrictions. The class of persons becomes larger. The restrictions become smaller. You have an 805 question that you have to deal with.

**DELEGATE TOMAS B. ALDAN:** My third question is: Would it be constitutional to prohibit corporations, whether or not completely owned by CNMI descent, to own land? What do you think of it? Is it a good prohibition or not?

**MR. MITCHELL:** That, too, a question of considerable relevance and importance. In the first Constitution, the criteria required for eligibility 51 percent of the board of directors and membership and 51 percent on the voting stock. And, then, in 1985, those percentages, each of those percentages was increased to 100 percent.

During the period between the First Constitutional Convention and the Second, there were numerous, really quite a large number, companies that were set up to, at least facially, superficially, to become -- to comply with those requirements, to be a corporation of Northern Marianas descent, as I call it.

Since it is amended in 1985, I don't know -- you should inquire of others -- I don't know of a single corporation

that is 100 percent Chamorro, Carolinian that was ever set up and used to purchase land or to hold title to land. It was never done.

The reason for that, I think, is that you only have room to maneuver and set up a phony corporation and get -- you just need one or two cooperative people to hold 51 percent of the stock and be 51 percent of the board of directors.

If they cooperate with you, you are home free. You have a company that holds title and you control the company.

As to the -- I don't know. I -- you create a possibility when a corporation can it own land under any conditions. But if the corporation -- if a corporation is not allowed to own land, then an individual who is cooperative, I could buy all the land in the Commonwealth, I have enough money and one Chamorro who will cooperate with me and take the title and in their name and hold it and do with the land what I tell them to do with it. That's all I need.

So I don't think you are going to solve the problem by eliminating corporate ownership of land when you deal with the corporate -- the realities of the corporate land holding. Ask yourself this question among others: Why in the world, if during the time it was 51 percent, if you look at the older transactions, why would any Chamorro or Carolinian set up a company to own land and let an American be a director or a shareholder? They don't need them. They have no need for them.

Those corporations were set up for the benefit of the Americans or the Japanese.

**DELEGATE TOMAS B. ALDAN:** Thank you, Mr. Mitchell.

**MR. MITCHELL:** I think it's constitutional.

**DELEGATE TOMAS B. ALDAN:** I think I got the response already.

I have one last question. From what you just said, basically, then, the bottom line of all this litigation is the fact that the corporations or what have you, individuals, are using Northern Marianas descent as a means of owning the property; is that correct?

**MR. MITCHELL:** Yes. That's right.

**DELEGATE TOMAS B. ALDAN:** Thank you.

**MR. MITCHELL:** Those are the two ways that Article XII has been violated.

**DELEGATE LIFOIFOI:** Any other delegates that would like to ask Mr. Mitchell questions?

If none, I'll recognize Delegate Quitugua.

**DELEGATE QUITUGUA:** Mr. Mitchell, I am pretty sure that as a lawyer you have drafted or executed lease agreements representing CNMI descent.

If you did do one, is there any means or any language contained in the lease contrary to the intent of Article XII? And if it is contrary, why was the lease executed, and also, why is your testimony different if there was a lease

drafted by you or executed by you that offends or contradicts Article XII?

**MR. MITCHELL:** That is a question that was planted with you by Mr. Kosack or Mr. Dotts or somebody.

There was -- maybe Dotts. Is Robert O'Connor here?

**MR. KOSACK:** Rex Kosack is here.

**MR. MITCHELL:** Rex didn't do it. Or Randy Fennell.

There was one or two leases that I drafted years ago, one for Marian Aldan-Pierce's father that subsequently -- I'm sorry. Should I proceed?

**DELEGATE LIFOIFOI:** One moment Mr. Mitchell.

(Change of tape.)

**MR. MITCHELL:** There were one or two leases that I drafted a number of years ago that at the time I thought would be consistent with Article XII.

I now think and I confess that they weren't, in retrospect, in light of subsequent litigation, subsequent court decisions, and subsequent analysis.

One of those leases, for example, that we did for, as I recall, San Marianas was the lessee, a Korean firm, and Jose Tenorio, Jose P. Tenorio, provided in the lease itself and attached to it a blank deed, and provided that if and when the law ever changed to allow ownership, if and when it ever changed to allow ownership by this foreign corporation, then the deed,

the blank deed, could be filled in and title would pass to the foreign corporation.

At the time I drafted that lease, I thought it was rather clever and consistent with Article XII. I don't think so now, and I think it was wrong. I think that lease is invalid. In other words, I confess error. That was one or two leases.

Randy Fennell -- the reason -- this is a big issue is that Randy Fennell used that same type of transaction in his deal with Ramon Mafnas, and then he got in trouble for that. Ramon sued him and challenged the validity of that type of transaction, or lease with that blank deed attached to it, so Randy Fennell got really mad at me because he thought I was such a brilliant lawyer, did something right, and he found out I did something wrong. It didn't work.

Although he won the case in the end. That is another one of the Article XII cases in the Superior Court, Ramon Mafnas, the decision went against them. That particular Superior Court judge did not, in my opinion, enforce Article XII the way he should have.

**DELEGATE LIFOIFOI:** Thank you, Mr. Mitchell. The committee appreciates your coming and testifying before the committee. The committee wishes to receive your written testimony.

Thank you very much.

**MR. MITCHELL:** Thank you very much, Mr. Chairman and

members of the Committee and the Convention.

**DELEGATE LIFOIFOI:** The committee will now recognize Tony Guerrero.

**MR. TONY GUERRERO:** Thank you, Mr. Chairman.

(Statements in Chamorro.)

**DELEGATE LIFOIFOI:** (Statements in Chamorro.)

**DELEGATE GONZALES:** (Statements in Chamorro.)

**MR. TONY GUERRERO:** Thank you, Delegate Gonzales.

(Statements in Chamorro.)

**DELEGATE GONZALES:** (Statements in Chamorro.)

**MR. TONY GUERRERO:** (Statements in Chamorro.)

**DELEGATE GONZALES:** (Statements in Chamorro.)

There is a security that the transaction was done in good faith and was executed honestly with integrity without discrepancy or misinformation.

**MR. TONY GUERRERO:** (Statements in Chamorro.)

For you to sell your property -- this is in the past. Even my father sold a property that was very, very low. And I could have come and accused that buyer that you have cheated my father. This is not for a constitution. This is for the court to decide.

(Statements in Chamorro.)

We cannot go back to the past. We have to look for the future. We have to seriously look at the future and do something.

Look at me. I started with zero. Nothing. I started with zero. Everybody knows that I'm a substantial land holder on the island, but I do it the right way. I do it the right way.

The right way is the person of the Northern Marianas descent is me. That's the most right way. I'm doing it because I'm a Northern Marianas person. I'm entitled to buy property or to own property.

So whatever happens between the transactions, that is for anybody to bring it up to the court, because there might be a fraud or there might be a cheating, like you said, and the court should decide on that.

(Statements in Chamorro.)

We're all American citizens. We have all the rights.

(Statements in Chamorro.)

Don't get me wrong. I want to make sure that the title remains with the local persons of the Northern Marianas, the Chamorros and Carolinians.

**DELEGATE GONZALES:** (Statements in Chamorro.)

**MR. TONY GUERRERO:** (Statements in Chamorro.)

The clock is clicking on this room, you know.

(Statements in Chamorro.)

The bottom line here is, the question is: Who holds the title? Who owns the land?

(Statements in Chamorro.)

The First Constitutional Convention allows a corporation, that is beyond my understanding, because I was never involved in that. But even that allows that corporation to be false.

(Statements in Chamorro.)

**DELEGATE GONZALES:** (Statements in Chamorro.)

**MR. TONY GUERRERO:** (Statements in Chamorro.)

**DELEGATE GONZALES:** (Statements in Chamorro.)

**DELEGATE LIFOIFOI:** (Statements in Chamorro.)

Delegate Manglona.

**DELEGATE MANGLONA:** (Statements in Chamorro.)

**MR. TONY GUERRERO:** (Statements in Chamorro.)

**DELEGATE MANGLONA:** (Statements in Chamorro.)

**MR. TONY GUERRERO:** (Statements in Chamorro.)

**DELEGATE MANGLONA:** (Statements in Chamorro.)

**MR. TONY GUERRERO:** (Statements in Chamorro.)

You don't have any to protect one side and then the other side is not protected. You have to look at it in general.

(Statements in Chamorro.)

That's what the Constitution says, that only descendants can hold title.

(Statements in Chamorro.)

**DELEGATE MANGLONA:** (Statements in Chamorro.)

**MR. TONY GUERRERO:** (Statements in Chamorro.)

**DELEGATE LIFOIFOI:** Thank you, Mr. Guerrero.

(Statements in Chamorro.)

**MR. TONY GUERRERO:** Thank you.

**DELEGATE LIFOIFOI:** The committee will now recognize Rex Kosack.

**MR. KOSACK:** Mr. Chairman, members of the committee, other delegates, thank you very much for allowing me to address you today. If my voice sounds quaking, I have to tell you it's because it's very cold back here in the Chambers.

10 years ago I was actively involved with the Second Constitutional Convention as Attorney General and as legal counsel.

The delegates to the Second Constitutional Convention made several amendments to Article XII at that time, but no one could have guessed in July of 1985 what would be ahead in the next 10 years for Article XII.

Starting the next year, in 1986, there was a flood of lawsuits filed by plaintiffs seeking to void transactions that they entered into using Article XII.

I disagree with some of the comments that have been made this morning, many of them, actually. I think that there is a problem. I think that Article XII is alive and well. I'm going to tell you why, and I hope you will listen to my opinion.

I think with the benefit of hindsight over the last 10 years and my experience as an attorney defending an

Article XII case, I think that Article XII itself has been of great benefit to the Commonwealth.

But the lawsuits which have sought to extend it beyond its original meaning have done us all quite a bit of harm. These cases have left our land title system in shambles. Our Recorder's Office has no purpose any longer. Our reputation as a community, all of us, for fairness has been lost and the stability that is required to attract investment is without question gone for many years.

One thing you learn, and I learned very quickly, when I moved here is that you build a reputation slowly and surely over many, many years, but you can lose it overnight.

Unfortunately, I think that has happened to the Commonwealth. The harm that has been done over the last 10 years is a harm that will be visited not only as currently, but on the next generation that comes, your children and their children, as well.

I would like to submit for the record, Mr. Chairman, a series of articles, that just cover about a period of one year, that have appeared in our newspapers. They're my records of the news clippings that have appeared. I think they kind of give you a montage. They tell the story.

If you could hand these out to the members, please, yes.

(Mr. Kosack's articles are in Exhibit 3.)

Let me read to you a couple of headlines off those articles -- more than a couple. It will kind of give you a feeling for what these lawsuits have done here to the community.

"Saipan, Land of Disenchantment, the Article XII Stranglehold"; "Sheraton, Other Hotel Projects Cancelled"; "Report, court wrong on Article XII"; "Voters Point To Article XII Problems"; "Torres Says Eviction of Firm To Affect Investment Climate"; "Chamber Calls for Article XII Changes"; "Bank Deposits Drop 20 Percent"; "SBA Blames Article XII Worries"; "JAL Nikko May Leave CNMI"; "If JAL Loses Suit, Saipan Is in for Rough Time."

These are not written by me. These are the headlines in these articles.

"Future Uncertain in Saipan. Employers Concerned"; "Saipan Tourism Threatened"; "CNMI, Islands of Thieves"; "Home Sweet Home No More"; "CNMI in a Scary Situation"; "Property Disputes Stifle the Economy in the CNMI"; "Article XII Crisis Remains. They Can't Take Away My Home. Victim of Article XII Lawsuit Speaks Out"; "Residents Push for Article XII Action"; "Petition To Solve Article XII Crisis Continues To Draw Local Signatures"; "Article XII Bill Gains Overwhelming Support"; "More Than Land At Stake in the CNMI"; and, lastly, "Article XII, Scares Investors Away."

You've got the newspaper articles. As I said, I don't write the headlines. It's been in the PDN. It's been in

the Marianas Variety, Commonwealth Examiner. Take a look at them, and I think they tell the story that the people of the Commonwealth are concerned about what has happened in this litigation.

Let me tell you about what our legislature found. This is this Eighth Commonwealth legislature, both houses, because they actually made this one of their legal findings in section 1 of this Public Law 8-32, which has been discussed to day.

I'll read to you apart of that.

> "The legislature further finds that these pending actions --" by that, they meant lawsuits "-- taken together have had a cumulative adverse effect on the CNMI economy in the last two or three years.
>
> "These actions have led to uncertainty of title, instability of land values, and financial in equities. They have caused the Commonwealth to suffer in an undesirable reputation as a risky and uncertain place in which to lease land for investment or development or in which to grant leasehold mortgages."

When that finding was made by the Eighth Commonwealth legislature, there were there about 25 lawsuits

pending in the courts of the commonwealth.

Today, there are at least eight more lawsuits that have been filed since that became law.

With over a 30 cases pending at present, the Article XII crisis remains. It remains a problem for the Commonwealth.

But the good news is that the litigation in these cases can be separated from Article XII itself. The question that should be asked is: Do we have to do away with Article XII in order to stop these lawsuits?

The answer is definitely a "no," we don't have to.

These lawsuits do not seek to enforce Article XII as you know it. Each of the lawsuits seeks to expand Article XII's meanings by applying it in entirely new ways; and, therefore, the litigation can be halted without changing Article XII as we know it.

To understand my point, you need to do this, and I hope to take you through this in my testimony. You need to look at Article XII and ask what rules are in Article XII -- with that one hand.

Then, you look at the litigation and you ask what rules are the plaintiffs trying to enforce or have the courts adopt in the litigation? Put that in the other hand.

Compare the two, and you will find out they are not the same. To prove my point, what I've done is I've just handed

to, I believe, the clerk or sergeant at arms, sheets that everyone should be handed. It looks like at least one Delegate has them. Thank you.

(Mr. Kosack's documents are in Exhibit 3.)

That sheet has two parts to it. One part, the back page, is just a Xerox copy of Article XII as it appears in the Commonwealth Code.

The other part in the front is my work product. What it is is the 11 rules that I sort of distill from the black and white letters of Article XII as rules that affect persons who are not of Northern Marianas descent in telling them what they can and what they cannot do with land.

So, necessarily, some things are not in there, like inheritance issues, mortgages are not in there.

These are rules that I would use as an attorney sitting down advising a client on a normal land transaction.

I don't want to take too much time doing it, but let's review the rules, because I'm going to compare them in a moment to the cases. You can ask yourself which rules are involved in these cases that are currently going on.

I hope that this will give you what I understood from your legal counsel in speaking with her yesterday sort of an overview of the Article XII where Article XII is at right now, sort of a check-up, and, obviously, it's only my opinion, but I hope you will give it due consideration.

The first rule on here, is that leasehold interests acquired by non-Northern Marianas descent persons are limited to no more than 55 years, including renewal rights.

From January 9th of 1978 until January 8th of 1986, which was the original period between the two constitutional conventions, that was 40 years. That's the basic rule. We all know that rule. That's engrained in us.

The second rule is one that was added by the Second Constitutional Convention which says that a longer lease or freehold interest may be acquired for --

**DELEGATE LIFOIFOI:** Mr. Kosack, one moment.

(Change of tape.)

**DELEGATE LIFOIFOI:** Please resume.

**MR. KOSACK:** Thank you.

It says that a longer lease, or a freehold interest, may be acquired in a condominium above the second floor of a building on private land.

