Ninth Northern Marianas Commonwealth Legislature

MEMORANDUM

DATE: August 31, 1995

TO: All Senators

FROM: Senate Legal Counsel, Steve Woodruff

SUBJECT: Third Con-Con Proposed Amendments

Several of you have asked me to summarize the legal issues surrounding submission of the work of the 1995 Constitutional Convention to a ratification vote and the Convention's request to have this vote deferred until March of next year.

Timing of Ratification Vote

Section 19 of the Enabling Act (P.L. 9-18) provides, "All proposed amendments to the Constitution of the Commonwealth of the Northern Mariana Islands adopted by the Convention shall be submitted to the people for a ratification vote at the November 1995 regular general election, pursuant to Article XVIII, Section 5, of the Constitution of the Commonwealth of the Northern Mariana Islands." This was the law when delegates were elected, it was the law throughout the Third Con-Con, and, unless amended, this continues to be the law and the Convention's work must go before the voters in November.

The Enabling Act is consistent with the mandate of the Commonwealth Constitution. The Constitution provides that proposed amendments must go before the voters at the next general election unless the legislature provides otherwise by law:

> A proposed amendment to the Constitution shall be submitted to the voters for ratification at the next general election or at a special election established by law.

CNMI CONST., Art. XVIII, § 5(a). Thus, the Constitution grants the legislature discretion to determine whether proposed amendments should be presented to the people at the next general election or at a special election.

The question then is how should the legislature exercise this discretion? The answer to that question depends significantly on the number, form, and content of the proposed amendments. Unfortunately, it is far from clear exactly what, if any, amendments were proposed by the Third Con-Con.

Number, Form, and Content of Proposed Amendments

Section 12 of the Enabling Act (P.L. 9-18) requires the Convention, "[u]pon completion of its work," to "transmit copies of all proposed amendments adopted by the Convention to the Governor, and President of the Senate, and the Speaker of the House of Representatives." Although the Convention adjourned sine die on August 4, 1995, so far no list of proposed amendments has been transmitted to the legislature.

The Convention did transmit a document signed by a majority of the delegates and consisting of a revised Commonwealth Constitution. It is possible, as discussed more fully below, that the Convention produced only one amendment, this document: a single amendment consisting of an entire new Constitution. However, the former Convention President and chairman of the Post-Convention Committee, Herman T. Guerrero, and former delegate Esther Fleming, a member of that Committee, maintained in discussions with members of the Senate and myself during a recess in the August 29, 1995 Senate session, that it was not the intention of the Convention to propose a new Constitution.

At this point it should be noted that a court, if called upon to determine what a deliberative assembly did or what its intention was, cannot look to extrinsic evidence. That is, it cannot, for example, take testimony from former delegates or consultants as to what they believed, intended, or thought they were doing, or their post hoc interpretation of what they did. The court must determine what the deliberative body did exclusively from the official records of the body: its journals, reports, rules, and so forth. An examination of these materials strongly suggests (but far from conclusively) that the Convention did in fact propose, or attempt to propose, a single amendment: a new constitution.

Public statements of the Post-Convention committee following the Convention indicated that the committee believed that it has the power to decide what amendments were proposed by Convention. Put another way, the Post-Con committee appears to believe (or have believed) that it has the power to decide precisely what, out of the Convention's work, constitutes an individual proposed amendment--in other words, the number, form, and content of the amendments. In fact, the Post-Convention Committee does not and cannot have any such power.

First, the Convention never granted any such power to the Post-Con committee. Resolution No. 16, adopted by the Convention on its final day, simply recites that "the Convention has appointed a Post Convention Committee . . . to perform the duties specified in [Public Law No. 9-18.]" Nowhere in P.L. 9-18 is the Post-Convention committee given the power to determine the number, form, and content of particular amendments, to be selected from a larger body of proposed constitutional language approved by the Convention.

Section 23 of P.L. 9-18 clearly designates the powers of the Post-Convention Committee. These powers are limited to assisting in public education and, if necessary, the drafting of an analysis, and liquidating remaining financial obligations of the Convention. The enabling legislation authorizes no other powers for the Post-Convention Committee. In any event, even if the enabling legislation permitted and the Convention attempted to grant the Post-Convention Committee the power to define specific amendments, the Post-Convention Committee cannot have and is precluded from exercising any such power, as a matter of parliamentary and constitutional law.

It is a well-established principle of law that a deliberative assembly cannot delegate any of its powers to another body or to a part of itself. The power to propose amendments was vested in the Convention. In order to propose an amendment, it is necessary to state what constitutes the amendment being proposed. Language alone is not an amendment. The task or process of stating the length, breadth, and height of the proposed amendment is an essential part of adopting a proposed amendment. The Convention alone could perform this duty.

