



**THE SENATE**  
**NINTH NORTHERN MARIANAS COMMONWEALTH LEGISLATURE**

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**OFFICE OF SEN. PAUL A. MANGLONA**

September 7, 1995

The Honorable Herman T. Guerrero  
Chairman  
Post-Convention Committee  
Third NMI Constitutional Convention  
Dan Dan  
Saipan, MP 96950

Dear Mr. Guerrero:

This letter is to follow up on our conversation during a recess in the Tuesday, August 29, 1995 Senate session with yourself and former delegate Esther Fleming, also a member of the Committee.

As you will recall, you agreed that the Senate should defer action on H.B. 9-408, SD2, HS1, which proposed postponing the ratification vote on amendments proposed by the Third Constitutional Convention until March of next year. This was to permit the Post-Convention Committee to provide the Legislature with a list of proposed amendments. The Convention was, of course, required by law to "transmit copies of all proposed amendments adopted by the Convention" to the Legislature, among others. Although the Convention did provide the Legislature with a rewritten Commonwealth Constitution, no amendments for submission to the voters were specified, unless this new Constitution is the sole proposed amendment.

The Senate Legal Counsel and I briefed you during our conversation Tuesday relative to the Senate's concerns and legal issues connected with ratification of Third Con-Con proposed amendments and the timing of the ratification vote. Since then the Senate Legal Counsel has prepared his findings in written form. I am enclosing a copy of his memorandum for your information.

The Constitution clearly vests discretion in the legislature to determine when proposed amendments will go to the voters for ratification or rejection. The Legislature is placed in a predicament in the exercise of this constitutional authority by the fact that it does not know exactly what are the specific amendments that are supposed to go before the people. Indeed, it is virtually impossible to tell what the Convention actually did.

*Recd 9/7/95*  
*cc*

Mr. Herman T. Guerrero  
Post Convention Committee  
September 7, 1995  
Page 2

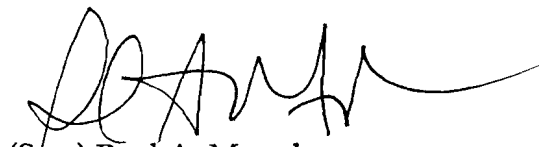
This, of course, is entirely aside from the question of whether the Convention had the legal power to do what it may have attempted to do. In any case, the Legislature is left in a position of having to deal with this situation as best it can. Several alternative approaches are under consideration. One approach is contained in the draft bill I am enclosing. In view of the protracted and costly litigation that can easily result from the Convention's failure to properly propose amendments, this bill would permit Commonwealth voters to decide whether to reject the work of the Convention in its entirety in November or vote on ratification in March.

If the voters rejected the amendments in November the time, effort, and cost of litigation would be avoided; if not, any litigation would have to run its course. The question of what amendments were proposed is, of course, critical to a ratification election. At least the question the voters are asked to answer must be clear and specific. One alternative is to define the proposed amendments by law. If the Post-Convention Committee supplies the Senate with specific proposed amendments in a timely manner, we may be able to incorporate this sort of listing into legislation dealing with the ratification election. Unfortunately, despite of our conversation over a week ago, the Post-Convention Committee still has not provided the Senate with any additional information.

The Senate is acutely aware of the severe time pressures facing the Board of Elections. Consequently, we intend to act on this matter in our session this coming Tuesday, September 12, 1995. Hopefully, you can supply us with specific proposed amendments before then. If not, or if we are unable to agree on a proper method for presenting this material to the voters, I intend to push for passage of the enclosed or a similar bill.

I look forward to hearing from you regarding this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Paul A. Manglona', with a long horizontal flourish extending to the right.

(Sen.) Paul A. Manglona

Enclosures

\_\_\_\_\_  
SESSION, 1995  
\_\_\_\_\_  
\_\_\_\_\_

## A BILL FOR AN ACT

To provide for the ratification or rejection of the work of the Third Constitutional Convention; to amend P.L. 9-18; to amend the Election Law as it relates to special elections; and for other purposes.

BE IT ENACTED BY THE NINTH NORTHERN MARIANAS COMMONWEALTH LEGISLATURE:

1           Section 1. Short Title. This Act may be cited as the Constitutional  
2 Amendments Ratification Act of 1995.

3           Section 2. Findings and Purpose. The Legislature finds that it is  
4 difficult at best to determine what, if any, amendments to the Commonwealth  
5 Constitution were proposed by the Third Constitutional Convention. However,  
6 the Convention did produce a document in the form of a revised, redrafted, or  
7 new Constitution incorporating, by one count, some 168 amendments. Most of  
8 the delegates signed this document on the final day of the Convention. The  
9 Legislature further finds that the Convention requested that the ratification  
10 vote on its work be delayed until March 1996. The Legislature finds that the  
11 answer to whether this request should be honored--in full, in part, or not at  
12 all--depends in large measure upon the form and content of the proposed  
13 amendments, a question that may ultimately have to be resolved by litigation.  
14 The Legislature finds very real possibilities that the Convention proposed only  
15 a single amendment--a new Constitution--or failed to propose any amendments  
16 at all. And whether it even had the power to do the former (propose a new  
17 Constitution) is very much in question.