The third rule defines what you have to be to be of Northern Marianas descent. You have to have at least one-quarter Northern Marianas Chamorro or Carolinian blood, or a combination of the two of them, and you have to be a U.S. citizen or national; or, one has to be adopted by a person of NMI descent before reaching the age of 18 years old.

The fourth rule defines what is a person of Northern Marianas descent -- a full blooded Northern Marianas

Chamorro or Carolinian person. Two requirements there: One, you have to have been born or domiciled in the Northern Marianas by 1950; and, two, you have to be a citizen of the Trust Territory prior to the termination of the Trusteeship. I think that was in '86.

The fifth rule, and these are my numbers, just the way I've outlined it, a corporation is of Northern Marianas descent if -- there are four requirements. We've talked about these earlier in the testimony today.

First, it has to be incorporated in the Northern Marianas; second, the Northern Marianas have to be its principal place of business; third, currently, 100 percent of the voting stock must be held by persons of Northern Marianas descent truly owned by them; and, fourth, 100 percent of the directors have to be persons of Northern Marianas descent. That's an amendment that occurred in '86. Prior to that, the period before that, there was a 51 percent requirement for voting stock and a 51 percent requirement for directors.

The sixth rule added by that Second Constitutional Convention is that minors, people under the age of 18, cannot be directors.

The seventh rule, no trust or proxy voting by non-NMI descent persons which is a way of controlling NMI descent persons. That was also added by amendment.

No. 8, the beneficial and the legal title of shares

have to remain in the same person.

No. 9, probably the rule that is most well known, is that violations of this main rule, rule No. 1, shall make the transaction void ab initio, all the way back to the beginning as though it never had occurred.

Rule No. 10, is that a corporation, once it's qualified as a Northern Marianas descent person, which later loses its qualifications, shall immediately have its permanent or long-term interest in land that it acquired after January 9th, 1986, forfeited to the Commonwealth government.

And the last rule, another amendment from '86, the registrar shall issue regulations to insure compliance and the legislature may enact enforcement laws and procedures.

You have the evidence in front of you. That's the Constitution. Those are, as Mr. Mitchell says, those are the words. Okay?

This is my abstract, or my outline of what law you can pull from those words, what meaning we can derive from it. You have your legal counsel. Ask her if she thinks it's a fair representation.

Those are, to my way of thinking, and the 14 years that I practiced law in the Commonwealth, those are the rules of Article XII. Those are the rules that are set forth.

Now, with that out of the way, let's take a look at the lawsuits, what we call the litigation that has arisen around

of Article XII and see which of those rules, if any, are involved in that litigation.

I'm going to start with a case that I'm going to tell you a little bit more detail about than any of the other cases. The reason I'm going to do that is not only because it was the first case, Wabol v Muna, now it's Wabol v Villacrusis. It was filed on August 1st of 1985. So it was one of the earliest cases. But the other reason why I'm going to tell you a little bit more about it is you can see how these rules work. It's a good example.

In that case, there was a 1978 lease. Okay? The first thing that it fits into the Constitution in the first constitutional period where 40-year leases were all that were allowed.

It was a corporation. The lessee was a corporation with only one of its three directors being people of NMI descent, and only 50 percent of its voting stock was owned by NMI persons. So if you look at rule No. 5 on your sheet, which defines NMI descent, look at subsection A, which says what the original rule was, which required 51 percent, you can see that that corporation was not a Northern Marianas descent corporation. Okay? That lease was for a period of 30 years, and there was an option to extend the option for another 20 years.

Now, if you take a look at rule No. 1, look at the

subsection there, which is the original period of the Constitution, you can see that the limit for leases, including renewal rights, so you include that option term, was for 40 years. So in this case, the lease is 30 years plus 20 years, 50 years. It exceeds the 40-year rule. Okay? So far, we can settle this case, determine it by following the rules.

The appellate courts eventually did that. They determined that because it is rule, rule No. 1, was violated, they applied the enforcement mechanism, which is in rule No. 9, which says violations of that main rule shall make transactions void ab initio. The courts ruled that the transaction was voided. That's the Transamerica Building on Beach Road.

As you know, it's still, as I understand it, in litigation. That was the first case, and to my way of thinking, that was the pure case. That was the case that was a real workout for the Article XII rules. The rules that are on this sheet solve that case.

That's a contrast, I think a stark contrast, to the litigation which everyone is talking about that is occurring right now.

The way to do that, I have to give you an overview of the litigation. There is over 30 cases now. I can't take the time to go into the details of each case even in I presume to know the details, which I don't.

From my knowledge of Article XII litigation, I have

developed my own way of looking at these cases. I think that they fit into four categories. If you take all the cases out there, they all sort of fit into one of four categories, or some fit into maybe two categories.

I think that if I explained that to you, it will help your understanding of all of this commotion about Article XII, why you have lawyers from one side here and lawyers from the other side up here.

The first kind of case I want to explain to you is the what I call the resulting trust case. The reason why we will start with that is because it was the earliest of the Article XII litigation to arise.

It raised the issue of whether the fact that purchase money has been provided to a person of Northern Marianas descent in order to buy land by a person who is not of Northern Marianas descent in return for a lease of 40 or 55 years, whether that somehow voids the purchase, whether it wipes out the purchase.

Let me give you some facts. I find that when I explain this to people, it's easier if they understand it on a made hypothetical.

Let's assume that I want to buy -- I want to put a home up. I want to put it in Gualo Rai. I find a lot there that I really like. I have a friend who knows the owner of that lot. I don't want to approach the owner because I don't know

the owner very well, so I say to my friend, "Would you go ahead and talk to the owner, see if he is willing to lease that land to me. Okay? Would you help me get a lease on it?"

He does so. He has some negotiations, maybe has several meetings with the owner of the land, goes back and forth, and finally, he says, "Yes. The owner tells me that he is willing to lease that land. He does not have any use for it right now, and he's willing to lease it for $55 a square meter. Are you interested"? I said, "Yes."

Then he says to me, "In fact, the owner told me the following words: He said, 'I don't really care whether I lease it or sell it. I'm not going to be around in 55 years, so I'll sell it for the same price, $55 a square meter.'"

I say to my friend, "Fine. You have done a lot of work helping me on it. You have been a good friend for years. Why don't you buy the land? I'll give you the money. You use the money, use my money. Buy the land and you'll be the owner. Then, what I want is what I started out wanting from the very beginning. I want a 55-year lease. So will you give me a 55-year lease if I give you the money to buy the land?"

He says "Fine."

In the end, I end up with my 55-year lease. My friend, who has done the work as a broker and he's been a friend to me, he ends up with fee simple title. He'll never be able to use it because he's not going to live that long to get the land

back. But his children will have something to inherit according with custom system, so that each of his children has something that he can pass on. He now has something he can pass on to his children.

And, the original owner, what does he get? He gets his $55 a square meter. That is the transaction. That's the sort of fact pattern that is involved in a resulting trust case.

What happened is that two cases in 1991, Aldan-Pierce v Mafnas and in 1992, Ferreira v Borja, our Supreme Court said that when the purchase money is provided by a person who is not of NMI descent, like me, the NMI descent buyer only holds the title in trust for the non-NMI descent person. What the court really said is that I'm the real owner because I paid the money. I'm real owner. Even though the property documents say all I have is the lease and say that he's the one with the deed. He's the one that's holding the deed.

In those cases, the court said that since I'm real owner, the transaction is void because we know I can't be the owner of land. Right? Okay. They throw out my lease and they go back to my friend and throw out his deed and the land goes back to the original land owner. Okay?

Regardless of how many years I've held onto that and under my lease, regardless of the fact that I built my family home on that land, my children may be living on that land, regardless of what plans I've made with it, no matter what

I've done with it, that's the result.

The theory of the court was based on the Restatement of Trusts, and the section on resulting trusts. That's why I called this fact pattern a resulting trust case. I think most people know it that way.

Let's go back to the 11 rules that I handed out to you. Take a look at that sheet. Do you find in these 11 rules any rule that states that if the purchase money comes from an outsider, that no matter who gets the lease, no matter the fact that the outsider only gets the lease, he is, in fact, the real owner of the land? Can you find that rule on this sheet? The answer is no, you can't.

That's an example of what I'm saying. It's not in the language of Article XII. It's just not just not there. What happens is that this litigation is trying to expand Article XII into new fact situations and to essentially ask the courts to write new rules and supplement these new rules so that this year we have 11 rules. Next year, we have 12 or 13. Two years later, we have 15 or 16 rules. These cases try to establish new rules.

Let's go to another type of case. This one is very easy to understand. The fact pattern is not difficult. It's a lease provision case. Again, that's my name for it. It's a case where there is no sale of the land. There is just a lease. The lease is for 55 years. On its face, it seems to comply with

the law.

In these cases, the plaintiff will argue that, actually, even though it says 55-years, it's really for longer than that because some provision in the lease, in effect, extends the term longer.

Let me give you an example. Probably the most well known case is the Diamond Hotel v Matsunaga case that was decided by our Supreme Court.

In that particular case, the lease had, I don't remember, 40 or more provisions in it, had one as of it's provisions, just one of it, a change of law provision.

Now, I think most of you know what change of law provisions are. They're provisions that say that if the law changes and I can hold on to more than 55 years, then I would like you to give that to me.

In particular, the Diamond Hotel lease said that if the law changes so the lessee can have a lease for longer than 55 years, then the lessor will extend the lease term in return for an additional payment of rent equal to the fair market value of that extension. That is what the change of law provision was.

It was alleged that that one particular provision gives someone more than 55 years, and so it violates the main rule and because there is that one section that is bad, you have to throw out the entire lease.

Now, without going to what the court decided in that case -- let me explain one other thing, why are change of law provisions put into the leases.

As you heard this morning, the reason why Article XII was originally drafted is to comply with section 805 of Covenant, which requires the Commonwealth to restrict alienation of land for a period of 25 years after the termination of the Trusteeship.

If you are making a 55-year lease, you know that somewhere in time the restriction on land that is in Article XII may disappear. It may change. 25 years is only a portion of 55 years.

There is another reason why it's in there. Because it may be amended. In fact, the history of our Commonwealth shows just that. In the very first 10 years of our Commonwealth, we amended Article XII.

The Second Con-Con raised from 40 years up to 55 years. That's exactly what the change of law provisions are for.

So I want you look again at the 11 rules I've given you, or if you don't trust those, look at the text. I don't care which one. But find me something in there that says that you can't put a change of law provision in a lease.

Find me something in there that says that you can't put a repurchase of improvement provision in a lease.

The fact of the matter is, Article XII, the actual black and white letters of Article XII, don't tell us what can be in a lease and what cannot be in a lease. Right now, all of us, lawyers and laypersons alike, are left in guess as to what can be put into a lease.

I'll talk to you more about that in just a second. What are these lawsuits on lease provision cases try to do? They try to write more rules. They try to say these sort of lease provisions are okay, these sort aren't. They try to add to the list of 11 rules by putting on more.

The lease provision cases are important because almost all of those eight new lawsuits that were filed in the last year and a half were lease provision cases. In other words, this is the major area of litigation in Article XII currently.

Now, the third category of case are sham corporation cases. It's a little more difficult to explain, but you've heard quite a bit about it from earlier witnesses.

These cases involve the purchase of land by a corporation that purports to be a person of Northern Marianas descent. Now, if you apply the four factors found in this test in rule 5 as to what is a corporation of NMI descent, you'll find that these corporations pass the test. They are of NMI descent.

You ask, "What the problem?" The plaintiffs in

these cases argue that a person of non-NMI descent, usually someone who is a minority shareholder, has used this corporation as a sham, a fake, as kind of a mask to mask their own personal transactions in real estate. That's the theory in these cases, as I understand it.

The lawsuits are asking the courts to disregard the corporation as the owner, and say, "No, look, the real owner isn't that corporation. I know that corporation meets the four tests. It's really that one person there that is so strong in the corporation. Treat that person as the owner, and since he is not of NMI descent, void the transaction."

Again, a new rule. That's what the Nikko Hotel case, as I understand it, is based on, among other things, is an allegation that there is a sham corporation in that case.

You won't find this rule among these 11 rules. These lawsuits on sham corporations are trying to get the courts to adopt a rule that says even though a corporation meets all four requirements, if one person in that corporation, who is not of NMI descent, it may only be a minority shareholder, not even a director, if that one person exercises a lot of control in the corporation, then the corporation is not real owner. The real owner is that person. The person is of not of NMI descent, throw it out. Write that down as rule 12. It's not in the 11 rules. Look at the language. You won't find it in the Constitution.

I dare say that the First Con-Con never even contemplated this sort of situation arising. I don't know. The fourth category of cases are bona fide purchaser cases. Bona fide purchaser, maybe you heard the term, BFP, if you have not, I'll explain what it is.

A bona fide purchaser is a person who takes property upon payment of value in good faith without any notice of a defect in title. One is held to have notice of not only those things you actually know, but of those things which an inquiry into public records would show are there.

The proper recording of a land document in our Commonwealth laws gives notice to the entire world that that document exists and of all the contents of that document, and that's why our Commonwealth legislature has established a Commonwealth Recorder's Office under the Superior Court. It's a place to give constructive notice to the world of a land transaction.

If someone fails to record a land transaction, then it's void as to any bona fide purchaser, BFP, who in good faith and for or consideration, or money, for example, without notice of that prior transaction later records an adverse interest in that real property.

So the BFP rule is just a way of protecting all of us. When we want to acquire an interest in land, we do, what? The first thing you do is go to the land and look to see if

there is a squatter there or someone else there that is claiming that they have it or that they own it and it's not the person we're dealing with; right? That's the first thing you do.

What is the second thing you do? You go down to the Recorder's Office and you look up in the chain of title and see if anyone has any claims on that land. That is what that rule says. It says, "If you do those things and you don't come up with any defects in the title, you are protected." Okay?

But this rule comes to Article XII when a plaintiff seeks to set aside or lease of land for reasons that would not be apparent from a diligent search of record title.

For example, and these examples are a little hard, but let's take a second. This is the last category of case.

Let's assume a that you buy land from another person of NMI descent. Assume that that person bought their land from "X," who also was a person of NMI descent, but they bought the land using funds that I provided. Okay? I'm a person who is not of NMI descent. It's a resulting trust type of situation; right?

So that original owner, "X," then will sue you to take your land. He's going to allege that the transaction that he was involved in where I had paid the purchase money, that that purchase was no good.

So every transaction that has occurred after that also is no good. What is the problem with that? The problem

with that is if you go to the Commonwealth Recorder's Office, yes, you'll see that there was an earlier transaction who sold it to the person who sold it to you.

You'll see that that person also leased it to me. But what you won't find from those records is who paid the money. You'll see who -- you'll see that this Northern Marianas descent person paid another Northern Marianas descent person money, but you don't know where he or she got the money from. It just does not appear in record title. People don't explain, "Well, yes, I'm going to pay $50 a square meter from my bank account or from this person." It does not show the source of funds.

If it does not show the source of funds, then there is no way that the Commonwealth Recorder's Office can protect you.

These BFP cases simply take our Commonwealth statute on recording and make it useless against Article XII defects. It's useless against Article XII defects.

Let me give you an actual case. You may have heard of the Bonita Vista lawsuit. The reason I bring it up is I've seen at least one of the people who is a defendant in the lawsuit here today.

Bonita Vista Properties, Ltd., is an NMI descent corporation. It bought 45,990 square meters of land near the top of Mt. Topatchau. They bought it from Realty Trust

Corporation. Realty Trust bought it from the original -- we'll call them the original land owner.