When the Convention adjourned sine die, it ceased to exist. It became functus officio, meaning it has no further force or authority. Thus, if the question of what, if any, amendments were proposed by the Convention comes before the courts, the answer will

have to be found exclusively in the records of the Convention and the governing law. One exception to this exists. If the legislature passes a bill enumerating the proposed amendments (or approving a list prepared by the Post-Convention Committee), and the Governor signs it into law, the courts may invoke the political question doctrine and decline to hear any challenge to presenting the amendments in the specified form, or based on the fact they were so presented. Otherwise, the question is wide open for judicial determination in an action filed by any citizen dissatisfied either with the choices presented or the content of an amendment.

The political question doctrine is grounded in separation of powers. Under the doctrine, the judiciary will decline to intervene in a matter that is better determined by the coordinate branches of government. These branches--the legislature and the executive--are known as the "political" branches because their officials, unlike judges, are elected, and because of the nature of the tasks they perform. The legislature and the executive perform broad, open-ended functions, developing and implementing policy and selecting means to ends. In contrast, the judiciary adjudicates disputes and interprets the law. It takes evidence, finds facts, and then applies the law to the facts to reach a conclusion in a specific case.

In a matter of such sensitivity and complexity as the question of how the revised constitutional language adopted by the Third Con-Con should be presented to the voters--what choices they should be given--it seems very likely the courts would defer to the judgment of the political branches. If such a bill were passed and signed into law, the courts would note the concurrence of the legislature and the executive, and probably hold the number, form, and content of amendments to be presented to the voters to be a political question already decided by the coordinate, independent, and equal branches of government.

Post-Convention Committee chairman Herman T. Guerrero also explained, during the August 29 discussion previously mentioned, that one reason the Post-Convention Committee had not yet given the legislature a list of the number, form, and content of proposed amendments was that they felt a necessity to consult with legal counsel on this issue. This is understandable because both the Enabling Act and rules of constitutional law require that amendments be limited to a single subject. What constitutes a single subject and how this rule meshes with the actual actions of the Convention are, as this memorandum indicates, thorny legal issues.

What Did the Convention Do?

It is well known that the Convention voted on proposed constitutional language article by article. On the surface, this would seem to indicate that the Convention adopted 19 proposed amendments, each consisting of a single article. It is not that simple, however. For one thing, none of these votes was designated as a vote on a proposed amendment. For another, the actions of the Convention must be understood in the context of the Convention's rules. Also, the Convention produced 19 articles, but the current Constitution contains 22 articles. None of the 19 new articles specifically states that it repeals or amends designated parts of the current Constitution. To treat the 19 new articles as proposed amendments requires reliance on principles of implied repeal and amendment. Finally, the Convention voted separately on a Schedule of Transitional Matters, an action completely inconsistent with adoption of 19 separate proposed amendments, each of which would have had to incorporate its own transitional provisions.

The Convention also produced a draft constitution, which was signed by most of the delegates on the final day of the convention. This final document can be contrasted with the final document produced by the 1985 Constitutional Convention, which listed 44

specific amendments and was likewise signed by most of the delegates to that convention. The 1985 Convention also voted at the conclusion of the convention to confirm the 44 amendments in their final form.

No precisely comparable action was taken by the Third Con-Con; however, the Convention did adopt Resolution No. 16 which affirmed that the Convention "conducted its business in accordance with [its] Rules of Procedure . . . and . . . made every effort to comply fully with those rules throughout its work . . ." The resolution went on to waive any inadvertent technical irregularities, thus confirming the Convention's intention that its actions be interpreted as consistent with its rules.

Rule 52(a) of the Convention's rules provided that "[a]ny suggestion , proposition or draft intended to amend the Constitution shall be called . . . a committee recommendation." Rule 53 established the order of consideration for "suggestions[s], proposition[s] or draft[s] intended to amend the Constitution." The articles voted upon by the Convention did pass through the process specified by Rule 53, and only such articles passed through this process. Rule 53 is instructive. It read in full:

> **53. Order of Consideration.** The Convention shall consider delegate proposals and take action in the following order:
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> (a) Introduction of delegate proposals by number and proposer; duplication and distribution to delegates; followed by reference by the Committee on Organization and Procedures to a substantive committee established under Rule 24.
>
> (b) Consideration by the substantive committee; followed by action by majority vote.
>
> (c) Receipt by the Convention of reports accepted by the committees.
>
> (d) Consideration by the Committee of the Whole of committee reports; followed by action by majority vote.
>
> (e) Receipt by the Convention of reports accepted by the Committee of the Whole; followed by action by majority vote. Adoption on FIRST READING may be by majority vote.
>
> (f) Reference of amendments adopted by Convention [sic] on first reading to the Committee on Organization and Procedures for scheduling for second reading after the deadline for delegate proposals imposed by Rule 52(d) has passed.
>
> (g) Consideration by the Committee of the Whole of amendments adopted by the Convention on first reading; followed by action by majority vote.
>
> (h) Receipt by the Convention of amendments accepted by the Committee of the Whole; followed by action on SECOND READING. Adoption on SECOND READING must be by super majority [sic] vote pursuant to Rule 6.