18           Pursuant to Article XVIII, Section 5(a) of the Commonwealth  
19 Constitution, proposed constitutional amendments must go to the voters at the  
20 next general election unless the Legislature, in its discretion, provides by law  
21 for proposed amendments to be submitted at a special election. In view of the  
22 ambiguities concerning the product of the Convention and the time it would  
23 take for litigation to run its course, taken together with the constitutional

1 mandate for ratification elections and the Convention's request for deferral,  
2 the Legislature finds that it should exercise its discretion under Article XVIII,  
3 Section 5(a) to allow the voters an opportunity at the general election to reject  
4 the product of the Convention as a whole and should the voters decline to do so,  
5 to submit such amendment or amendments, as the case may be, to the voters  
6 for ratification in March 1996.

7 It is the purpose of this Act give effect to these conclusions and address  
8 the indicated problems by submitting to the voters at the next general election  
9 the question, "Should the new constitution or amendments proposed by the  
10 Third Constitutional Convention be rejected in its or their entirety?" In the  
11 event a majority of the votes cast on this question answer in the affirmative,  
12 the entire product of the Third Constitutional Convention will be rejected,  
13 thereby obviating the need for either a special election or continued litigation  
14 to determine the form and content of specific amendments, if any. In the  
15 event fewer than a majority of the votes cast favor rejection, the Act provides  
16 for a special election in March 1996 to consider ratification of whatever  
17 amendment or amendments, if any, are determined to have been proposed by  
18 the Convention.

19 The requirement that a majority of votes cast favor rejection in order  
20 for the work of the Convention to be rejected is greater than the proportion  
21 necessary under Article XVIII, Section 5(b) to reject an amendment in a  
22 straight ratification election, wherein a mere one-third of the votes cast in  
23 each of two senatorial districts can reject an amendment. The purpose of this  
24 Act is to allow the work of the Convention to go before the voters for  
25 ratification at the next general election as mandated by the Constitution  
26 conditionally, in view of the special circumstances present, such that in the  
27 event a majority of the votes cast are in the negative, i.e. fewer than a  
28 majority wish to reject the work of the Convention in its entirety, the election  
29 will be deemed a vote to defer ratification to March 1996. This approach is  
30 warranted and necessitated by the fact it is impossible to know prior to the  
31 general election--or at least far enough in advance to permit full and fair  
32 deliberation or debate--what the form and content of any specific amendment  
33 might be, or the resolution of any other legal issues. This situation, created by

1 the failure of the Convention to vote specific proposed amendments, largely  
2 frustrates the ability of the Legislature to exercise its constitutional discretion  
3 as to ratification elections. It is possible, however, for the voters to make a  
4 judgment on the work of the Convention as a whole, as reflected in the  
5 document signed by the delegates, and if a majority should reject it in its  
6 entirety, the public interests in economy of judicial, executive, legislative,  
7 electoral, and monetary resources dictate that the matter go no further, and  
8 the whole be declared rejected, all and several, irrespective of whatever form  
9 or components into which it might be possible to break the Convention's work.  
10 Thus, the final purpose is to preserve both the people's right to reject proposed  
11 constitutional amendments and the Legislature's constitutional discretion to  
12 determine the timing of submission of proposed amendments for ratification,  
13 notwithstanding any act or omission of the Convention. This Act will permit  
14 Commonwealth voters to decide whether to reject the work of the Convention  
15 in its entirety in November or vote on ratification in March.

16 Section 3. Definition. As used in this Act, "Third Constitutional  
17 Convention" means that convention convened pursuant to Public Law 9-18 to  
18 propose amendments to the Commonwealth Constitution and which adjourned  
19 sine die August 4, 1995.