Bonita Vista, then, after they acquired that property, and it is an NMI descent corporation, they subdivided the land into 22 lots. Some of these lots they sold, and some of the lots they leased.

Some of the lots that they sold, they sold to people of NMI descent. I won't mention names. Some of the people they leased to, were people of NMI descent. There are no problems, as I understand it, with the selling of the land, the ultimate sales, and no problems with the ultimate leases. Yet these people have been sued. Why? Because of Bonita Vista maybe not being of NMI descent? No.

Because the company before them, Realty Trust Corporation, which held the land for only about 4-1/2 months, because that one is alleged to be a sham corporation.

This corporation had nothing to do with these ultimate people who owned or hold leases on the land. At least one of them has built their family home on the land. They have no way of knowing about it. They can go to the office of the Attorney General, check the Registrar's records, and they look at the corporations, and the corporations meet the four requirements.

They look at the Commonwealth Recorder's Office at the land title there, and there will be no defect there. There

is no way for these people to have actual or constructive notice that this company, Realty Trust, was allegedly, I don't know whether it was or wasn't, a sham corporation.

But because it was in the chain of title for four months, everything that follows after that, everything is wiped out.

These innocent people, who bought the land, who have leased the land, now stand to lose the land. They have not lost it yet, but they have litigated it now for many years. That's what a BFP case is.

So the four types of cases are, in my opinion, maybe other people see it differently, resulting trust, lease provision cases, sham corporation cases, and BFP cases.

I'll ask you one last time. Look at the Constitution. Look at the rules that can be derived from the language of the Constitution. Are any of those cases solved by the language here? The answer is "No."

The courts have found that. We have some judges that have been so candid, like Presiding Judge Castro, in one case wrote, he said, "I've looked at these documents, and I looked at the historical documents that are behind them, and I don't get any help in finding out what the meaning of Article XII is in this situation."

Why? Because what these lawsuits are trying to do is they're trying to write new rules to Article XII, and that's

why I'm telling you what I think is good news. The lawsuits and Article XII are two different things.

You can stop the litigation that is so much harming the Commonwealth without affecting Article XII. That is what Public Law 8-32 has attempted to do. I'll talk more about 8-32 in a moment.

The legislature went through several hearings. That's what they eventually realized, that, yes, they could bring a stop to these lawsuits without harming the interest, the privilege, the rights, of indigenous NMI descent persons.

You are the same people you were before 8-32 was passed. You have the same rights you had before it was passed. Nothing has changed.

Now that I've given you that overview of the litigation, let me tell you a couple of points that I think -- a couple of conclusions that you can distill from that understanding of the lawsuits that are out there.

The first one is the one I've tried to drive home. And that is, the litigation out there does not involve the sort of rules that you could find by just sitting here and looking at Article XII; that the litigation actually asked judges to create new rules, to apply Article XII to new situations.

The second point I bring up, the Article XII problem has not been solved. People come to me all the time and say, "Isn't the Article XII problem over? I mean, why would it

even come up in the Con-Con? Has it not been solved? Public Law 8-32 was passed.

8-32, though, was a very good attempt at solution by the legislature; but unless it's upheld against any constitutional challenges by our Supreme Court, it's really of no value.

I mean, it's very clear that Article XII is the supreme law because it's in the Constitution. 8-32 is beneath that.

We have not yet had our Supreme Court rule on 8-32. We've had one trial court judge rule on it just a couple of weeks ago. That trial court judge found that a couple of provisions in 8-32 to be unconstitutional. Unconstitutional in the area of severability. The problem, yes, is still out there.

A lasting solution cannot be found in the legislature. It can only be found in the Constitution.

As I said, the litigation is not only continued. It's actually increased with the filing of some eight more lawsuits in the last year alone.

Let me give you a status check of where we are today in lawsuits. The resulting trust cases, the Ferreira case and Aldan-Pierce case span a distance -- I want you to understand this -- it spans a distance of nine years of litigation. Nine years to decide one lousy issue, one small issue in Article XII took nine years. And from what I

understand this morning from our one of our witnesses, it's still on appeal. It's going back up yet again.

Do you know that in those nine years there were nine different decisions on those cases on the merits, not technical decisions on procedural matters, but on the merits there were nine different decisions. There were four different levels of court involved in those cases. There were over 16 judges who sat on those cases. That is a great use of a judicial resources and time.

Hopefully, the Supreme Court's ruling -- not the Ninth Circuit's ruling, don't get confused, keep your eye on the ball, the Supreme Court's ruling, our Supreme Court -- the CNMI Supreme Court ruled in January in Ferreira, and they rejected the resulting trust theory. The CNMI Supreme Court rejected the resulting trust theory. Hopefully, that decision will bring an end to this one category of litigation, the resulting trust litigation.

Look at how long it has taken and how much controversy it stirred up in the Commonwealth. Friends against friends. I've seen family against family. Neighbors against neighbors. It's really divided the community. Look at how contentious a hearing like this can get.

I've been accused, I don't know how many times today from everything to bribery to being ugly, and I only plead guilty to one of those. It's the latter one.

The second category of cases, are lease provision cases. As I told you, those are the hottest new area of cases. That's the area where most cases are being filed right now.

Only one appellate court decision has come out in that area. That is the Diamond Hotel case. It involves a change of law provision. They found, by the way, for your information, that it is unconstitutional that particular type, but it severed it from the agreement.

There are other provisions that can be called in to question. There are so many for each one of these types of provisions, there are so many flavors that are involved.

Let me give you an example. Repurchase of improvements; repurchase of improvements secured by a lien; repurchase of improvements secured by a lease extension; repurchase of improvements at fair market value; repurchase of improvements at the cost of the improvement; prohibition on the sale, mortgage, or encumbrance on the lessor's reversionary interest without the lessee's consent; a requirement that the lessor mortgages the fee interest for the lessee to obtain construction financing.

These are all issues that have been brought up in existing litigation, and when you see how many flavors there are, I can think of more provisions that could be called into question, and you think of how it took nine years to reach a decision in one particular area, you have to realize we're going

to be in litigation in this area for years and years.

I have to tell you that it's very difficult for me as an attorney when someone comes in and they want me to draft a lease, I can't answer some questions, because I don't know if some provisions are going to be held ultimately to be constitutional or not.

Courts have already differed on the issue of repurchase of improvements. I can tell you judges who have written opinions saying it's okay, and judges who have said that it's not okay in the resulting trust area.

You can see the Supreme Court said resulting trust is the rule and it throws out the transaction. In the Commonwealth trial court, it held the opposite, several judges there. The appellate division and the district court held the opposite. The Ninth Circuit held the opposite. So judges can disagree.

Even Mr. Mitchell has indicated previously in his testimony in front of other bodies that, yes, judges can disagree. The answers are not all clear in this area.

The sham corporation cases, I've have to tell you that I cannot think of a single appellate decision that has been rendered in this area. I can't even think of a trial court decision on this theory of a sham corporation. Maybe I'm wrong. Maybe I missed one, but I think I have read most of the cases.

In other words, these cases are in their infancy.

They have years and years of litigation ahead of them through both the trial courts and the appellate courts. Do we want to put our resources into that?

The last category, the BFP cases. Again, I'm not aware of a single BFP decision, bona fide purchaser decision. I don't think it's come up to bat yet. I think it's in its infancy. We have years and years of trial court decisions ahead of us. We have appellate decisions ahead of us in that area, as well.

And, by the way, until that is resolved, our land title system is the going to be useless. Our Recorder's Office can just shut down because it does not help us with respect to Article XII defects.

And that is why there isn't a single title insurance company in the world that will presently issue a policy in the Northern Marianas that covers Article XII defects.

As you know, that the fact is that insurance companies have left the Northern Marianas. If you can't protect yourself by carefully investigating the records of the Commonwealth Recorder's Office and you can't protect yourself by buying insurance to protect against that sort of risk, who is going to buy land? Who is going to lease land with these risks? I mean, the issue is that simple. It's that simple.

My last point: The litigation war, and to some extent it's a war of people on both sides. There's a lot of

interest, a lot of money involved in this, plaintiff's attorneys with contingency fees stand to make a great deal of money if they win cases. Attorneys, like myself and other attorneys, who are paid on hourly rates to defend cases, yes, we make money on these cases.

A lot of energy, a lot of efforts, have gone into all this litigation. It's left some casualties. I'm afraid the casualty is the community. I consider myself part of the community. I'm not of NMI descent. My children were born here. I was -- I've been married here. I've lived here for a lot of years. I've put in government service since the day I stepped on this island until now. I still have government service time that I've done in this community.

It's important to me that it be protected, and the community isn't being protected. This litigation is not in your interest and you should not believe people who tell you otherwise.

Let me tell you where is very first casualty is. It's one you should be concerned about, and it's one that I as a lawyer am passionately concerned about, and that is we've lost a sense of justice.

A fundamental concept of justice in the Commonwealth is that a person cannot be punished for violating a rule that is first announced after they've committed the act.

If right now I talked to Mr. Aldan, Delegate Aldan,

Honorable Delegate Aldan, and we have a conversation, and tomorrow the legislature passes a law that says that anyone who talks to Rex Kosack has to serve one year of imprisonment and he's arrested for talking to me today, would that be fair? It wouldn't be; right? You can't pass a criminal law and apply it retroactively.

In fact, our Constitution prohibits it. We don't announce new rules and apply them retroactively. Within this Committee's purview, is Article I, personal rights; right? Look at section 1.

Section 1 is on ex post facto laws. It prohibits them. Our due process, which is also in Article I, due process says that you can't punish a person without first giving them a reasonable notice as to what conduct is prohibited.

What I'm saying is that these rules have in them a fundamental moral sense that it is not fair to punish people, to harm them, to take away their property, or take away their liberty or life without first giving them notice as to what the rules are.

What are the Article XII cases doing? They seek to go beyond the rules we know and set up new rules. Should courts be allowed to set up new rules? That's a tough one. That's a tough decision, because, you know, constitutions are often called living and breathing documents. Judges routinely interpret constitutional provisions, and give them new meaning

and new life with changing circumstances.

I think that is the way constitutions should be. Let me tell you a problem. Article XII poses a unique problem. Section 6 of Article XII says that the enforcement mechanism is that any transaction is void ab initio. That means that if the courts set up a new rule tomorrow, that new rule will have to be applied retroactively to every transaction that has happened since 1978.

And, not only is it applied retroactively so some poor person is caught having a rule applied to them that they never had any knowledge that they would be held to. In addition, it causes a forfeiture of the land.

By cancelling out the transaction, the person loses their land that they either bought or they have leased, whatever they have, regardless of how innocent they are, regardless of the fact that they entered into the transaction in good faith; regardless of that no one could have known that what they were doing, some day would be held to violate Article XII.

There is no good faith exemption to Article XII. There is no good faith exception. Void ab initio causes a retroactive application of any new rules, and it causes a forfeiture.

In the BFP cases, it goes one step further. In those cases, a person has actually done nothing wrong. It's someone else that supposedly did something wrong causing a

defect in the title and a defect that they had actual awareness of and no way of knowing by looking at the record. They are completely innocent; and, yet, there are people suing the people trying to take away their family homes. Where has our sense of justice gone. Where is our sense of moral decency. This is want Article XII litigation is about.

This is why attorneys get so impassioned about it, because it is very, very unfair. Let met tell you -- that's not just Rex Kosack's opinion. Let me tell what the finding of the Commonwealth Senate was, the Eighth Northern Marianas legislature. I'll read you one sentence.

> "There are also fundamental issues of fairness and justice at stake. It's clear from testimony and other evidence that in at least some cases, innocent persons who acted in good faith are now being threatened with the loss of their homes and their life savings because of Article XII suits."

This is an intolerable situation. Judge King, who wrote the descent in Ferreira v Borja and then later sat on the majority of Ferreira when it was redecided this last January, wrote in the dissent:

> "What is clear is that if this court upholds a rule which permits the voiding of agreements entered into by persons who have no

knowledge and no reason to know of the unconstitutionality of their agreements or, in deed, of the possibilities that the agreements are logically or practically related to the acquisition of a forbidden interest by a non-Northern Marianas descent person, some persons may reap windfalls. Guess who? The plaintiffs."

**DELEGATE LIFOIFOI:** Excuse me, Mr. Kosack. Excuse me. You have one minute.

**MR. KOSACK:** If I may have three minutes.

**DELEGATE LIFOIFOI:** We need to call for a recess.

**MR. KOSACK:** You are going to call a recess now?

**DELEGATE LIFOIFOI:** We would like to call for a 15-minute recess now.

**MR. KOSACK:** I'm at the very end, but if you would like, that would be fine. I'll certainly wait.

**DELEGATE LIFOIFOI:** Now.

(A recess was taken from 1:18 to 1:38 P.M.)

**DELEGATE LIFOIFOI:** The hearing will resume.

Mr. Kosack, you have three minutes to wrap up.

**MR. KOSACK:** I thought that with the recess that time would grow, gather interest.

We were talking about what the fallout is, what would have been the casualties of all this Article XII

litigation. I said that I believe that our sense of justice as to what is fair in taking away property from persons who have been innocent violators of rules that could have only been unknown at the time that they engaged in their transaction, rules that are announced many years later by courts.

You know the counter-reply to that, which is most often made, is to bring up examples of fraud. We heard several witnesses mention the possibility of fraud today.

We all know, each one of us knows of some case, one or more cases, where people have been cheated out of their land. I have seen people, as an attorney, who come in to me and ask me to handle a case for them because they have been cheated out of their land, they did not get enough money because they dealt with some fast dealer.

There are land investors that do that. They're both of Northern Marianas descent and they're not of Marianas descent. Lots of people have done that. That is not a good thing.

But, just because someone sells their land for too little money does not mean that there has been a violation of Article XII. Article XII is like a measuring stick. It measures the length of a lease that you have with outsiders. If the lease is for 60 years, instead of 55 years, then Article XII is triggered, but it has nothing to do with the amount of consideration or amount of rent that you get for that land.

It's no good to talk about who has been cheated and who has not been. The amount of money that you get for your land has nothing to do with for how long you have alienated your land to this other person.

If you have been cheated, you can go to court. You can sue. You can sue on the cause of action of fraud or undue influence. That's how you get your protection. That is not what Article XII was set up to do.

Justice is a casualty. Another casualty has been trust by outside investors. When they learned that you could lose your land even if you try to follow rules, they're scared away. And when they go to lawyers and they're told that the lawyers don't have the answers, they're scared away.

If the simple act of leasing land is risky, then investors will have no interest in engaging in more substantial transactions in the Commonwealth.

The final casualty is one that happens to all of us. We're not talking about outside investors now. We're talking about everyone, Northern Marianas descent and not NMI descent, and that is there is no stability in land title.

If the bona fide purchaser rule does not apply to Article XII to protect innocent purchases who check land records, then there is no protection for either a buyer or for a lessee of land.

That means that if you go to buy land, there is no

protection for you, as well as there is no protection for me if I go to lease land. We're all affected by that.

In summary, the root of the problem is that these cases asked our courts to establish new rules under Article XII. And I'll admit that it's not unusual for courts to establish new rules, as I said.

But Article XII's void ab initio remedy creates a problem. It makes the new rules automatically retroactive, and it takes away an interest in land. It forfeits it regardless of the amount of investment that's been put in that land, no matter how much it has been improved, no matter how dear and precious it is to someone. That's the source of fear for investors, that today's transactions will be voided after years of investing in land because of a rule that is adopted many years in the future. That's the source of the injustice in these cases, that land is taken away from people many years after they've innocently engaged in a transaction that does not violate one of these 11 known rules of Article XII.