(i) Reference of amendments adopted by the Convention on second reading to the Committee on Organization and Procedure for incorporation into a composite Constitution.

(j) Receipt by the Convention of the composite Constitution containing all amendments adopted on second reading.

Taken as a whole, Rule 53 indicates that the goal of the Convention was to produce a new Constitution. The final product is to be a "composite Constitution," which is to be "[r]ecei[ved] by the Convention." This is, in point of fact, what the delegates signed at the conclusion of the Convention. All of the other steps are merely preliminary to this end. Further support for this conclusion lies in the fact the Convention, in proceeding through its rewrite of the Constitution article by article, included in its vote on each article sections it was not changing from the current Constitution as well as those it was.

An argument to the contrary can, of course, be made. One can argue that the composite Constitution was merely for the convenience of the delegates, to show what the Commonwealth Constitution would look like if all the amendments were adopted, and that the delegates' signatures on the composite Constitution were simply a formality, of no real significance, but merely designed to show solidarity of support for all of the work of the Convention. Of course, it is not clear how signatures on a composite Constitution better show solidarity than signatures on a list of specific amendments. And if the composite Constitution was just for the convenience of the delegates, why was it necessary for it to be received by the Convention as the last item in the detailed Order of Consideration for proposed changes to the Constitution?

Opponents of a theory that the Convention proposed (or attempted to propose) a new Constitution may also seek refuge in the definition of "composite," as something made up of discrete parts, and the use of the phrase "amendments adopted by the Convention" or "accepted by the Committee of the Whole" in it items (f) through (i) of Rule 53. But these observations are not particularly persuasive. "Composite" also means built up from parts to result in a cohesive whole. The meaning of the term "amendments" as used in Rule 53 is far from clear. Notably, the rule does not refer to "proposed amendments," which is the only thing the Convention was empowered to adopt for presentation to the voters.

Consequently, it is a stretch to assume that the "amendments" referred to in Rule 53 are proposed amendments to the Constitution, and that each Convention vote on Second Reading therefore constituted a proposed amendment to the Constitution. For one thing, the usage in Rule 53 is plural--"amendments"--at least leaving open the possibility that a vote might encompass more than one proposed amendment. For another, "amendments" could mean nothing more than changes recommended or made in the process of reaching the Convention's ultimate goal: whatever new Constitution or proposed amendment or amendments it would submit to the voters.

The Convention's own rules argue against interpretation of the word "amendments" in Rule 53 as meaning proposed amendments to the Constitution. As note above, Rule 52(a) states in part, "Any suggestion, proposition or draft intended to amend the Constitution shall be called a delegate proposal or a committee recommendation." Rule 53 refers to "amendments" "adopted by the Convention" or "accepted by the Committee of the Whole." It does not refer to "delegate proposals" or "committee recommendations" "adopted by the Convention" or "accepted by the Committee of the Whole."

None of this is conclusive as to what the Convention did. What is clear is that it is exceedingly difficult, perhaps impossible, to determine what the Convention did in the way

of proposing amendments. When it is not reasonably possible to determine from the record what specific action a deliberative assembly took, the only possible outcome may be to conclude that the body failed to take any action.

There are other reasons as well why the Convention may have failed, as a matter of law, to have proposed any amendments. If what the Convention did was attempt to propose a new Constitution, it is doubtful whether it had the power to do so. It is clear that only constitutional conventions can propose entire new constitutions; whether the Third Con-Con in particular or constitutional conventions in the Commonwealth in general have that power is another question. The Enabling Act gave the Convention broad powers to propose amendments touching all parts of the Constitution or adding new material but specifically required that "[e]ach proposed amendment . . . be confined to a single subject or topic." (P.L. 9-18, Section 13). An entire new constitution can hardly be said to be "confined to a single subject or topic."

Moreover, Article XVIII, Section 1 of the Commonwealth Constitution provides that "[a]mendments to this Constitution may be proposed by constitutional convention . . ." The question submitted to the voters under Article XVIII, Section 2, the answer to which provided the basis for the legislature's convening of the Convention, was "Shall there be a constitutional convention to propose amendments to the Constitution?" An amendment is a "modification, deletion, or addition." BLACK'S LAW DICTIONARY 74. The Convention lacked either the constitutional or statutory authority to propose a whole new constitution.