20 Section 4. Amendment. Section 19(a) of Public Law 9-18 is hereby  
21 amended to read:

22 "(a) All proposed amendments to the Constitution of the  
23 Commonwealth of the Northern Mariana Islands adopted by the  
24 Convention shall be submitted to the voters for ratification ~~at the~~  
25 ~~November 1995 general election,~~ pursuant to Article XVIII, Section 5, of  
26 the Constitution of the Commonwealth of the Northern Mariana Islands  
27 as provided in Section 5 of the Constitutional Amendments Ratification  
28 Act of 1985. Authority to conduct the referendum is hereby granted to  
29 the Board of Elections, in accordance with the provisions of this Act, the  
30 Constitutional Amendments Ratification Act of 1985, and existing  
31 election law. The Board of Elections shall certify ~~the referendum~~ results  
32 ~~of the referendum-~~ to the Governor and the Legislature."

1           Section 5. Ratification Vote.

2           (a) The following question, in the English, Chamorro, and  
3           Carolinian languages, shall be submitted to the voters in the November 1995  
4           general election pursuant to 1 CMC § 6432:

5           "Should the new constitution or amendments proposed by the Third  
6           Constitutional Convention be rejected in its or their entirety?"

7                           YES \_\_\_\_\_                           NO \_\_\_\_\_"

8           (b) If a majority of the votes cast on the question submitted  
9           pursuant to subsection (a) of this section are in the affirmative, the Board of  
10          Elections shall certify the result of the ratification vote and declare each and  
11          every proposed amendment rejected pursuant to Article XVIII, Section 5(b) of  
12          the Commonwealth Constitution, and the fact that the form, content, or  
13          number of such proposed amendments may not have been finally determined  
14          at the time of the election or subsequent Board action shall not preclude such  
15          certification and declaration or deprive the same of force or effect. "Proposed  
16          amendment" as used in this subsection means any language adopted by the  
17          Third Constitutional Convention which would effect an amendment to or  
18          change in the Commonwealth Constitution if approved by the voters.

19          (c) If a majority of the votes cast on the question submitted  
20          pursuant to subsection (a) of this section are in the negative, the result shall  
21          be deemed a vote for, and shall constitute approval by the voters of, deferral of  
22          the ratification vote to March 1996, or such later date as determined by  
23          Section 6 of this Act, and effect shall be given to this mandate by submitting  
24          such amendments, if any, as are determined judicially, by statute, or by other  
25          lawful means to have been proposed by the Third Constitutional Convention, to  
26          the voters for ratification at a special election to be held pursuant to 1 CMC §  
27          6432 and subsection (d) of this section on the fourth Saturday of March 1996  
28          (March 23, 1996) or such later date as prescribed by Section 6 of this Act.

29          (d) In a special election directed by subsection (c) of this section,  
30          amendments to the Commonwealth Constitution proposed by the Third  
31          Constitutional Convention shall be submitted to the voters in the manner  
32          prescribed by this subsection. The proposed amendments shall be presented so  
33          that each is voted upon separately. Sufficient copies of the full text of each

1 proposed amendment, in the English, Chamorro, and Carolinian languages as  
 2 translated pursuant to Section 12 of Public Law 9-18, shall be available at the  
 3 polls so that every voter who wishes may refer to the actual text of the  
 4 amendments when voting. Each proposed amendment shall be identified by a  
 5 unique number, running consecutively beginning with one (1). The  
 6 referendum ballots shall be in substantially the following form:

7 (1) Each proposed amendment shall be identified by its  
 8 unique number and a short title or caption describing the subject  
 9 of the amendment;

10 (2) The title or caption of the amendment shall be  
 11 presented in the English, Chamorro, and Carolinian languages in  
 12 accurate translation; and

13 (3) The number and title or caption of the amendment  
 14 shall be preceded with a question, in the English, Chamorro, and  
 15 Carolinian languages, posed substantially as follows:

16 "Constitutional Amendment Referendum  
 17 Do you approve the following amendment to the Constitution of  
 18 the Commonwealth of the Northern Mariana Islands, as proposed  
 19 by the 1995 Constitutional Convention?  
 20 YES \_\_\_\_\_ NO \_\_\_\_\_"

21 Section 6. Deferral of Ratification Vote in Event of Ongoing Litigation.  
 22 As used in this section, "relevant litigation" means any litigation challenging  
 23 the number, form, or content of proposed amendments, seeking to enjoin  
 24 conduct of the ratification election or the presentation of one or more  
 25 amendments, contesting the form of any question presented or to be presented  
 26 to the voters or the effect of any prior action taken by the voters pursuant to  
 27 law relative to ratification or the ratification election, or seeking declaratory  
 28 judgment or injunctive relief on any other matter relating to a proposed  
 29 amendment or amendments or the conduct of the ratification election. If any  
 30 relevant litigation shall be pending on March 1, 1995, the ratification vote  
 31 pursuant to subsections (c) and (d) of Section 5 of this Act shall be deferred  
 32 until a date designated by the Governor which is at least 30 days but not more

1 than 120 days after all such pending litigation, including all available  
2 appellate review, has been finally determined.

