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FAX TRANSMISSION COVER SHEET

Total number of pages sent (including cover sheet):

TO: Herman T. Guerrero
Chair, Post-Convention Committee
Third Northern Mariana Islands Constitutional Convention
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FROM: Deanne Siemer

MESSAGE:

Herman:

Dave Cahn is headed back your way for about a month. He should be arriving on Monday or Tuesday. He has reviewed the Constitution in detail and has a lot of comments. I have talked with him on the phone and explained why there are no problems with the language on which he has focused. Because he may advise the Governor on this, I decided to write down his comments and the explanations I gave him so you will have the necessary information in case any of these things come up before we get back there.

These comments deal with Articles 1-9 which have always been his main focus. He is going to fax the rest of his comments on Articles 10-19 when he gets back to Saipan.

Cahn says the Governor is happy with the Constitution except for (1) gambling; (2) the succession rule on judges; (3) the election rule on judges; (4) the residency requirement for the Secretary of Education. Overall, Cahn says the Convention's efforts are a "tour de force" and he is highly complimentary about many specific provisions.

Deanne

September 1, 1995

Memo for the file

Re: Dave Cahn's comments on the proposed constitutional amendments to Articles 1 through 9.

From: Deanne Siemer

1. Comment: Article 1, Section 11: The word "protection" in this section seems to indicate that the former prohibition on abortion is included in this new language and the explanatory language in the Analysis should be in the constitution for maximum protection.

Response: The Analysis makes clear that there is no protection until the legislature acts and that this language does not create any cause of action until the legislature does so. It was not necessary to put the explanatory language in the constitution; the courts will use the Analysis and only if they find a direct conflict between the Analysis and the constitutional language would they not follow the Analysis.

2. Comment: Article 2, Section 2(b): The constitutional language could be read to mean that the Lieutenant Governor votes only in case of a tie in the election of the presiding officer, not in subsequent Senate proceedings.

Response: The Analysis explains this section on p. 4. The practice intended -- that the Lieutenant Governor vote in all cases of a tie -- is modeled on the U.S. Senate and should be clear enough. The Post-Convention Committee could add the word "thereafter" in the Analysis so that the sentence would read "until it elects a presiding officer and voting thereafter only in the event of a tie."

3. Comment: Article 2, Section 2(d) (and other similar sections) uses the term "resident and domiciliary". Other sections use only the term "resident".

Response: The 1976 provisions used the formulation "resident and domiciliary" meaning that the person has to be physically residing and have his or her primary home in the Commonwealth and

also have the requisite intent to support a domicile. The 1995 provisions used the formulation "resident" because physical location and primary home are much easier to determine than a person's mental intent. The Commonwealth's interests are served adequately by a residence requirement, and the very low possibility of winning litigation in a contest over someone's intent led to dropping the second part of the requirement.

4. Comment: Article 2, Section 5(a) says: "The legislature shall not enact a law that requires the expenditure of public funds without also appropriating the funds." Does this mean that any law that purports to create an entitlement does so only to the extent funds are appropriated?

Response: Yes. Once the appropriated funds run out, there is no entitlement unless the legislature appropriates more funds.

5. Comment: Article 2, Section 5(a) says: "Every expenditure of public funds must be authorized in an appropriation bill." The authorization process in the federal government, for example, is different from the appropriation process. The substantive committees propose authorization bills that say a project or process is approved and the the budget committees propose appropriation bills that say money is appropriated for authorized projects. The Governor is considering an executive order with respect to the authorization process that has heretofore not been used in the Commonwealth (at least along the federal model -- the resolutions that carry no appropriations could be thought to be an authorization process of sorts) and the use of both terms in this section will confuse things.

Response: The word "authorize" in this context has the usual dictionary meaning of "establish by authority". It does not refer to a specific authorization process that is separate from an appropriation process. If the legislature wishes to develop a separate authorization process, for example to use with capital projects, they are not limited by this wording from accomplishing that objective.

6. Comment: Article 2, Section 7 does not provide for impeachment of local officials. Why are they exempt?

Response: Local officials are removed by recall petitions, not by impeachment. Impeachment is done by the Commonwealth Legislature and applies only to Commonwealth officials.

7. Comment: Article 2, Section 9 provides for changes in legislative salaries "upon the recommendation of an advisory

commission" and specifies how the commission is to make its findings. Is the commission's recommendation binding on the legislature?