I'm asking this committee both for justice and for the future prosperity of the Commonwealth, for ourselves, for our children; that you, who have been given the power to change the Constitution, to propose amendments to the Constitution, that you work to bring an end to this litigation.

The legislature has done the best it can with the power given to it. It's now up to you to take it to the next

step.

Thank you, Mr. Chairman, for your indulgence.

**DELEGATE LIFOIFOI:** Thank you, Mr. Kosack.

Now, I would like to call on the members of the committee to ask a few questions.

Delegate Manglona.

**DELEGATE MANGLONA:** Thank you, Mr. Chairman.

Mr. Chairman, I would to at this point to just make some observation pertaining to Attorney Kosack's testimony.

I would like to say the Constitution on Article XII is crystal clear. Let it not be misunderstood. I think the language under Article XII is very clear. It says that only persons of Northern Marianas descent can own land. But it all boils down to some misunderstanding, and I think with all due respect to all our legal scholars, I would like to blame all the lawyers.

I'm sure the lawyers could have been very candid and blunt about that section, or that provision, and they could have advised their clients that they can come here to the Northern Marianas and they can do business, but they cannot own property. But they can lease for up to 55 years. And that is what there is.

The problem here is that we are trying to solve problems that were really created out of advice that was given to our developers.

Another observation I have, Mr. Chairman, is that you know what prompted and created all these misunderstandings was that the court made a ruling that there was circumvention. But the court failed to go one step further by deciding on what should be the resolution of the problem.

I think that is where the lawyers disagree, and that's what prompted all of these tremendous numbers of court cases before our courts today.

Now we are tasked with the very difficult decision of who to side with. Are we siding with the original owner or the second owner? All of them are of Northern Marianas descent.

As I can hear from the testimony, we have two sides of the story. Mr. Mitchell is representing the original owner, and some of the attorneys are representing the second owner. Both of them are of Northern Marianas descent. We have now been caught in a dilemma, what should we do, and this is what this committee is trying to get at.

Now that we have all these problems today because of the court decisions, Mr. Kosack, what can you do to assist this committee, rather than arguing about Article XII, because we all know there is a restriction there, what can we do to rectify all of the problems before our courts today as a result of all that confusion?

How would you assist this committee to do its work so that we will identify the real problem and tackle it from

there rather than talking about all these other aspects, the technical, the legal? What will you do to help this committee identify the problem and how to rectify it?

**MR. KOSACK:** Thank you, Lieutenant Governor. There are two ways I can assist the committee. I'm engaged in one of them already, I'm trying to, and that is to educate you as to the nature of the problem.

The problem has been out there for nearly a decade. It's involved a lot of cases. It's hard for most attorneys to follow what is going on. I tried to give you an overview of what is going on. I agreed with your earlier remark that the language of Article XII is crystal clear. It is crystal clear.

I gave you the rules, which I think come out of that clarity. As I pointed out to you, these cases don't involve people who have violated those crystal clear rules.

The litigation that is out there involves cases, people, who are trying to establish new rules, something that in your clarity in looking at Article XII you won't find that the rule is there.

That is what my first step was, was to show you that the nature of the problem is that these cases don't involve those rules that you understand and that I understand are in the Constitution.

I guess I should go back out of sense of honor to lawyers, and I should say lawyers make a great butt for jokes,

but in this case, I think the accusation against attorneys is probably not well taken because these new rules are rules no attorney could have anticipated because they are rules that are not found in the Constitution, whether you can have a repurchase of improvement provision, whether you can have a change of law provision, whether or not person who provides money is important or not to the transaction. Those are not in those crystal clear rules.

So no attorney, whether it's F. Lee Bailey, your counsel, or me, no one can tell a client with 100 percent certainty what is permitted and what is not permitted.

I don't think in this particular case that attorneys take the heat or that the clients take the heat.

The second way I can help the committee, beyond educating us on this problem, because there is a lot to learn, is by suggesting solutions. Let me give you a couple of ideas. Okay?

I think one of the things that is very helpful in Public Law 8-32 is the severability provision. It's very simple. Remember we talked about the four types of cases? This affects only one type, the lease provision case, but it is a growing type of case, and it will take years to litigate.

Basically, the theory of a lease provision case is that if there is something bad in there, you toss the whole lease out.

A severability, you are familiar with it from all your years on the Senate, when severability is commonly added on to legislation at the end, and it simply goes with the notion that if you have got an apple, it has a bad spot in it, you don't throw it out. You cut the bad spot out and then eat the apple. That's what a severability provision does with the lease.

If you have a lease and it has a bad spot in it, you cut the bad spot out and let the rest of on the lease go forward, and that's what is in 8-32. It's not something horrible that makes Article XII lawsuits impossible or hurts the enforcement of Article XII. It's something that allows essential justice to occur. The parties both agreed to make the lease. This allows it do go forward, but without the bad part. That would be my first suggestion. Severability should be put into the Constitution.

A second suggestion that is in 8-32 is the statute of limitations. There is a six-year statute of limitations in 8-32 which limits the amount of time a person has in which to bring a lawsuit.

And the advantage in that, the reason behind that, is that six years is plenty enough time to determine if there is violation of Article XII.

It gives plenty enough time to get into the courts. You've don't have to finish the case in six years. You only

have to start, to file the case within the six years.

This gives people plenty of time to litigate if they need to. But after six years, land should go into repose. The stability should take over. Our interest, the community's interest, in having stable land should occur.

If you look at a piece of property and you want, say, in your case, you wish to buy it, then, if you know that the last transaction occurred more than six years ago, you don't have to worry about the Article XII issues and what new rules may be there, what unknown defects are going to taint the whole transaction.

I think a statute of limitations is a good provision and that is in Public Law 8-32. It has not been tested by the courts yet.

I think that, obviously, the enforcement mechanism of Article XII should be looked at because it does cause this retroactive application of new rules, because it causes forfeiture. That's something I leave that to the discretion of the committee.

Those are some ideas. I hope that does assist you.

**DELEGATE MANGLONA:** Thank you.

As I look at this case, sir, we understand what created all of these misunderstandings and all of these problems. I would rather see that we find a common ground for a solution.

I would like to encourage you, if you can assist this committee, maybe in the next three, four days, at least, to come up with any recommendation or suggestion that you feel that would cure, if not all, but some of these problems.

The question that I'm going to ask you next is: What is your feeling, do you think that this can best be corrected by this Convention or it can be better dealt with if we go and let the court decide some of these pending questions?

**MR. KOSACK:** That's a good question. It's a point I didn't cover. I have a very firm feeling about that. I think that the Convention should correct the problem.

As I pointed out before, the resulting trust cases took some nine years to bring to what looks like might be a final answer. That's a long time. That's only one of four types of cases.

If we don't have our Convention come up with an answer to these problems, then we're going to be burdened with years and years of litigation in court. That's a loss of judicial resources. It's a long period of uncertainty. I don't think that benefits anyone. I don't think it benefits the litigants. I don't think it benefits the Commonwealth. I recommend this committee should do it.

**DELEGATE MANGLONA:** I asked the question because it appears to me that in everyone's mind, even in the court, they feel there is a circumvention of Article XII, and everybody

feels that Article XII should be read as is in the Constitution.

The problem here lies with circumvention. The problem lies with the original owner, who perhaps feels that he or she was cheated and that's where some of these problems arise. That's why we have so many cases now before our courts.

I'm wondering whether it would be right for this Convention to address those areas of circumvention here rather than permitting the court to take care of the problem.

**MR. KOSACK:** I think that the committee should try to address as much of Article XII as it can. I don't agree with your characterization of circumvention.

The courts have not found there is circumvention. Quite to the contrary. The majority of courts have found that there is no circumvention and have not found Article XII violations.

You asked what causes these cases to come about in the minds of the plaintiffs. I don't know. I can guess. We can look at a couple of the factors.

One of them is that in many of these transactions that are sued upon, are transactions that occurred before the economic boom that we all experienced in the Commonwealth, or at the very beginning of the boom.

At that time, land prices were very depressed, quite low. A person would lease their property or sell it, whatever the case was, at a very low price. Yet, a year or two

years later, they see the value of the land go up five-fold, ten-fold because of all these transactions that were occurring.

Then they felt, as you said, and I think it's accurate, a lot of people felt cheated and said, "This isn't a good deal. I've got cheated. I want to undo it."

They found an attorney who said, "Well, I think I can get you out that. We'll use Article XII." It's a mechanism for them to try to get the land back so they can readjust the economic situation and then lease it over again at current values, which are higher than the values they had then.

I'd have to tell you personally I don't think those people were cheated, but I think it's unfortunate what has happened to some of those people.

I think that when anyone sells or leases something, they negotiate to the best of their ability, and if the market changes a year later or two years later, we all take that risk.

And again, I contrast this with those cases that I talked to you about earlier where there is fraud, actual fraud, real cheating going on. I'm distinguishing it from those situations.

I think that is what has fueled a lot of the Article XII controversy. I think a lot of the litigation has been fueled by that.

To the extent that people feel there is circumvention that is at the root of this, that's a problem.

It's a problem of public education, a problem of public understanding.

There has been reference to the massive lobbying efforts that went on before the Eighth Legislature. That was an attempt to educate the public. One of the great benefits of that is that a great deal of the public, a great many of the people in the public who felt that this litigation was not good for the Commonwealth stepped forward. Tano y Taotao people, they stepped forward, they came forward, and they talked rather than the lawyers. All right?

So when the legislature -- those hearings on 8-32, which were probably some of the most well-attended hearings in the history of the legislature, one of the most thoroughly considered pieces of legislation, that's probably why your administration signed it into law.

**DELEGATE MANGLONA:** Thank you.

Let me conclude the hearing by observing that, more or less, you are asking us to be involved in what I call maybe the lawyers' war on land. Thank you.

**MR. KOSACK:** Fair enough.

**DELEGATE LIFOIFOI:** Delegate Gonzales.

**DELEGATE GONZALES:** Thank you, Mr. Chairman.

Before I ask Mr. Kosack a series of questions, I would like the record to reflect two statements. The first of which is to agree and reiterate the statement made by our former

Lieutenant Governor, Delegate Manglona, that one of the inherent roots of the problem is litigation with attorneys themselves.

Article XII is crystal clear with regard to the restriction of land to NMI descent people. I would like the record to reflect that, that one of the problems is the attorneys themselves.

No. 2, the commotion within the Eighth Legislature regarding the sentiment that Article XII is to be blamed for the economic downfall, with all due respect, I disagree with that, as well.

I don't think there is any proof for the proposition that Article XII was the culprit for our economic downfall. I want the record to reflect that.

The first question: In your opening argument you mentioned something about the instability of land values, which you cited from one of the statements of the Eighth Legislature.

My question is, and correct me if I'm wrong, there was not at that time, nor I think up until this moment, any formal standard procedure to establish fair market value of land.

I remember back in I think '89 it was, the Shimizu land lease where land where the golf course is right now was appraised at 12 cents a square meter. I thought that was a hoax, of course.

But absent the presence of real estate value, or

indicators that would show that this is the market rate value for this portion of the island and that portion of the island, absent that real estate value at the time, how would you have justified a fair assessment of a deteriorating market value for a disposition of public land?

**MR. KOSACK:** I'm not sure I understand your question. If you could clarify it.

**DELEGATE GONZALES:** Okay. People have said, for example, the case, again, was with Shimizu. They said it was 12 cents a square meter.

Now, for an ocean view property of that magnitude, 12 cents sounded, to me as a layperson, to be a hoax. It was -- it was far below what the actual price would have been.

Now, my observation as a layperson, as a constituent, as a resident of the CNMI, how do we establish a fair assessment of the prevailing market rate value of the land in Kagman, ocean view property, as opposed to a property in Chalan Kanoa.

Absent that body, absent that standard market rate value of land, how would you or will you justify a fair assessment of a land value?

**MR. KOSACK:** I can give you my opinion. I'm not sure how it affects the issue on Article XII.

With respect to land values, the way it's commonly done in courts, is that people who are on adverse positions on

land value, the owner, for example, and the government in the case of eminent domain, each side brings in appraisers that have appraised the land.

The court may appoint a neutral appraiser and they testify as experts on a number of factors that they look at, such as you indicated, proximity to the ocean, access to utilities, comparable values in land sales or land leases in that vicinity for similar land, that sort of thing.

The court looks at the credibility of the witnesses, as much as you are doing today, looks at the credibility of the witnesses, looks at their expertise, looks at the factors that they've considered and decide whose opinion it's going to adopt.

That's the only way I know of that land values are established, a fair market value is established, that, I guess, I would rely on.

My guess is -- I did not attend the Shimizu hearing, so I'm not really familiar with the testimony you are talking about.

But in that particular case, it may be that that 12 cents per square meter, I think you said, that was the opinion of one expert representing one side, you know, as opposed to a final finding. I don't know.

**DELEGATE GONZALES:** I'm curious to know, for example, in the State of California, or any state that you are familiar

with, how do they set their land values?

The reason I'm asking this is because it relates to the good faith execution of how contracts or leases are concocted.

Do you have any figures? Is it the same way?

**MR. KOSACK:** I don't know what is done in California. I assume it's pretty much the same mechanism that I've described to you here. That's essentially what is done here.

We've had a number of cases in our courts, and one that comes to mind, exchanges that come to mind, are the Tinian exchange that occurred.

**DELEGATE GONZALES:** Thank you.

Second question: You reiterated in the beginning of your remarks, or at least the previous speaker, Mr. Mitchell mentioned it, I'm sure you know, that the CNMI Supreme Court decided that the provision for the non-NMI descent providing money to an NMI to purchase land was held unconstitutional. Then the Ninth Circuit Court of Appeals reversed it. The resulting trust --

**MR. KOSACK:** That's essentially right.

What occurred is that the Supreme Court in those earlier decisions, '91 and '92, made the decision that the resulting trust doctrine applied to that fact, that circumstance.

It went on appeal to the Ninth Circuit. The Ninth

Circuit in of those cases, Ferreira, indicated that the reasoning used by the Supreme Court with respect to resulting trusts, applying it to this particular factual circumstance is untenable, which means without much merit, I suppose, is the way I would put it.

It didn't reverse it. It didn't tell the court what to do. As I recall, it remanded it. It may be that they reversed it. It was sent back. The it was sent back to the CNMI to be decided as they determined.

The CNMI Supreme Court heard arguments in January of '94, and if I recall right, in January of '95, after considering it for a year, issued a new decision. And this time, rejected the doctrine of resulting trust.

I can't remember on which grounds, whether it was illegality or intent.

**DELEGATE GONZALES:** You mentioned that one of the vague provisions that is not in Article XII is specifically regarding resulting trusts -- is that correct? -- that it's vague, that it's not within one of the 11 rules.

**MR. KOSACK:** You are --

**DELEGATE GONZALES:** Is that what you said?

**MR. KOSAK:** I've indicated that the resulting trust rule is not in those 11 rulings, the crystal clear language you are talking about.

**DELEGATE GONZALES:** Absent that specificity in the

Constitution, specifically, Article XII, and the fact that the CNMI Supreme Court ruled in contrast to the Ninth Circuit -- okay?

**MR. KOSACK:** I'm not sure. Go ahead.

**DELEGATE GONZALES:** -- how then can the reversal of the Ninth Circuit of the CNMI Court Supreme in the Aldan-Pierce case and in Ferreira be justified absent that specificity.

