MEMORANDUM FOR CONVENTION DELEGATES

SUBJECT: Legal Challenge to Work of the Convention September 19, 1995

You may have seen the attached article from the September 11 Marianas Variety quoting Senator Paul Manglona and making reference to a legal opinion issued by Mr. Woodruff, Senate Legal Counsel. A copy of the opinion was sent to Chairman Guerrero by a letter dated September 7 from Senator Manglona.

Woodruff's opinion makes the following general points: (1) it is impossible to determine exactly what the Convention is proposing by way of amendments and accordingly it can be concluded that the Convention did nothing; (2) the Convention did not have the authority to recommend "an entirely new constitution;" (3) if the Convention proposed 19 amendments with each addressed to a separate article, they may violate the "single subject" rule contained in the enabling legislation; (4) the Legislature has the authority to decide how the proposed amendments should be put to the voters; and (5) the Post Convention Committee has no authority to solve any problems regarding the placing of the amendments on the ballot.

Some of these points, such as #1, border on the foolish and do not merit any response. With respect to points ##2,3, and 4 counsel Woodruff is clearly wrong, based on the Commonwealth Constitution and applicable legal precedents in other United States jurisdictions. What is even more interesting is that Woodruff is now taking legal positions exactly contrary to those that he presented in 1985 when he served as a consultant to the Second Constitutional Convention.

Attached is a copy of Woodruff's memo dated July 11, 1985. He was challenging, although not a lawyer at the time, two legal opinions suggesting that the Convention could not propose an amendment that covered more than one article. Woodruff made the following points:

1) On the subject of the authority of the Convention, Woodruff relied on materials generated during the 1976 Convention and concluded:

"The purpose of a constitutional convention is comprehensive review of the constitution and proposal of any and all amendments necessary to correct deficiencies in the constitution as they relate to the aspirations of the people and the conduct of their government. To perform this enormous responsibility, the people elect special representatives to address this single purpose. This purpose is quite different from that of legislative or popular initiative, which is to correct a limited, single deficiency. When a broader review is needed, legislative or popular initiative can be used to call a constitutional convention" (p.2)

Woodruff was right in 1985. So much for his challenge to this Convention's authority to do exactly what it did.

2. In 1985 Woodruff was contending that the Convention could properly propose amendments that cover more than one article. He maintained that the "single subject" requirement in the Commonwealth Constitution applicable to legislative initiatives was not applicable to amendments proposed by the Convention. He stated:

"With respect to the constitutional restriction on embracing "the subject matter of more than one article", which applies to legislative initiative, we should note that the focus in on the subject, not articles per se. In the instance of certain subjects, for example, local government, qualifications for office, ethics of government officials, etc., the subject appears in more than one article. It would be impossible to make an amendment treating the subject in general without amending more than one article. To require several separate amendments in order to address the subject would make no sense. Consequently, I do not believe this was intended to be an absolute prohibition even on the legislature, and to apply it to constitutional conventions as well would effectively prevent the people from changing the constitution to reflect their needs and desires."(p.4)

Woodruff's position in 1985 is directly contrary to his position in 1995. So much for his contention that this Convention's proposed article-by-article amendments do not meet the "single subject" requirement.

3. Woodruff in his 1985 opinion was very definite that the Legislature did not have the authority to dictate to the Convention to restrict the scope of the amendments proposed by the Convention or the way in which they should be presented to the voters. Relying in part on briefing papers submitted to the First Constitutional convention, he stated:

"...I do not believe the legislature has any constitutional authority to restrict the scope of amendments proposed by the convention. Amendments proposed by the convention are not subject to legislative approval." (p.4) "I believe the Convention itself is the sole judge of what a proposed amendment is. When the Convention takes final action stating that something is proposed amendment No. 1, etc., then that is the form it goes to the voters. The Convention, of course, has a responsibility to submit amendments to the voters in an orderly manner and to give them free and fair choices, but there is no constitutional authority for restricting the freedom of the Convention in proposing amendments, other than that imposed by the Covenant and the Constitution and laws of the United States s applicable to the Commonwealth." (pp.4-5)

Woodruff was right in 1985. So much for his contention now that the Legislature can impose limitations on the work of the Convention and determine how the proposed amendments should be presented to the voters.

There are many conclusions that one might take away from this discussion of Woodruff's opinions in 1985 and this opinions in 1995 -- about the function of lawyers, the importance of principles, and the differences among lawyers. You may have others in mind as well.

ConCon product under fir

Legal opinion: Proposals violate rules

By Rafael H. Arroyo
Variety News Staff

THERE IS a need for Legislature to define the constitutional amendments proposed by the Third Constitutional Convention owing to the vagueness, in form and content, of such amendments.

This was the statement made by Sen. Paul A. Manglona who said the failure of the Third Constitutional Convention to clearly delineate what was amended in the constitution made it virtually impossible for the Legislature to tell what the ConCon really did.

He said without this knowledge, it would be difficult to for legislature to decide on whether it would enact a law to provide for a special election to ratify the proposed constitutional amendments.

Manglona's statement was contained in a Sept. 7 letter he sent Third ConCon President Herman T. Guerrero airing his concerns over the overall product of the ConCon.