Supposing that the Convention adopted 19 proposed amendments, each consisting of a single article (disregarding the fact that this proposition is completely irreconcilable with the action of voting on a Schedule of Transitional Matters separately), even this potentially violates the single subject requirement. As noted previously, both the Enabling Act and general principles of law require that constitutional amendments be limited to a single subject. That the Post-Convention Committee was well aware of this is evident from the fact that they sought legal advice. Thus, many, if not all, of such supposed proposed amendments may be invalid as violating the single subject requirement.

If such proposed amendments were what the Convention proposed and they violate the single subject rule, it is not possible for them to be broken down now. Under the Constitution, only the Convention was given the power to propose amendments. This power cannot be delegated, and it cannot be assumed by a third party. Determining exactly what is incorporated in a single proposed amendment is an integral part of proposing an amendment. It is a task that could only be performed by the Convention. Opportunity for deliberation and debate by the delegates on this question, followed by a vote, is essential for a valid expression of the collective will of the Convention. Without it, there can be no proposed amendment. This is a fundamental principle of parliamentary law.

That the Convention may have failed to propose any amendments does not mean it was a waste of time, money, and the delegates' efforts. The Convention produced a very substantial product in the form of informative and educational deliberations and recommended constitutional language, complete with an analysis, which can form the basis for proposed constitutional amendments by legislative initiative or by popular initiative advanced by concerned and civic-minded citizens. These are very significant gains for which the Convention and its support staff deserve much credit, irrespective of the immediate fate of its work.

Other Issues

The Convention wrote the following into Section 8(c) of its Schedule on Transitional and Related Provisions:

> Any amendment proposed by this Convention that is submitted to the people for ratification at the same election as an amendment proposed by the legislature that relates to the same subject shall supersede the legislature's amendment if both are ratified irrespective of the number of votes each amendment receives. The legislature shall make no law inconsistent with this provision or that otherwise interferes with the right of the people to vote on the amendments proposed by the Convention. No amendments to the Constitution by legislative initiative shall be presented to the voters at the November 1995 general election or subsequently, other than House Legislative Initiative 9-1, until the people have had an opportunity to decide whether the legislature should continue to have this authority.

I believe this provision is invalid. In effect, the Convention is attempting to amend the Constitution even before its proposed amendments go before the voters. The Convention is attempting to usurp the legislature's constitutional authority to propose amendments. It is also attempting to restrict the choices given Commonwealth voters by preventing the legislature from proposing amendments that differ in some respect from amendments proposed by the Convention. In sum, the Convention clearly appears to have tried to assume extra-Constitutional powers to itself. In any case, the legislature needs to take the existence of this language into consideration in evaluating how best to proceed with the ratification process.

H.B. 9-408, SD2, HS1 (deferral of ratification vote)

I recommend against passage of this bill in its present from. It fails to amend or repeal the specific portions of P.L. 9-18 that deal with submission of amendments for ratification. Although rules of implied amendment and repeal would likely govern, reliance on these principles is, at best, poor form. There is no reason to accept sloppy draftsmanship. H.B. 9-408, SD2, HS1 also fails to make badly needed changes to the existing election code as it relates to special elections. If the Senate should decide to defer the entire ratification vote, I recommend that either the existing text of H.B. 9-408, SD2, HS1 be replaced with a Senate Substitute or, preferably, an alternative Senate bill be passed. The necessary language has already been drafted. The Senate also could pass more than one bill, to give the House a choice of options regarding this matter.

Conclusion

At present, the question of what, if any, amendments were proposed by the Third Con-Con is wide open to court action and judicial determination, with the possible finding that the Convention failed to propose any amendments. If the legislature defines the amendments by law, however, the courts will probably respect that determination. Given the failure of the Convention to clearly define its proposed amendments, wide discretion on the part of the legislature is appropriate. By its failure to specify proposed amendments, the Convention, at a minimum, clearly authorized the submission of its work to the voters in the largest legally permissible chunks. For the legislature to break it down into smaller parts merely gives the voters greater choice, consistent with the fundamental values of democracy.

I am continuing to research these matters and will keep the members of the Senate informed. The Commonwealth Constitution vests discretion in the legislature to determine the timing of the ratification vote. The Convention's failure to present a list of proposed amendments to the legislature clearly tends to frustrate the Legislature's ability to make an informed judgment and exercise its constitutional discretion. As a result, I believe the legislature has wide latitude in defining a solution to this problem. Several alternatives are available to the Senate. Because of the time constraints on the Board of Elections, there is an urgent need to make a decision on the ratification vote, preferably by next week's Senate session.