Does the court --

**MR. KOSACK:** That's a good question, actually.

The answer is that the resulting trust doctrine is a doctrine of trust law. It's a doctrine of substantive it is a Article XII Constitutional law doctrine.

This is something that there was a great deal of testimony on in the second legislative hearing in the Eighth Legislature on 8-32. That it's a doctrine, and that it's very simple to understand.

It's a doctrine that says if I give you $200 and you go take that money and you buy a car with that, and later you and I show up in court, I sue you because you kept the car and you won't give it to me, and I say that ti was actually for me. You come in to court and say, "No, it was supposed to be mine."

The court looks at it and it has no idea what our intent was, it will say that in a case where it is ambiguous and they don't know what the intent is, they'll look to the factual

circumstances, and they'll look to the source of the funds and say that it must have been the intent of the person who paid to be the owner of the vehicle, and the other person is holding is only holding it in trust for that person.

The problem with that is that it is kind of like a last resort rule. It's when you don't have any evidence of intent. In the particular case where it was applied, Aldan-Pierce and Ferreira v Borja, there was ample evidence as to what the intent of the parties was, which is that the money was going be provided so one person could buy land and become the owner and that in return, a 55-year lease, 40-year lease, whatever it was, a permissible lease, would be given.

The intent was there. So as Professor Holbrook, who writes the restatement of trusts, the third restatement, says:

> "It is an intent enforcing doctrine. You look to the intent of the parties."

That's one reason why its untenable. The court ignored the intent that was clearly expressed in the evidence and, instead used this other doctrine.

Another reason is because the doctrine cannot be used to accomplish an illegal purpose. If the court really determined that the intent was that I give you the money and you are going this time to buy land for me and you going to hold it for me, but I'll be the true owner, if that was the real intent,

that would violate Article XII. That would be an illegal transaction. You can't use an resulting trust to create an illegal transaction only to knock it out later. That's another reason why it's untenable.

There are two or three reasons why the adoption of that doctrine by the Supreme Court was not a good legal decision. Essentially, that was what was argued, and the Ninth Circuit said, "yes."

But you see those arguments that I've just given you they revolve around trust law under the Restatement, I think it's section 440. It's trust law; it's not Article XII law.

First you go to trust law to decide what interest each party holds, and then you take that over to the Article XII measuring stick and say, "Okay. Is it more than 55 years or less than 55 years?"

So they used the trust law and said, "Oh. The non-NMI person is really the owner. That's more than 55 years, and so they kill it." The dispute in those cases was not over Article XII. The dispute was over the proper application of trust law.

**DELEGATE GONZALES:** Third question: You were involved as counsel to the Second Constitutional Convention; is that correct?

**MR. KOSACK:** Correct.

**DELEGATE GONZALES:** You have effervescently presented

both sides, cases pertinent to your 11 rules.

**MR. KOSACK:** Right.

**DELEGATE GONZALES:** I wish you had, I guess, effervescently, as well, thought of it to have transpired.

My question is: You mentioned resulting trusts, ambiguous cases in Article XII, you know, the absence of it, the four types of cases -- the resulting trust cases, lease cases, sham corporations, and BFPs.

**MR. KOSACK:** Right.

**DELEGATE GONZALES:** As counsel, did you at that time think of the possibility of such cases, could you have inserted some clarification into the Constitution at that time?

**MR. KOSACK:** No. I wish I could have. I would be a great soothsayer. I'd have the ability to look into the future and guess what would be happening. Remember, those case didn't happen until after that Convention.

Prior to the time of that Convention, the Article XII cases that really achieved any notoriety were cases that had simple issues on these crystal clear 11 rules that you are talking about.

The litigation, as I indicated in my opening remarks, the litigation started a year after that Constitutional Convention. After the Convention was over, after the ratification by the voters in the following spring, was when Article XII was used for the first time as a sword rather than a

shield, and it went out and these lawsuits started.

I think in the next several months, I know in September and October, there had to be at least six Article XII cases filed in 1986. Just boom, boom, boom, one right after the other.

I didn't have the ability to project what was going to occur a year later in the future. And I certainly would have never have guessed that someone would have concocted these sort of theories and tried to get the courts to adopt them as rules.

**DELEGATE GONZALES:** You mentioned it was a year later, after the passage of the amendments in '85.

Do you think that the reason why those cases arose was because of the '85 amendments? I guess what I'm trying to say is that prior to '85, prior to the Second Constitutional Convention, there was no litigation with regard to Article XII.

**MR. KOSACK:** Right.

**DELEGATE GONZALES:** Now, my question is: Do you think that with the advent of the '85 Constitutional Convention, the second one, that, obviously, there were cases, litigation after the '85 Constitutional Convention, do you think that the '85 amendments contributed to that litigation?

**MR. KOSACK:** That's a good question.

I'm just looking over at these 11 rules. I guess the answer would have to be without a question "no." The amendments made in 1985, if you take look at the rules, my

little list of 11 rules, rules 1, 2, 5, 6, 7, 8, 10, and 11. None of those rules are the rules on which these lawsuits are based.

The basic ingredient to the present lawsuits are two rules: Rule 1, which says that a leasehold interest by an a non-NMI interest can only hold a leasehold interest up to a period of 55 years, or 40 years, either way, it does not matter.

The second ingredient is: If you violate that, it's void ab initio.

Those two ingredients are the ingredients that make for a lawsuit and those are what the present lawsuits rely on, plus a theory that somehow a particular document goes beyond 55 years.

Those could have been easily been filed between '78 and '85. They weren't. At that time -- you know, if you want answers, I don't want to get real personal here, one of the things happened, obviously, is that almost all of the lawsuits that were filed were filed at that time by one attorney. Not all of them, but almost most all of them were filed by a single attorney.

**DELEGATE GONZALES:** I guess I have a hard time believing that it was not contributing factor to the drastic litigation workload, because it was low, then why weren't there Article XII litigations before the '85 Constitutional Convention.

**MR. KOSACK:** As I just said, the concept of Article XII

litigation in its present modern sense of these four types of cases is the brain child of basically one attorney. And one attorney started filing those cases and in probably '85 or '86 and had the majority of cases then and has had them since then. It came from one particular person. I don't think that person was on island before that date.

**DELEGATE GONZALES:** Another question is: Mr. Chairman, can I have two more questions? Thank you.

Again, as Lieutenant Governor Manglona mentioned the Constitution is very clear about the restriction of land ownership to NMI descent.

The '85 Constitutional Convention inserted a phrase which includes the adoption of any person under the age of 18 years old to hold -- to be eligible for land ownership here. You were --

**MR. KOSACK:** Are you sure of that? I don't think that is correct. I don't think that's a correct statement.

**DELEGATE GONZALES:** My reading as a layperson is that the inclusion of a phrase which is to make eligible people adopted, to be eligible for Article XII.

**MR. KOSACK:** I hear you.

**DELEGATE GONZALES:** Right.

**MR. KOSACK:** My recollection, I may be wrong, but my recollection is that the adoption provision was in the original Constitution in 1978. It was not added in 1985. It's part of

the original Constitution.

**DELEGATE GONZALES:** Mr. Siemer, was that part of the First?

**MS. SIEMER:** That is correct, it was part of the First, 1976 Constitution. Section 4 was not amended in 1985.

**DELEGATE GONZALES:** All right. I thought it was part of the Second Constitutional Convention.

Last question, is with regard to the severability clause. You are advocating that it be included into the Article XII section of the Constitution.

**MR. KOSACK:** That's right.

**DELEGATE GONZALES:** Again, as a layperson, I would not agree otherwise because if lawyers and judges would just follow conscientiously, honestly, and with integrity the intent of Article XII, there is a no need for us to insert severability clause that would, in essence, say that if one portion of the contract lease agreement is faulty, then, you know -- it was just a simple basic understanding.

**MR. KOSACK:** Let me answer that for you. I will ask your indulgence for a second. I am going to make you an attorney. You are now an attorney.

Now, you graduated from law school. You've taken the Bar in the CNMI. You have passed the Bar, and you've got these rules in front of you because I handed them to you -- right? -- and their crystal clear according to you, crystal

clear. Now, you tell me: Repurchase of improvements. Is it valid or not valid in the lease? Look at the crystal clear rules and give me an answer.

Take as much time as like.

**A VOICE:** It's not an issue.

**MR. KOSACK:** I can tell you that -- it is an issue.

I can tell you that the answer is not in there. It's just not in the rules to be fair to you. It's not in the rules. You can ask your counsel if she, or he, believes that it is in the rules. It's just not in there. It's something we're left to guess at how a court would decide that. When look at another issue -- that's repurchase of improvements. Let's go to --

**MS. SIEMER:** Let's stick with repurchase of improvements.

As his lawyer, I would look at the words "including renewal rights." And I would ask myself doesn't repurchase force a renewal and doesn't it change the economic circumstances?

So as his lawyer, wouldn't I at least have a question as to whether that was a permissible way to go about it?

**MR. KOSACK:** I think that is a good point. The answer to that is that you have to keep in mind the different flavors of repurchase provisions.

It sounds to me like you are thinking of a

repurchase section and then later on a lien section being placed or probably an automatic renewal in the event that the person is not able to come with the money up for the repurchase.

A repurchase section in itself, I would argue, does not do that. It requires them to repurchase it. If it's not repurchased, it does not require that the lease be amended.

But to answer -- let me answer your real question, which is: Wouldn't it cause a question to come up in the mind of the attorney?

Clearly, I agree with you 100 percent. It would cause a question to come up in the mind of the attorney. But would it cause the answer to come up?

**MS. SIEMER:** What Delegate Gonzales is trying to get at, if I may, is that perhaps the Constitution should include incentives to lawyers to follow the Constitution as correctly as they possibly can, and therefore, if something creates a question, the burden should be on the lawyer and his client to take on that risk. And what the lawyer should say to the client is if do you do this, you are taking on a risk, but if you leave this clause out, you have a clean lease and I can tell you that it will be all right.

The incentives in that kind of a transaction flow in the right direction, which is to the lawyer who knows where the risks are.

I think what Delegate Gonzales is concerned about,

should this Constitution by putting in a severability clause to reverse that, so that the incentives are for the lawyer to put in as much as he or she can, take the chance, and when it comes to be litigated, the only thing to be lost is the portion that is unconstitutional.

**MR. KOSACK:** Without a penalty. Right.

**MS. SIEMER:** Yes.

**MR. KOSACK:** I understand what you are saying.

It raises several issues. The first answer I would have to that is that incentives already exist. They've existed for years, for the last 10 years of people drafting leases, 16 years. The incentive is malpractice. The attorney who makes an error on a lease like that is already looking at the possibility that they could be sued for malpractice, because a lease is later thrown out and the person loss the land and everything that is built on there.

In addition, I think that lawyers have done the best that they can to try to determine what is permissible, what is not permissible. Take for example, the change of law clause, the change of law provision.

There was a study done a couple of years ago of the percentage of leases at the Commonwealth Recorder's Office that have a change of law provision in it. I don't remember the exact numbers, but I can get it to you. It was well over half the leases that were drafted, and drafted by attorneys. They

had change of law provisions in it.

It was because those attorneys, I think, and I know many of those involve attorneys who involve their own land there is a desire to be conservative. I think the fact is that attorneys thought that a change of law provision would be valid because it never goes into effect until the law changes.

So when it changes, then, okay, we can, you know, if it's 55 years today, the change of law provision has really no meaning until suddenly it goes to 60 years tomorrow, then it goes into effect. And at that time, it does not exceed the 60 years.

That seems to me to be very logical. I'm really surprised that our Supreme Court just a couple of weeks ago reached the opposite conclusion, and said no, change of law provision violates the Constitution.

Now, I never put a change of law provision in a lease. It has me scratching my head because I would have ruled that the change of law provision is valid.

I would rule that a repurchase of improvements provision is not valid. But I can tell you that there are very many members of this Bar who are probably better property attorneys than I who would argue to the death with me on that particular issue because they disagree.

As long as we have rules where reasonable minds disagree, there isn't that crystal clarity. The crystal clarity

is as to the basic terms of the Constitution. But beyond that, in these areas that we're talking about now, which lease provisions can be used, which can't, there isn't that clarity. Should the client be punished?

I don't think Article XII should be used as an incentive program for attorneys to draft tight, conservative leases.

It should, as I said before -- the idea is we want to make the Commonwealth a place that is safe to invest in, to engage in business in. We want to try to uphold the reasonable expectations of parties to an agreement. If an agreement goes on 50 pages, has 40 provisions, and one of them is a change of law provision, the whole agreement should not be thrown out. You don't throw the baby out with the bath water.

As I said, before, it's like an apple. If there is a bad part of the apple, you cut it out, and you eat the rest of the apple. But if there is bad part in the apple and it's small, you don't throw the whole apple away. It seems, to me, to be good common sense.

**DELEGATE GONZALES:** It's also common sense, to reiterate the fact that, you know, it's crystal clear.

I'll close with this statement: It's crystal clear with conscience, honesty, and integrity if we follow the intent of Article XII or the provisions of the Constitution, it will all fall into place.

It seems to me that the move to include this change indicates, and I guess it's my personal opinion, that the lawyers will continue, perhaps, to feel that they have leeway to continue to attempt to circumvent Article XII.

It's just an opinion on my part which, I guess, would make obvious where my position stands with regard to a severability clause.

I guess that is it. Thank you.

**MR. KOSACK:** Certainly. I don't think it really encourages lawyers to do anything that circumvents Article XII because if it's invalid, it is invalid. It gets thrown out later on. They don't get any benefit and neither do their clients. I certainly appreciate your view.

**DELEGATE LIFOIFOI:** Delegate Quitugua.

**DELEGATE QUITUGUA:** Mr. Kosack, I heard several times that Article XII is crystal clear. If it is, why do the courts not make decision on cases that are referenced to Article XII but are not actually Article XII and throw them out of court?

**MR. KOSACK:** That's really, really a good question. It kind of cuts to the heart of what I'm saying.

I'll agree with both sides of the proposition. It's crystal clear and it's not. Let me tell you what I mean by that.

It's crystal clear in the sense that the language of Article XII, the language that you have in front of you,

comes up with these crystal clear rules.

I know as a lawyer, any lawyer that violates the rules, any lawyer that makes a 60-year lease is committing malpractice. It's that clear. Those rules are clear.

But, as I indicated, these new lawsuits, the litigation that has come up since 1986, does not try to enforce these rules. It attempts to ask the courts to create new rules, such as, one, the source of the money in a purchase agreement determines whether its valid or not; in other words, if it comes from a person that is not of NMI descent as a rule. Or, two, they try to establish the rule that a repurchase of an improvement or change of law provision extends a 55-year lease beyond its stated term. Or, three, that a corporation that has as a minority shareholder one person which dominates that corporation, even though it meets all the four requirements of the NMI descent test for a corporation, that corporation will be ignored and that particular shareholder will be treated as the owner.

These rules, obviously, are not crystal clear. They're not here in Article XII. We've got to face the reality. The reality is that counsel are asking the courts to extend Article XII, to create new rules, take the list of 11 up to 12 or 13. That's why it's not clear.

**DELEGATE QUITUGUA:** My next question is that no matter what we do with Article XII, even if we put probably 1,000 pages

of Article XII, the lawyers will still come back and find things that are not included in there or are not specifically spelled out in there, and try to force the court to come up with rules again.