Although the Convention did provide the Legislature with a rewritten Commonwealth Constitution, he said no amendments for submission to the voters were specified, unless the new draft constitution is the sole proposed amendment.

According to the Rota senator, the constitution clearly vests discretion in the legislature to determine when the proposed amendments will go to the voters for ratification in the next general elections or in a special elections proposed by the Third ConCon.

"The Legislature is placed in a predicament by the fact that it does not know exactly what are the specific amendments that are supposed to go before the people," said Manglona.

Manglona took issue with an opinion written by Senate Legal Counsel Steve Woodruff which casts legal doubts on the validity of the product of the Third Concon and on his observation that the single amendment that it produced is the entire draft Constitution.

"If what the Convention did was attempt to propose a new Constitution, it is doubtful whether it had the power to do so," said Woodruff in his eight-page opinion.

Although he said the ConCon can propose entirely new constitutions, Public Law 9-18, specifically required that each proposed amendment be confined to a single subject or topic.

"An entire new constitution can hardly be said to be 'confined to a single subject or topic,'" said Woodruff.

In another part of his legal opinion, Woodruff also observed that it is also possible that the ConCon may have proposed 19 amendments, each consisting of a single article.

If that was the case, he said

there may still be some doubts over the legality of the move.

"For one thing, none of these votes (on the amendments) was designated as a vote on a proposed amendment. 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," said Woodruff.

He added, "To treat the 19 new articles as proposed amendments require reliance on principles of implied repeal and amendment."

But supposing that the ConCon adopted 19 proposed amendments, Woodruff said this also violates the single subject requirement.

"Thus many, if not all, of such supposed proposed amendments may be invalid as violating the single subject requirement," the Senate legal counsel said.

According to Woodruff, 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 as the Convention, now non-existent, was the only one empowered to propose amendments.

"Determining exactly what is incorporated in a single proposed amendment is an integral part of proposing an

Herman T. Guerrero

amendment. It is a task that could only be performed by the Convention," said Woodruff.

At present, added Woodruff, the question of what, if any, amendments were proposed by the ConCon, is wide open to court action and judicial determination, with the possible finding that the Convention failed to propose any amendments," he said.

However, if the Legislature defines the amendments by law, Woodruff said the courts will probably respect that determination.

Currently, Sen. Manglona is coming up with a bill to effectively address the said amendments.

"If the Post Convention Committee supplies the Senate with specific proposed amendments in a timely manner we may be able to incorporate this listing into legislation dealing with the ratification election," said the Rota senator.

MEMORANDUM

July 11, 1985

TO: Convention President

FROM: Consultant

SUBJ: Legal Opinions Nos. 7 and 9

The subject legal opinions maintain that Article XVIII, Section 3 of the Constitution restricts the Convention from proposing a constitutional amendment that affects more than one article of the constitution, even though the language of Public Law 4-30 permits such amendments. It is my view that if the Convention is bound by these opinions, the Convention could be hampered in the performance of its constitutional duties and responsibilities. For this reason, I recommend that an opinion be requested from another attorney and the following issues be considered.

Legal Opinion No. 9 notes that Article XVIII, Section 3 restricts the legislature from proposing an amendment that embraces "the subject matter of more than one article of this Constitution." The opinion then extends this restriction to amendments proposed by a constitutional convention and by popular initiative by inference. I do not believe this reflects either the constitutional intent or usual standards of legal construction. First, when a provision is put in one part of a law and left out of another, the presumption usually is that it applies to the first set of circumstances and not to the second, unless there is something in the context or the legislative history that clearly indicates it was meant to apply generally. Second, we should focus on the significantly different purposes of constitutional convention, legislative initiative, and popular initiative. Third, we should note that the constitutional restriction is on embracing "the subject matter of more than one article", not articles per se.

With respect to whether the restriction "A proposed amendment may not embrace the subject matter of more than one article of this Constitution" should be construed as applying generally, I believe there is considerable evidence that it should not, in addition to rules of construction. While Section 4 on popular initiative specifically authorizes the legislature to transform a popular initiative into a legislative initiative, I note that the legislative vote requirement of this section is less stringent that that in Section 3 on legislative initiative. The ability of the

legislature to transform an amendment proposed by constitutional convention or popular initiative into a legislative initiative is obvious even in the absence of this provision, since the legislature is empowered to propose amendments even without a convention or popular initiative simply by meeting the vote requirements of Article XVIII, Section 3. Section 4 simply relaxes the vote requirement.

The purpose of a constitutional convention is comprehensive review of the constitution and proposal of any and all amendments necessary to correct deficiencies in the constitution as they relate to the aspirations of the people and the conduct of their government. To perform this enormous responsibility, the people elect special representatives to address this single purpose. To restrict a convention to proposing amendments article by article would defeat the constitutional purpose. This purpose is quite different from that of legislative or popular initiative, which is to correct a limited, single deficiency. When a broader review is needed, legislative or popular initiative can be used to call a constitutional convention.