3 Section 7. Election Law Amendments.

4 (a) 1 CMC § 6205(f) is hereby amended to read:

5 "(f) Notwithstanding any registration requirements provided for  
6 in this Act, a registered voter who has voted in ~~an~~ the last general  
7 election need not register again in order to vote in any general or  
8 special election, unless it is necessary due to a change of identification  
9 or residency or unless disqualifications enumerated by this Act have  
10 intervened. If voting records have been destroyed or lost, the Board  
11 nevertheless may require reregistration of voters."

12 (b) 1 CMC § 6432 is hereby amended to read:

13 "~~§ 6432. Establishment of a Provision for Special Elections .~~

14 A Subject to the provisions of this section and section 6433,  
15 special elections shall be held to place before the Commonwealth voters  
16 for ratification or other action several amendments to the Northern  
17 Marianas Constitution as proposed by various popular or legislative  
18 initiatives or constitutional convention, and such other matters as  
19 provided by law. Such special elections shall be held no more than 60  
20 days after notification by the legislature by joint resolution to the Board  
21 of Elections or at such time and in such manner as provided by law. In  
22 accordance with its responsibilities and duties under 1 CMC § 6104, the  
23 Board of Elections shall administer and supervise the special elections.  
24 Voter eligibility and voting procedures shall be in compliance with  
25 1 CMC § 6201 et seq."

26 (c) A new 1 CMC § 6433 is hereby enacted to read as follows:

27 "§ 6433. Form of Question.

28 Except as otherwise provided by law, in a special election under  
29 section 6432, amendments to the Commonwealth Constitution and other  
30 matters shall be submitted to the voters substantially in the manner  
31 prescribed by this section. All proposed amendments and other matters  
32 shall be presented so that each is voted upon separately. Sufficient  
33 copies of the full text of each proposed amendment or other matter, in



1 the English, Chamorro, and Carolinian languages in accurate  
 2 translation, shall be available at the polls so that every voter who  
 3 wishes may refer to the actual text of the amendments or other matter  
 4 when voting. Each proposed amendment or other matter shall be  
 5 identified by a unique number, running consecutively beginning with  
 6 one (1). The referendum ballots shall be in substantially the following  
 7 form:

8 (1) Each proposed amendment or other matter shall be  
 9 identified by its unique number and a short title or caption  
 10 describing the subject of the amendment or other matter;

11 (2) The title or caption of the amendment or other matter  
 12 shall be presented in the English, Chamorro, and Carolinian  
 13 languages in accurate translation; and

14 (3) The number and title or caption of the amendment or  
 15 other matter shall be preceded with a question, in the English,  
 16 Chamorro, and Carolinian languages, posed substantially as  
 17 follows:

18 "[Constitutional Amendment; Other Matter] Referendum

19 Do you approve the following [amendment to the Constitution of  
 20 the Commonwealth of the Northern Mariana Islands; other  
 21 matter], as proposed by [Constitutional Convention; Legislative  
 22 Initiative; Popular Initiative; Other Means]?

23 YES \_\_\_\_\_ NO \_\_\_\_\_"

24 (d) A new 1 CMC § 6434 is hereby enacted to read as follows:

25 "§ 6434. Funding.

26 In the absence of an appropriation for a special election  
 27 conducted pursuant to this Article, the Governor shall, notwithstanding  
 28 any other provision of law, reprogram sufficient funds for the conduct  
 29 of the special election from Executive Branch accounts to the Board of  
 30 Elections."

31 Section 8. Repealer. Section 19(b) of Public Law 9-18 is repealed.

32 Section 9. Severability. If any provision of Sections 4, 5 or 7 of this Act  
 33 or the application of any such provision to any person or circumstance should

1 be held invalid by a court of competent jurisdiction, then Section 4, Section 5  
2 and Section 8 shall be invalid in their entirety and without effect on any law  
3 as it existed prior to the effective date of this Act. In every other respect, the  
4 provisions of this Act are severable.

5 Section 10. Effective Date. This Act shall take effect upon its approval  
6 by the Governor or upon its becoming law without such approval.

Date: \_\_\_\_\_

Introduced By: \_\_\_\_\_  
Sen. Paul A. Manglona


Approved for Introduction on \_\_\_\_\_

\_\_\_\_\_  
Chairman, Rules and Procedure

Ninth Northern Marianas Commonwealth Legislature

**MEMORANDUM**

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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.

9 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:

(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]eceived 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 its 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 noted 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 form. 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.