**MR. KOSACK:** You are very realistic. I think that is probably true. The fact of the matter is that as long as there is property which has been obtained, in this case, where property is obtained at a lower value before an economic boom and subsequently now the property is worth much more money, for the person to receive the property back and make a new transaction, they will make a windfall profit, and as long as the third of that or 40 percent of that profit goes to attorneys on contingency fees, which is, as you know, a regular arrangement for a contingency fee, as long as that can occur, there is an incentive for lawyers to try to go out and break these deals and use Article XII, try to get the courts to create new rules of Article XII to put aside agreements.

Win one case, you know, you could make a million dollars. The incentive is there for litigation.

I just hope that this committee in trying to close some of these loopholes and some of these problems will bring enough clarity to it so that the courts wouldn't have as much difficulty dealing with it and so that some of the litigation would be discouraged.

**DELEGATE QUITUGUA:** I have another question.

Do you feel that Article XII should not be touched as is in its present form?

**MR. KOSACK:** No. I think that Article XII should be amended. I guess that was behind the question of severability to be put into Article XII. I think that would cure one whole area of cases, which are the lease provision cases, which I think otherwise would take years and years for the courts to unravel.

I think that a statute of limitations should be put in there so that after six years of opportunity to sue on it, if a person does not sue, then, finally that land title will essentially be quieted for purposes of Article XII.

I think that those are things that should be looked at.

**DELEGATE QUITUGUA:** Do you agree on taking some portions of Public Law 8-32 and putting them in the Constitution?

**MR. KOSACK:** I do. The two sections I just told you about. Severability comes from 8-32 and I would use essentially the same language in there because it talks about -- there is a balancing test in there. They don't apply severability in all cases.

If it causes unfair prejudice to one of the parties, then the court has the discretion not to apply it. I think it's a very carefully balanced test.

I think the other thing, the statute of limitations

that's in there also can be moved into this with a little bit of change.

When you consider how extensively that legislation was considered with the number of witnesses that were involved, the great deal of testimony that was presented, the lengthy hearings, several hearings in a row, the legal expertise that was put into it, I think that borrowing from 8-32, given the short time schedule of this committee, 60 days, is not a bad idea.

**DELEGATE QUITUGUA:** After inserting some provisions such as you recommended in the Constitution, is it fair to say that you should also insert in the Constitution a provision that the legislature shall not enact any law that will try to weaken the intent of Article XII, if it is amended and includes the provisions you recommended?

**MR. KOSACK:** I think the problem with a provision like that is, you know, basically, the legislature is not supposed to pass a law that is contrary to Article XII. And if a law comes up that is contradictory to the Constitution, the Constitution is more supreme and that law, then, would be ineffective.

I don't know that you need to say that. That is already the effect of the law.

**DELEGATE QUITUGUA**: Do you think that 8-32 is creating some problems in reference to Article XII or in having the court decide on these issues?

If we put this provision in there, in the Constitution, and the people ratify it, don't you think that limiting the legislature in enacting laws to try and create another law is similar to 8-32 will kind of minimize the litigation in land dealings?

**MR. KOSACK:** I think that 8-32 has not aggravated the situation. I don't think it has made things any worse.

Contrary to what Mr. Mitchell testified to earlier, he predicted that all the litigants in all these Article XII cases would come running into court with 8-32 in their hand saying, "Dismiss the case."

That has not happened. The only case that I know of in a year, year and a half, since the law became into effect, I'm aware of only one case where there has been a motion for summary judgment to bring the case to an end based on 8-32, and all the rest of the 30-some cases that are out there have not had that happen. The facts are contrary to what he just stated.

8-32, the provisions in there -- you need to look at 8-32. There is nothing scary about this. There is nothing wrong. It provides restitution.

The Lieutenant Governor said one of the problems with the Article XII litigation was that if the court found a violation, there wasn't any restitution to the person who was a defendant and lost their land. 8-32 puts in a restitution provision. It's fair, basic fairness.

Severability, which I just talked to you about, which is you don't throw away the whole apple if there is one bad spot in it. Severability comes from there.

The statute of limitations, which allows eventually some stability to come to our land title. That is in there. Attorney's fees, yes, that is in there, but that is to prevent windfall profits. That protects local people who hire plaintiff's attorneys to make sure that the attorney does not take away all the profit. Look at the amount of attorney's fees in there. They're quite commercially reasonable.

I don't think 8-32 has created a problem. I think it promises some solution to a problem. It has not been used very much yet.

**DELEGATE LIFOIFOI:** I'll recognize Delegate Villagomez.

**DELEGATE VILLAGOMEZ:** Mr. Kosack, prior to the enactment of 8-32, there was fear that the economy was going down, so 8-32 was enacted. We have a new government. The economy has not gone up. I wonder whether Article XII was the real cause of the downturn of the economy.

Anyway, earlier, Mr. Mitchell mentioned provisions in Article XII which prohibit, say, the owner from looking behind the corporation's document. Everybody talked about fairness, you know, to the owner, to the developer, and, of course, the middleman, and the lawyers get rich.

Don't you think that section is unfair and should

be stricken out, or maybe included in the Constitution to provide equality?

**MR. KOSACK:** The section that says you are not to look behind the corporate documents? No, I don't think so. It actually enforces the intent of Article XII.

Article XII sets up a four-factor test which looks at things which are found in the corporate documents, where you are incorporated, where your principal of business is, who your directors are, and who your shareholders are of voting stock. Those are things that are in the corporate records.

What it was intended to do was to keep people -- it was intended from keeping lawyers from getting rich. Through days and days of discovery, going over documents that have to do with things that are irrelevant to that inquiry, things about how a person voted at the meeting, what conversations they had about the votes, and things of that nature. I think that does not affect fairness, and it's actually intended to enforce Article XII.

**DELEGATE VILLAGOMEZ:** But according to Mr. Mitchell, it prevents the owner from finding out whether it's a sham corporation.

**MR. KOSACK:** I don't think it does.

**DELEGATE VILLAGOMEZ:** That's not what Mr. Mitchell said.

**MR. KOSACK:** I will just point one thing out. To date, the courts have not interpreted it yet, so we don't quite know

what the courts are going to do with that.

**DELEGATE VILLAGOMEZ:** Thank you.

**DELEGATE LIFOIFOI:** Delegate Aldan.

**DELEGATE TOMAS B. ALDAN:** Thank you, Mr. Chairman.

I like that phrase, sense of justice. I have a question on that.

Are you suggesting that to bring a sense of justice that all prior transactions be declared valid or a solution would be incorporate what you are recommending about severability, statute of limitations, and enforcement?

**MR. KOSACK:** I think that -- no. I'm saying that the sense of justice that is offended, or my sense of justice that is offended and where I think the Commonwealth has lost its sense of justice, is that if we establish new rules in these cases, if we expand Article XII beyond what are the crystal clear rules, if we expand it beyond the 11 rules into new areas, which is sort of the constitutional growth process, if that is done but we retroactively apply the rule to all transactions when no one could have known what the rule was, and we not only apply it then, but we take away the person's property and everything they built on it, that's the sense of justice that is offended.

Do we have to say all prior transactions are valid? Absolutely not. Those transactions which violate the known rules should be invalid. But we should stick with either the

known rules and be strict constructionists or we should look at the enforcement mechanism if we're going to be liberal constructionists.

**DELEGATE TOMAS B. ALDAN:** One final question, Mr. Chairman.

Would you believe or would it be true to conclude that if we take all the recommendations that you have made, we would have less lawyers in the Commonwealth?

**MR. KOSACK:** Is that a benefit to be achieved or one to be avoided? I certainly think that the Article XII cases keep some lawyers, many lawyers very busy. And, unfortunately, well, as good as that might be for some lawyers, it's not very good for our judicial system. A lot of time is spent in court. If we were to look at how many linear feet of files there are in the Commonwealth Superior Court and at the Commonwealth Supreme Court that are dedicated to these particular issues, I think we have to say we have a problem. We have a problem. We're putting too much time in on something.

And, at the very least, what we should do is make these rules more clear.

**DELEGATE TOMAS B. ALDAN:** Thank you, Mr. Chairman.

**DELEGATE LIFOIFOI:** Delegate Manglona.

**DELEGATE MANGLONA:** I have one question, Mr. Kosack.

I think it's included under your so-called 11 rules. This is pertaining to rule 1. This is pertaining to the

55-year lease.

With all the leases that you have drafted, what happens after the 55 years? Would the land be automatically returned to the owner?

**MR. KOSACK:** The first thing I should say, while I've drafted a lot of leases, I've never seen one come to the end of 55 years. I'm not quite that old.

But I think that the way it is handled at the end depends on who drafts the lease. Most leases I've seen and the way I draft them, at the end of 55 years, the land does -- it goes -- land title always remains in the owner.

What a lease is, it's giving possession to someone for 55 years. So possession of the land goes back to owner at the end of the 55 years. The only issue, usually, at the end of that period, is what happens to the things that have been built on the land called the permanent improvements. Different leases handle that different ways. All my leases have the same provision in them and that is all the permanent improvements left on the land at the end of the 55 years go to the fee holder. He owns them.

**DELEGATE MANGLONA:** I asked that question because many of our people are of the opinion that after 55 years their land will be returned to them.

I would like to ask you and maybe even ask the other attorneys whether our people are fully protected there or

is there a disagreement that would just leave the option for renewal in violation of rule 1?

**MR. KOSACK:** That's right. If there is an option for renewal in there, that's clear. That violates one of the clear rules. If it's a 55-year lease with an option to renew, it would be unconstitutional. You shouldn't see any of those leases out there. What you should see at the end of 55 years, the land goes back you.

**DELEGATE MANGLONA:** Therefore, it is your understanding that whatever transaction that has been transpired so far, that whatever the terms of the agreement, whether 20 years, 40 years, 55 years, that a upon its expiration that that will go back to the owner?

**MR. KOSACK:** That's right.

**DELEGATE MANGLONA:** No condition?

**MR. KOSACK**: You know, there is a trick to that question. I have to be careful.

With respect to the 55 years, that's correct. A 20-year lease can have an option to renew as long as the option does not exceed 55. If you have a 20-year lease, you can have a 35-year option. You can't have a 36-year option.

**DELEGATE MANGLONA:** But after 55 years, it has to return to the owner?

**MR. KOSACK:** That's the way the Constitution is written.

**DELEGATE MANGLONA:** And if documents are signed that is

reflects otherwise, would you view that to be unconstitutional?

**MR. KOSACK:** If a document says that a person is going to have it for more than 55 years, and that the lessee is not of NMI descent, it would be unconstitutional.

**DELEGATE MANGLONA:** You don't see the need for this Convention to put an extra protection in the Constitution protecting rule 1?

**MR. KOSACK:** The only area that comes to mind where there may be a need for extra protection is the issue of repurchase of improvements, the one that we were talking about earlier.

There are some leases that provide that at the end of that time period, yes, the land goes back to the person, but the Northern Marianas descent person has to pay, for example, the fair market value of whatever improvements that are on there, which could be a hotel.

**DELEGATE MANGLONA:** This is the problem. I'm sure that many of our people don't know that. I think that what they have in mind is here I entered into a lease agreement with a developer and after 55 years I am get being back my property, or my great, great grandchildren will get back the property.

Now, I just learned a new thing from you that says that no, maybe there will be a condition there that you have to pay back for the improvements. How would I pay millions of dollars? I know I would not have that money.

**MR. KOSACK:** That's right. I think that's the point.

Let me that I don't think that is in the majority of the leases. I think the majority of the leases are the sort that at the end of 55 years, the permanent improvement goes to the fee owner. Okay?

But there are some leases out there that have repurchase provisions in them and you may as a committee want to propose an amendment to make those repurchase provisions improper, unconstitutional.

Let me just tell you one thing: I don't put them in leases that I draft. I never have put them in leases that I have drafted.

Let me tell what an attorney who does put them in would tell you about a repurchase provision.

That attorney would say, "Well, it's only fair, and here's why: We put this benefit, this value, maybe a hotel or nice home or whatever, on that land and while we can only hold it for 55 years, it shouldn't be a windfall at the end of the 55 years that the person not only gets their land back, but the fruit of my labor, all of my investment, in making these things."

That's why I think those attorneys put them in.

**DELEGATE MANGLONA:** Mr. Chairman, I think this is an issue that I would like ask the Chair have our legal counsel look into. Maybe I'm not the only one to have that opinion that I'm expecting that after 55 years this land will automatically,

including the improvement, be mine.

I don't know what the transactions that are going on today. I would like to ask the Chair to start looking into that seriously.

**MS. SIEMER:** Let me ask you a couple of clarifying questions on behalf of Delegate Manglona.

If it is the view of the Convention that the repurchase agreements are unconstitutional, the Convention need do nothing, I take it, with respect to this?

**MR. KOSACK:** No -- I'm not sure. It has not been decided by the courts.

At this point we don't know how the courts are going to rule. If you, as a committee view, or the Convention views, that this should be unconstitutional, I would think that the Convention has to speak out on it. The courts may disagree.

**MS. SIEMER:** What is your view, if the Convention speaks out on it, with respect to repurchase rights? Does it somehow affecting the court's view of what went before? That is, if what went before didn't deal specifically with repurchase rights and this Convention does, does that give any weight to the argument that repurchase agreements before this Convention really are constitutional, particularly, if this Convention thinks they are not constitutional?

**MR. KOSACK:** I think that if that there is such an amendment, that argument could be made, yes, that previously

they were. If I were on the other side of that I would argue, however, that no, this does not indicate a change in position. It indicates that the Convention has awakened to the fact that this issue exists.

We can take the transcript from this particular hearing and show it to say, no. The people just became aware that this is real estate practice and that's what caused it, so there is no inference to be drawn by the fact that there is now this remedial change to the Constitution.

I think that really needs to be written in clear constitutional history. We don't want to affect the things before.

**DELEGATE QUITUGUA:** Mr. Kosack, I asked you a question previously similar to that, that after having amended the Constitution, I'm really afraid that the legislature in the future will come back again and pass legislation that is similar to 8-32 where it will require that the owner of the property will have to buy back the improvements, and that, in a way, is forcing the owner to automatically lease -- for example, if we owned the land at Diamond, and I told my kids, "You know, when they have children, they have a hotel. You will own Diamond Hotel in 55 years' time."

Then, you know, the hotel owners have money. They can lobby the legislature to come up with some kind of legislation to mandate that I should -- my grandchildren

should -- buy the back the improvement before they can ever say "that's our hotel."

**MR. KOSACK:** I think that -- I was trying to reflect back on the answer I gave you before. I think most of my answer I gave you before was a defense of 8-32. It's not something that was a bad thing for the legislature to have done. I didn't answer your question, which is whether you should prevent legislatures from doing anything further. I think that is within your purview.

I think you can limit the extent to which the legislature can pass laws affecting Article XII. I think you do that already. If you look at section -- I believe it's on section 6. It says with what the legislature can do. I believe they can pass enforcement laws for Article XII.

For example, passing a law tomorrow that says that all leases shall have read into them the fact that the person of Northern Marianas descent shall buy back the improvements on the land, if that sort of law passes, which I think you are concerned about as your example, it would be unconstitutional because it's not an enforcement law. It's not a law that is put out to enforce Article XII or have to do with a means of enforcement.

What I'm saying is that there is already some limit on the legislature's authority. You can limit it further if you wish to.

**DELEGATE QUITUGUA:** What is the difference between having the legislature requiring the land owner to buy back the hotel or having it in the contract that at the end of the 55 years if you wanted your land back, you must buy the hotel back or pay for the hotel.