The report of the Committee on Finance, Local Government and Other Matters on Committee Recommendation No. 1 as recorded on pages 584-597 of the Journal of the first Constitutional Convention (Vol. II) sheds additional light on the subject. It reads in part:

> The Constitutional Convention process facilitates a comprehensive review of the entire document, or major portions of it, and assures close attention to the experience under the constitution, which often cannot be done by ordinary legislative processes.
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> Legislative initiative. A constitutional convention typically involves a broad review of the existing constitution and is not a matter to be undertaken frequently or lightly. Based on widespread experience in fifty states and Puerto Rico, however, there is need or desire to consider specific amendments of the constitution, some of a technical nature, others relating to particular constitutional policies or protection of individual liberties. Among the fifty states, the legislature is considered the appropriate forum for proposing individual cosntitutional amendments. . . . To facilitate voter understanding of the issues raised by the amendments, any single amendment would be limited to the subject matter contained in one article of the constitution.
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> Popular initiative. . . . To preserve the public's ultimate

right to decide the content of its fundamental document . . .

> Ratification. . . . The range of changes that a constitutional convention might propose . . . support the higer vote requirement in these instances . . .
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> Organization of Constitutional Convention. . . . Once a constitutional convention is authorized, it should be free to consider a wide range of potential revisions or amendments, subject of course to provisions of the Covenant and applicable provisions of the United States Constitution. . . . Restrictions on the scope or power of a constitutional convention was not considered warranted.

Legislative initiative, on the other hand, is designed to permit limited, often purely technical, amendments to be proposed, without the extra difficulty of calling a constitutional convention or obtaining signatures on a petition. Since the legislature does not represent the voice of the people specifically with respect to constitutional issues, and to prevent political professionals from confusing or manipulating the voters with respect to a constitutional amendment, the restriction on the scope of amendments proposed by legislative initiative is appropriate.

Popular initiative is likewise very different. Since it represents the direct voice of the people, in whom all right and power of governance reside, a restriction on the scope of a proposed amendment is not only inappropriate but would deprive the people of a fundamental right. However, in recognition of the fact that a popular initiative could be put forth in the heat of the moment or by a special interest group, the framers of the original constitution took the care to include the requirement that the petition must "contain the full text of the proposed amendment." (see also the Analysis, pg. 190) By ensuring that each signatory sees the full text, the framers protected against abuses without infringing on a fundamental right. This particular requirement is not included in the provisions on legislative initiative and constitutional convention; however, the legislature, recognizing the value of this provision with respect to the people's right to know, included it in the provisions of Public Law 4-30 relating to the form of the ratification ballot.

With respect to the constitutional restriction on embracing "the subject matter of more than one article", which applies to legislative initiative, we should note that the focus is on the subject, not articles per se. In the instance of certain subjects, for example, local government, qualifications for office, ethics of

government officials, etc., the subject appears in more than one article. It would be impossible to make an amendment treating the subject in general without amending more than one article. To require several separate amendments in order to address the subject would make no sense. Consequently, I do not believe this was intended to be an absolute prohibition even on the legislature, and to apply it to constitutional conventions as well would effectively prevent the people from changing the constitution to reflect their needs and desires.

We can further ask, "What sort of responsibility is this restriction against embracing the subject matter of more than one article?" One can easily make the case that, particularly with respect to a constitutional convention, if it applies to such a convention, that it is the same sort of responsibility as the legislative responsibility to limit bills to a single subject. That is a responsibility that is not subject to judicial review. That is, the legislature (or the convention) determines, in its judgement, what the subject is.

As the primary drafter of the Senate amendments to House Bill No. 22 (P.L. 4-30), I do not believe the legislative intent was to restrict the authority of the convention to propose amendments in any way. The language in Section 13 of the law, which I drafted, was intended to 1) memorialize in the statute the broad authority to propose amendments which the convention would have, and 2) require that the convention not propose two or more amendments which are inconsistent one with another, nothing more. Indeed, I do not believe the legislature has any constitutional authority to restrict the scope of amendments proposed by the convention. Amendments proposed by the convention are not subject to legislative approval. Further, Briefing Paper No. 9, prepared for the first Constitutional Convention states: "A number of state constitutions that require periodic submission of the convention question to the voters include in the constitution the precise question to be put to the voters with respect to the convention. For example, the Hawaii constitution provides: The legislature may submit to the electorate at any general or special election the question, 'Shall there be a convention to propose a revision of or amendments to the constitution?' This type of provision denies the legislature the opportunity to limit the scope of convention powers." (page 18)

Conclusion. I believe the Convention itself is the sole judge of what a proposed amendment is. When the Convention takes final action stating that something is proposed amendment No. 1, etc., then that is the form it goes to the voters. The Convention, of

course, has a responsibility to submit amendments to the voters in an orderly manner and to give them free and fair choices, but there is no constitutional authority for restricting the freedom of the Convention in proposing amendments, other than that imposed by the Covenant and the Constitution and laws of the United States as applicable to the Commonwealth. The precise language of Public Law 4-30 may pose some problems, but I believe the constitutional principle should override. If not, an amendment to Public Law 4-30 should be sought from the legislature in order to bring the language into precise conformance with the intent as stated above.

Stephen C. Woodruff