**MR. KOSACK:** I'm not sure if I'm answering your question right.

The difference I see between the legislature putting it into a lease, which has all sorts of Constitutional problems with it, but the difference between that and it being part of the original lease transaction is if the legislature does it, it's putting new terms on to a document that the parties never agreed on; whereas, what the Lieutenant Governor was talking about is a situation where, you know, the parties are negotiating the terms.

Hopefully, the ideal situation of making a lease is that the two parties are negotiating the terms and both of them read the terms through thoroughly and understand them before they sign the document. That is the ideal way of entering into a lease, not having the legislature write terms into it.

**MS. SIEMER:** Just a clarification question on behalf of Delegate Quitugua.

Would it be fair for the Convention Delegates to conclude that in the event that an owner had to repurchase a permanent improvement that the windfall is really to the lessee,

because that lessee has already amortized those improvements fully over a 55-year lease; and, therefore, if the lessee were to get anything more from the owner, that really that is the way the windfall would go?

**MR. KOSACK:** That's a good argument. It could turn on the facts, the circumstances.

Let's say it's a hotel. We don't know what year the hotel was built on the land. Maybe the hotel was built there at the beginning of the 55-year period, but additions were made. We don't know how recently the last addition has been made.

I find in representing people of Northern Marianas descent who have put out leases, and in some cases, very substantial leases, that there are a lot of things that you can do in drafting a lease to aggressively negotiate for your client so that circumstances turn differently.

The obvious thing is that you require insurance to be placed with the benefits going to the lessor on any improvements that are there, and that they can't be torn down during the last 10 years -- so a lease can be drafted either way. I think any attorney can draft it very pro lessor or very pro lessee.

**MS. SIEMER:** If the interest of the Convention is to say that at the end of 55 years there are no obligations that can carry over -- that what renewal rights means is any renewal

rights and any other obligation -- is that a fair way to put down a clear rule so that there are no questions about repurchase rights or any other derivation that any lawyer can think of in the future so that Delegate Manglona can have a clear and understandable rule for everyone in the community?

**MR. KOSACK:** That is a fair way of doing it.

I have to think about what other things are triggered other than repurchase.

At the moment, repurchase is the only thing that comes up. In looking at that, it's fair.

The only thing that I'm concerned about is how to deal with those transactions that occur before you've announced this new rule. That's where I get into my sense of justice and the concerns I have.

So far as prospectively, to some extent, I think what people want are certainty. They want rules. Lawyers want rules. They want to know what they're supposed to do and what they can't do in drafting a lease. Their clients want certainty.

So I think that is something this Convention should be encouraged to do is to set out rules.

The problem is -- I like the way you drafted that in your -- I don't know if you mentally drafted that, but it's a little generic. It covers many things at one time.

I think the problem is it's tough to put out a

laundry list of all the different lease provisions that will be acceptable and not acceptable. That does take care of one problem, and that is to have things chop off right at the end of 55 years. I think it's fair.

**DELEGATE LIFOIFOI:** Any further questions from the Delegates, members?

Delegate Gonzales.

**DELEGATE GONZALES:** Two questions, Mr. Kosack.

The first of which is the option to, I guess, sublease upon the original lease. There are cases out there, as well, that the would have options within the contract lease, or lease agreement, that would allow for the lessor to sublease.

**MR. KOSACK:** Lessee. The tenant.

**DELEGATE GONZALES:** Right, the tenant to sublease and continue, and then subsequent tenants to continue sublease.

I'm concerned with that because, No. 1, there is the potential for subsequent tenants to, I guess, make huge profits out of the original landlord, who later on sublease the land to other people. Also, there are different other ramifications.

In your opinion, and in light of our past experiences, again, I'm leaning towards the protection of the indigenous land owner, do you have any opinion or suggestion as to how to mitigate and control that aspect of the lease?

Can we constitutionally here in this Convention

restrict that to allow for a fair, you know, disposition of the lands?

**MR. KOSACK:** Let me start at the beginning with just tying it in with Article XII.

So far as any option to sublease goes, just a sublease clause allowing subleases to occur, or assignments, it's a very simple rule that they can't extend beyond the term of the lease.

If it extended beyond the term of the lease, then, of course, it would be more than 55 years.

So far as that goes, that's an area where clearly we know what the law is.

Into this area, which is sort of an area of landlord-tenant property law, the way that is protected is that I find that clients are very knowledgeable in the area of sublease and assignment clauses.

Sublease and assignment is an area they often look at first. There are three ways to draft it that I can think of off the top of my head.

One, some landlords draft it so it just prohibits any subleases or assignments. Another is no sublease or assignment without consent in writing in advance. Third is sublease or assignments can be done only if there is advance notice, but no consent required. I guess there is a fourth, which is that sublease and assignments are granted, can be done.

It seems to me that the answer to that isn't of constitutional dimension. That seems to me to be maybe more legislative or really it falls within just good legal advice, is that a person that is concerned about that would provide that you can sublease or assign is upon the written advance consent of the landlord, and anything without that consent violates.

At that time, when the person comes to seek consent and you look at the transaction, you see that they are going to receive a windfall profit, you can certainly condition your consent upon receiving a percentage of that profit. It puts you back in the driver's seat of being able to determine what you can get out of that transaction.

**DELEGATE GONZALES:** Would it withstand constitutional scrutiny, though, if we do restrict it?

My concern is that I could be careless if it's legislative in nature or not. If it protects the indigenous people, then let's put it in.

I don't want to continue being at the mercy of the legislature. If it's to protect the Chamorros and Carolinians, then let's put it in. Our Presidents have said in the past that there is that volatility if we do leave it at the mercy of the legislature.

I'm concerned and would it survive Constitutional scrutiny if we restrict it?

**MR. KOSACK:** Off the top of my head, I guess it would.

It seems a little unusual that you had a provision that says that all leases in the Commonwealth shall contain a provision that says that a subleases and assignments can only be granted with consent as long as it's provided prospectively to transactions that have not yet occurred, I don't know. I don't see any Constitutional tack that can be made. I can't think of any.

**DELEGATE GONZALES:** That's it for now. Thank you.

**DELEGATE LIFOIFOI:** No further questions from the Delegates?

The committee extends its appreciation, Rex, for you taking your time out and testifying before the committee.

**MR. KOSACK:** Thank you very much, Mr. Chairman.

**DELEGATE LIFOIFOI:** I hope you submit your written testimony.

**MR. KOSACK:** Yes, this next week.

**DELEGATE LIFOIFOI:** Thank you.

The next witness the Committee would like to recognize is Brian McMahon.

**MR. McMAHON:** Thank you, Mr. Chairman. Thank you for the opportunity to testify today. My testimony will be short.

I must say as a preface to my formal comments that it's already been a long day, and I don't know if I'm am as coherent as I was at 9:00 this morning, or I don't know if my thoughts will be organized.

I have presented your legal counsel with the memorandum outlining the problem, as I see it. I have some written testimony here today that, hopefully, will see you through my testimony.

(Mr. McMahon's documents are in Exhibit 4.)

Another aside, as I looked around the room today, I see people that are my age and older. What I'm about to engage in is a sort of a historical analysis of Article XII, at least as to the status criteria. I realize that some of you actually lived this, and I'm a little bit concerned that I miss a few details, but please bear with me.

For the record, my name is Brian McMahon. I'm a lawyer in the Commonwealth. I've been here since 1979. I represent a family whose status as persons of Northern Marianas descent has been attacked in an Article XII suit.

It has taken me some time to understand the nature of the status defect, and I think I have an understanding of that now.

What surprised me in my research was that I found, I think, a lot of people that shared this defect of their status of Northern Marianas descent.

I would like share that with the committee. Article XII defines a person of Northern Marianas descent as a person domiciled in the Northern Marianas by 1950, who is a Trust Territory citizen.

My remarks will be directed towards this Trust Territory citizen criteria, although I think there are some problems with domicile too, basically evidentiary-type problems, now 45 years later when we try to determine such things. But be that as it may, my comments here are directed towards the Trust Territory citizenship criteria.

I have to make an historical analysis here. As I'm sure you are all very aware during the Spanish times, there was a migration, sort of a forcible relocation of Chamorros to Guam from Saipan, which depopulated the Northern Marianas to a great extent.

During the German times, this process was reversed. There was a very successful recruitment program. The German administrators, who were interested in trade and such, found that these depopulated islands, in fact, did not support much trade, so they began the homestead program, along with jobs and encouraged many Guam-born Chamorros to migrate north to Saipan. This migration took place between 1898 and 1915.

From what I've discovered in my research, this migration continued, albeit slower, in Japanese times and the Guam born Chamorro continued to relocate to Saipan.

That brought us up to Japanese times. Now, during Japanese times, we had significant migration, and that was out of Saipan to Yap and Palau. About 500 hardy souls during Japanese times went to Yap, and about 100, 150 to went to Palau

from Saipan.

There was another migration out of Guam at about the same time to those two destinations, Yap and Palau. Again Guam-born Chamorros joined the Saipan Chamorros for the most part and formed communities on those two islands.

When the Americans invaded Saipan in 1944, one of the first tasks that they undertook was to register all the people that they found.

I'm sure that some of you remember that registration process, you participated in it. What was created were, for lack of a better word, what I call military identification records, records that were filled out in 1944 and 1945 for everybody that was in Saipan, Tinian, and Rota.

These records were used for variety of purposes, and used throughout the Trust Territory time. In fact, they contained information that provided the basis for the very first war claims for loss of personal property in the '70s.

At any rate, I have examined many of those records now, and this is the problem: The Article XII defines a person of Northern Marianas descent as, once again, one of the criteria being a Trust Territory citizen. It refers to the Trust Territory Code for definition.

The Trust Territory Code in every version I have uncovered requires birth within the Trust Territory, so it excludes from the Trust Territory citizenship all those

Guam-born Chamorros that resided within the Trust Territory. This was a problem. And throughout the Trust Territory, it plagued them.

In 1958, the Trust Territory government created a naturalization process that was used by 121 people. Most people did not avail themselves of that, but there are at least 121 records I have found, certificates, of Guam-born Chamorros that were naturalized as Trust Territory citizens.

But in the materials that I have given to the Committee, you will see that as late as 1975 and 1976, this was a problem that had not yet been resolved. The Trust Territory Attorney General Myamoto wrote to U.S. Immigration authorities asking for help identifying this problem class, these Chamorros of indeterminate status.

Now, the problem, I think is bigger than originally thought. When I went through these records, I created a spreadsheet, which I also included in your materials. I discovered -- let me back up for a moment.

The census, 1948 census, shows there were about 5,653 Chamorros, something like that, living in the Northern Marianas or just local people living in the Northern Marianas in 1948.

I have examined on microfilm at our archives, I don't know, maybe 2,000 records. Out of the 2,000 records, I found 290-some people that were born on Guam that were,

obviously, from the cards you can tell had lived here for many, many years and were part of the local community. These were the Chamorros of indeterminate status that were born on Guam. These are the ones that create the problem.

The problem is that they may not, and I have not given up on this issue, but they may not qualify to be the baseline ancestor, the baseline ancestor that all people under the age of 45 now need to qualify as people of Northern Marianas descent. All of those people who were not born before 1950 need to trace their lineage to someone that qualifies back before 1950. These are baseline ancestors, at least as I use the term.

The problem is this class of people, and going through, perhaps, half to a third, I found 291. While some are older and beyond their childbearing years, there is a significant number that, in fact, were still capable of having children, and, I'm sure, did have children after 1950.

These people, their descendants, live in this community today thinking that they are of Northern Marianas descent, and they may not be because this has not yet been decided.

I can tell you this: By the literal language of Article XII, I would say that there is a real -- they have real problems. How many people are involved? I don't know. I suspect, though, that there are hundreds of people who are -- whose bloodline, if you will, is diluted by these defective

baseline ancestors that people have kind of ignored over the years.

I didn't know that I would do all this testimony today. I did present the materials because I thought of it as almost more of a technical amendment than anything.

But I am hoping to draft some proposed amendment to the definition of Northern Marianas descent.

It's difficult to find something elegant does not expand the class that allows these people to be a part of the community that they have always been a part of without letting every Guamanian in at the same time. It can be done, I think.

So that's my pitch. I think there is a problem. The Committee needs to look at it and reassess the definition of Northern Marianas descent.

Thank you.

**DELEGATE LIFOIFOI:** Thank you.

Any questions from the members?

**DELEGATE TENORIO:** Mr. McMahon, can you give us an inkling as to how you propose that the current language in the Constitution be amended?

I know that you've given the materials to the legal counsel. I have not seen it. Can you give us an indication that you would like to see.

**MR. McMAHON**: I have not suggested anything, yet, because this has been moving on rather quickly.

My materials were recently developed for litigation. It was at a rather late date I decided I better just present this. This is a class that is too big to ignore. It destablizes the entire concept of Northern Marianas descent where you have maybe one out of five people who are affected in some way or another.

And when the Committee is thinking about reducing the percentage requirements and taking this on further to extend this another 15 or 20 years, the problems of identification become enormous. My personal agenda is that I think a registry is required, but that's another subject.

The only thing I've come up so far is that while the Trust Territory of the Pacific Islands has never included Guam, the term "Micronesia" does. Unfortunately, it also includes the Gilberts. I'm going along those lines. I have to have some geographical way of describing the people. It has to be simple. It has to be understood. Obviously, I have not gotten there yet.

**DELEGATE LIFOIFOI:** Delegate Villagomez.

**DELEGATE VILLAGOMEZ:** Mr. McMahon, would you be willing to name, say, the names of these families? I'm kind curious. Maybe it's lawyer-client privilege.

**MR. McMAHON:** It's a matter of public record. For my clients, you mean?

My clients are the Borja clan. They are Palau

Borjas, or maybe something. I think they qualify. But, you know, that is who they are.

I've given you a spreadsheet. I know it will drive you nuts. I've blanked out all the names so that you can't really tell who I'm talking about as far as the other 290 people. But, you know, there is a reason for that.

It's something that has to be addressed one way or another.

**DELEGATE LIFOIFOI:** Delegate Aldan.

**DELEGATE TOMAS B. ALDAN:** Thank you, Mr. Chairman. It's very interesting, Mr. McMahon. Your data is very interesting and your comments, as well.

I wonder if you have touched upon NMI descent who are in the U.S., and not necessarily Guam and other places because, I for one, just learned that I have a cousin living in New Zealand because of the war.

**MR. McMAHON:** Have I seen --

**DELEGATE TOMAS B. ALDAN:** Have you touched on in your study or Northern Mariana persons living in the U.S., and not necessarily Guam, and other places?

**MR. McMAHON:** I haven't. But in a related issue, this came up at MPLC all the time, the eligibility for someone's homestead, who qualifies, and does someone from Oregon qualify?

These are issues that are addressed daily. Again, not with a terribly cohesive set of rules. In this particular

study, it's basically just Guam, because we're talking about events that occurred in the Spanish-German and early Japanese times.

There's also, quite frankly, some real, I think, wide varieties of opinions as to the consequence of people leaving the Northern Marianas in the mid-50s and traveling to Guam and traveling to other areas of the world and residing there and now coming back.

I don't think it makes a difference constitutionally, but I know that emotionally it makes a big difference to some people. It's something that has always been part of the problem.

**DELEGATE TOMAS B. ALDAN:** Thank you, Mr. Chairman.

**DELEGATE LIFOIFOI:** Any further questions? None.

Thank you, Mr. McMahon.

**MR. McMAHON:** Thank you.

**DELEGATE LIFOIFOI:** The Committee appreciates your time for appearing.

The Committee recognizes Representative Hofschneider.

**REPRESENTATIVE HOFSCHNEIDER:** Thank you, Mr. Chairman.

Mr. Chairman, I have two requests. I have to stand, because I'm too small, and I would like to speak in vernacular.

**DELEGATE LIFOIFOI:** Yes, you may.

**REPRESENTATIVE HOFSCHNEIDER:** Thank you.

(Statements in Chamorro.)

**DELEGATE LIFOIFOI:** (Statements in Chamorro.)

**REPRESENTATIVE HOFSCHNEIDER:** (Statements in Chamorro.)

**DELEGATE LIFOIFOI:** Delegate Gonzales.

**DELEGATE GONZALES:** (Statements in Chamorro.)

**REPRESENTATIVE HOFSCHNEIDER:** : Statements in Chamorro.)

**DELEGATE ALDAN-PIERCE:** Okay. Any other questions?

Go ahead.

**DELEGATE TENORIO:** Congressman Hofschneider, (Statements in Chamorro.)

**REPRESENTATIVE HOFSCHNEIDER:** (Statements in Chamorro.)

**DELEGATE ALDAN-PIERCE:** Delegate Aldan.

**DELEGATE TOMAS B. ALDAN:** Thank you.

(Statements in Chamorro.)

**REPRESENTATIVE HOFSCHNEIDER:** (Statements in Chamorro.)

**DELEGATE ALDAN-PIERCE:** Delegate Aldan, are you done? .

**DELEGATE TOMAS B. ALDAN:** Yes.

**DELEGATE ALDAN-PIERCE:** Delegate Quitugua.

**DELEGATE QUITUGUA:** (Statements in Chamorro.)

**REPRESENTATIVE HOFSCHNEIDER:** (Statements in Chamorro.)

**DELEGATE QUITUGUA:** (Statements in Chamorro.)

**DELEGATE ALDAN-PIERCE:** Delegate Tenorio.

**DELEGATE TENORIO:** (Statements in Chamorro.)

**REPRESENTATIVE HOFSCHNEIDER:** (Statements in Chamorro.)

**DELEGATE TENORIO:** Thank you.

**DELEGATE ALDAN-PIERCE:** Any other questions of Congressman Hofschneider?

Thank you, Congressman.

I would like to call the last witness today, Mr. Bill Campbell, please.

**MR. CAMPBELL:** Thank you, Madam Delegate.

Mr. Mitchell had suggested that people who come here to testify should probably state what they come from, what is their orientation, and possibly bias.

I would like to state that although I'm a lawyer and I have been here five years, I represent no clients in Article XII litigation. I never filed a XII case. I never defended one, and I own no land, and I don't have any idea of owning land, nor am I married to a local family.

I've been a government lawyer here and for 10 months I was in the AG's office on the government's land caucus, and then for the next 3-1/2 years, I was with the governor's office, and I was assigned to an Article XII oversight task force, and out of the work of that 8-32 came forward thanks to a lot of local people here that got behind it.

The question and the problem we have here is one of respect for our land title system and the marketability. It does you no good to have a store in which you are not allowed to sell your items, or people are afraid to buy your items that

maybe they are all out of date or spoiled.

8-32 has, it appears, done some good towards clarifying the Article XII situation; however, what I stress is that it's only a Band-Aid solution.

What the Eighth Legislature brought in in late 1993, can always change all over again and put us back into the soup where we were. This is why when the question was asked of Mr. Kosack by Delegate San Nicolas, I think the remarks were very well taken that for the change to endure for the outside investor, developer, anybody who wants to come and lease land in the Commonwealth, it has to come from the Constitution because statutes can be too easily passed one way or the other.

This is an opportunity to make serious and enduring changes. I have absolutely no problem with the protections afforded to the local people under Article XII. And it does not make any difference what the length is, if it's from 10 years, 20, 40, as it was before, 55 or if they extend it now. That is not an issue, really. It will be later. However -- or what percentage of the blood line can effectively hold interest in the land.

Former Lieutenant Governor, Delegate Manglona, said when he was talking to Mr. Kosack, it seems to me like when the courts found there was a violation, they did not make an adequate remedy. That's where the problem lies.

There are three words people are talking about

adding to the Constitution. Maybe some additions might help. I'm talking about taking something out of it. That's the three words "void ab initio." It's an incredibly extreme remedy.

It doesn't take into account the differences between the various four types of cases that Mr. Kosack was addressing. It also will catch things we have not heard of yet.

Now, in American and Anglo-Saxon jurisprudence, it's a maxim that the law abhors a foreclosure. If you buy a house or something in those places, even if you don't pay for it, you get hauled in right up, and until the moment that house may be sold to other parties, you can always redeem it. It's your equity of redemption.

Judges bend over backwards under their inherent power to try to save the title where it is. I know of no jurisdiction that has a void ab initio except for one case, and that is fraud. If misrepresentations were made in the beginning, then there never was a deal.

The language that has created all the big havoc that we've seen in the Commonwealth about this Article XII stuff is not Article XII. It's the remedy of void ab initio.

I saw a FAX that was sent last year from a Japanese developer to one of his attorneys here. It said:

> "With what what is going on the Commonwealth, we are going withdraw because it's getting known around Japan you have to be

stupid to invest in the place."

That is because of the void ab initio language.

A person can get into an altercation with somebody out in the street or in a bar or something and haul off and snack him, get arrested, and his sentencing exposure can be up to a year or a thousand dollars for a simple assault.

The courts don't come down uniformly on everybody. You might have somebody who has done this, did it five, 10 times or had two or three convictions. You might have somebody that this is his first time. The judges work hard to find a sentence it that fits the crime.

We don't need extreme solutions to problems that vary along a continuum. The extreme solution is what scares off the investors. Investors will say, "Well, 8-32 has cured some of it, but what will pop-up next?"

"Well, we think we have it handled."

"You thought that back in the Second Con-Con that things were ironed out in the First."

There will be minds that will dream up all kinds of new rules, as Mr. Kosack says. He has the 11 that are clear, and, then, out of the four case scenarios, there are four more possibilities that are not in those 11. That takes us up to 15. If we patch up the problems we had with those, what else is going to come forward?

Now, you are still going to have cases. You will

still have problems with those four types of cases; but it should be within the purview of a judge's equitable powers to fashion an appropriate remedy if inadvertently a lease overextends. Say it's not 55 years, but say it's 56, there is a miscounting or in the case of Wabol, it was a probably a scrivener's error where you wound up with 50 years instead of 40.

Judge Hefner tempted to cut the bad 10 years off at the trial court level. He applied the equitable remedy, which you would in any lease on the mainland or in Western Europe or England.

However, the Supreme Court said he couldn't do that because of void ab initio. Technically, they were correct. So you wind up throwing the baby out with the bath water.

Another little project I happen to work on happened to work on had to do with the VA. We have many fine and courageous Chamorro and Carolinian people that fought in Vietnam and many in Desert Shield, and they got veteran's benefits, and they came out here and Mr. Hall from Hawaii did everything to set up a program where they could have a VA GI Bill to build a house on their land.

However, the VA will not guarantee those mortgages because you can't get title insurance. Why not? Because of the void ab initio. So that Chamorro veteran is better off to buy property in California rather than come back to his native home

because there is no more title insurance because of this.

I believe if that portion of just three little words can be eliminated, leaving it up to a judge's inherent equitable powers, it will go a long way towards not only curing the problems we've already seen, but those at this moment yet unforeseen.

No matter what else is done with this committee, if they raise or lower the percentage of blood that it requires or extend or contract the amount of the lease, I think that serious attention has to be looked at the remedy.

That's all I've got, unless there are any questions.

**DELEGATE ALDAN-PIERCE:** Thank you, Mr. Campbell.

Delegate Benavente Aldan.

**DELEGATE TOMAS B. ALDAN:** Thank you, Madam Chair.

Just one question. Do you think it would help the mortgage program for the insurance, mortgage insurance, if we designated an agency of the government, let's say, like the MPLOT, or the Mariana Island Housing Corporation, to guarantee the purchase of whatever the bank approved in terms of mortgage?

**MR. CAMPBELL:** If we look at it that far, I think, yes; however, what creates the ability to finance is the secondary mortgage market. In other words, your local bank here goes and lends a mortgage and they turn around and discount it to larger and larger pools.

Even though, perhaps, with government assistance provide mortgages, that would be fine. But if they can't peddle them on the secondary mortgage market, it wouldn't do very much good because they'll run out of money soon. They keep replenishing their money by discounting the mortgage rate.

Once conveyed just like by the BFP on the land title, the mortgage people are taking on a risk somewhere back in the chain where those mortgages move. If you've ever bought a house in the States, you go to one bank for a closing and about three months later they say, "Send your payment here," "Send your payment here." I bought a house in Florida that the payment went three times and finally out to California. That's the way it is done. They discount it in larger and larger pools.

But with this problem here, I think that the marketability of the mortgages, if even if this government attempts to guarantee them, it could be hurt. As far as the microcosm, Mr. Aldan, yes, it probably would help if the government could come up with the money to do it. That's another whole pile of issues.

**DELEGATE TOMAS B. ALDAN:** My question does not necessarily mean that the second mortgage or repurchase of the mortgage would be done by the government, but rather that the government or agency of the government would guarantee that if the borrower who is of Northern Marianas descent defaults on the

payments, that that agency would come in and buy whatever is remaining in that mortgage.

**MR. CAMPBELL:** That would probably help, but it would not do with the VA. That is what exactly the VA is doing. As a matter of fact, they're expanding to write their own mortgages, too, I understand.

Basically, they're saying to a bank, if this veteran should default on his home loan, we will come and guarantee the to buy it up from you and take care of it.

This government, legally could do that and it would be helpful. I don't think that the VA is going to, then, step in and pick it from this government. They're a guarantor organization in and of themselves.

And the second thing, which we have to ask, is: By the government doing this, is it incurring a possible liability itself? What if it cannot pick up that mortgage? Are we going to have the government on the hook, those of us as taxpayers.

**DELEGATE TOMAS B. ALDAN:** Thank you, Madam Chair.

**DELEGATE ALDAN-PIERCE:** Any other questions for Mr. Campbell?

If not, thank you, Mr. Campbell.

**DELEGATE CAMACHO:** Thank you very much, Mrs. Aldan-Pierce.

**DELEGATE ALDAN-PIERCE:** We have a request from Mr. Frederico Dela Cruz to come up.

**MR. DELA CRUZ:** Thank you.

My name it is Frederico Dela Cruz from the island of Tinian. I ran as a candidate for the Con-Con, and I was defeated. I did not make it. But I was so involved with the issues of the Constitutional Convention for almost a year before that.

One of the legal questions I have that you as Delegates have to be facing on this Article XII is the same question that I can't answer, and that is: When the Covenant was approved, the land alienation had a 25- year limitation. That means it's going to be the year 2011, 16 years from today.

Can these Delegates of this Constitutional Convention legally amend the Constitution where it's definitely going to be no value after 16 years from today unless we amend the Covenant with the United States government.

That's the legal question I ask myself. Not a single lawyer can answer this question. We are being very much involved, or you have been very much involved, with a lot of the input to solve the issue on Article XII.

If you put a lot of efforts and come 16 years from today with all these ramifications of amendments to Article XII -- I like Congressman Hofschneider's input. I love it. I'm for Article XII for the protection of the indigenous.

We heard what the Ninth Circuit Court has done to a lot of Article XII issues. What is going to happen in the year

2011? Are we going to have a beautiful future in terms of what we are doing today to address this issue because it's clean and clear that Article XII on land alienation is only 25 years and is going to die in the year 2011.

I want to know if there is a legal answer to this kind of question. It has been the biggest problem I have in trying to solve this question.

Also, at the same time, I would like to tell you my personal feeling about this thing. Land ownership in a fee simple status, I don't care whether you are a banker or not, but if you are going to take this fee simple a collateral, you must own it if I defaulted on a loan.

Here is what I would like to say about this: As an American citizen, citizen of the United States through -- not through the Covenant, but through being in the military and asked to be a full American citizen through naturalization, I'm a full citizen of the United States.

Fortunately, I am an American descent of Northern American Marianas descent, and I can own land here, but I feel that land ownership should be given to every American citizen under the Constitution of the United States.

I thank you.

**DELEGATE ALDAN-PIERCE:** Thank you, Mr. Della Cruz.

Any of the Delegates have a question for Mr. Della Cruz?

**DELEGATE LIFOIFOI:** No.

**MS. SIEMER:** That's it.

**MR. DELA CRUZ:** I have one question. Do you have any legal answer to this question that I have?.

**MS. SIEMER:** Yes, I can do that for you, Mr. Dela Cruz.

There are essentially three options. If this Convention provides that Article XII will expire at the end of the 25-year term and no other Constitutional amendment happens in between, then Article XII would expire.

If this Convention does nothing in that regard, Article XII goes on just as it is after the year 2011 until some other Constitutional Convention, or some other amendment mechanism is used to change it.

The only thing that changes in the year 2011 is the ability of the citizens of the Northern Marianas to change Article XII.

From 1978, when the Constitution came into effect, until 2011, the citizens of the Northern Marianas are bound by the agreement that was made in the Covenant. They may not discard Article XI.

After the year 2011, there is an election or a chance or a possibility of changing Article XII. That is the only thing that changes. It is open to the citizens of the Northern Marianas after that time to do away with Article XII if they want to do that.

To do away with Article XII in any case would take a Constitutional amendment. So that if this Constitutional Convention does nothing, Article XII would stay in effect every single year, year after year after year until there is an amendment.

**MR. DELA CRUZ:** I thought the Congress of the United States has to approve it, approve the extension of that.

**MS. SIEMER:** No. The arrangement under the Covenant was that the United States had to approve the first Constitution because there needed -- in the deal, the Covenant deal, the United States was concerned that the first Constitution be consistent with the United States Constitution, and they reserved the right to approve that.

But there is no approval right with respect to any subsequent Constitution. So, for example, the amendments that were done in 1985 did not go to the United States for approval and the United States has no right of approval. That is also the case with this Constitutional Convention.

None of the amendments that are approved by these delegates, if they are ratified by the citizens, can be affected by anything that is done in the United States so long as they are consistent with the United States Constitution.

**MR. DELA CRUZ:** Thank you very much. I got my answer. Thank you.

**DELEGATE ALDAN-PIERCE:** Delegate Aldan.

**DELEGATE TOMAS B. ALDAN:** I have a short question for Mr. Dela Cruz.

Given the size of our land and the fact that our people are rich only in land, are you suggesting that we open the land to anyone who can afford it, especially a U.S. citizen?

**MR. DELA CRUZ:** To answer your question, Congressman Hofschneider put out a very good question about Amendment XIV, equal application of the law under the United States Constitution. I don't know if it has an exception to anyone. That's why I'm asking that part. I don't know. I'm not asking for -- I can't answer that question, because I like to be a very personal person, and I like to keep what I like, and I have to keep my Chamorro indigenous rights. But you know what? We're all brothers under the U.S. Constitution. That's the reason why I must ask myself this legal question. That's all I can say.

**DELEGATE TOMAS B. ALDAN:** You will still support it if we continue the proposition of land alienation?

**MR. DELA CRUZ:** Yes, sir.

**DELEGATE TOMAS B. ALDAN:** Thank you.

**DELEGATE ALDAN-PIERCE:** If there is nothing else, I would like to thank Mr. Dela Cruz and the delegates who are left for being here today, for your patients.

That's it. Thank you.

(The public hearing concluded at 4:25 P.M.)