Response: This language has been in the Constitution since 1976; this Convention did not change it. The recommendation of the advisory commission is not binding in the sense that the legislature can decrease or reject it. But the legislature cannot increase it or take other actions to increase their salaries. This is the same system that this Convention adopted with respect to the Civil Service Commission's recommendations as to salary increases for civil servants.

8. Comment: Article 2, Section 14 provides that a member of the legislature who has a "financial or personal interest" in legislation may not debate or vote on the bill. This is unworkable and should have been changed by the Convention. Every legislator has some kind of personal or financial interest, perhaps attenuated, on almost every bill. This should be a "direct" or "significant" financial interest.

Response: This language has been in the Constitution since 1976. The legislature has enacted laws defining "financial and personal interest" and there is no indication these definitions do not work. Further, Masons Manual, which the legislature uses has a definition that incorporates the "direct and significant" concepts.

9. Comment: Article 2, Section 15 makes no provision for legislators' salaries and technically they may not be paid under the wording adopted by the Convention. Also, Section 15 makes no provision for the Speaker of the House or the President of the Senate to have any additional funds.

Response: Section 15(a) provides for legislators' salaries. There is no dollar amount because these salaries are subject to revision by the salary commission. Section 15(c) provides for extra allowances for two leadership positions -- the majority leader and the minority leader -- in each house. The legislature is free to assign the allowance for the majority leader in each house to the Speaker and the President by rule. The constitution requires, however, that the principal leader on the minority side also get an allowance.

10. Comment: Section 15(d) provides that the balance of the legislature's budget, after expenses covered by subsections (a), (b), and (c) are deducted, goes to the Legislative Bureau. This means that the Legislative Bureau must do political tasks such as paying expert witnesses and paying for litigation. This is

----- language would they NOT follow the Analysis.

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Response: The Analysis explains this section on p. 4. The practice intended -- that the Lieutenant Governor vote in all cases of a tie -- is modeled on the U.S. Senate and should be clear enough. The Post-Convention Committee could add the word "thereafter" in the Analysis so that the sentence would read "until it elects a presiding officer and voting thereafter only in the event of a tie."

3. Comment: Article 2, Section 2(d) (and other similar sections) uses the term "resident and domiciliary". Other sections use only the term "resident".

Response: The 1976 provisions used the formulation "resident and domiciliary" meaning that the person has to be physically residing and have his or her primary home in the Commonwealth and

outside the mission of the Legislative Bureau.

Response: The Legislative Bureau currently provides lawyers for litigation which the Legislature undertakes. For example, Maya Kara and Steve Woodruff represented the House and the Senate in the pending Sablan case about the apportionment of the Senate. The Legislative Bureau is competent to hire outside counsel. Individual legislators who want to be represented by their own outside counsel will have to use a part of their office expense allowance. The Legislative Bureau is also competent to find and hire expert witnesses, and would do so in consultation with the legislative committees.

11. Article 3, Section 4 says: "No person may be elected governor more than twice." This is a lifetime bar and is a violation of the U.S. Constitution's prohibition on bills of attainder. The recent Supreme Court decision striking down term limits is a relevant example.

Response: This is a lifetime bar, but it is not a bill of attainder. A bill of attainder is a legislative act that inflicts the consequences of attainder without a judicial

rights and capacities of a person. The constitution does not extinguish any civil right by limiting a governor to two terms. The Supreme Court decision is not relevant because that centered around a state's right to control persons elected to a federal position in Congress. The Supreme Court decided that states cannot extend their power into the federal sphere in this way.

12. Comment: Article 3, Section 7 provides that the presiding officer and speaker may move up to be governor and lieutenant governor under some circumstances. Do they lose their right to vote in the legislature by virtue of moving into the executive branch offices? Do they lose their seats in the legislature?

Response: Yes, they lose their right to vote in the legislature (except to the extent the Lieutenant Governor (former Speaker) may vote in the Senate by virtue of being Lieutenant Governor. Yes, they lose their seats in the legislature and the provisions of Article 2, Section 8 on vacancies in the legislature would come into play. If more than one half of the term remains, there would be a special election to fill these two seats. If less than half the term remains, the Governor (former President of the Senate) would appoint the successors.

13. Comment: Article 3, Section 8(b) provides that if the person next in succession has a question about whether the governor is unable to carry out the office, he or she may petition the

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these 2 pages (p. 4 & 5)

Herman
9/3/95

Supreme Court to declare a vacancy. This seems to indicate that the governor, once declared unable to carry out the office, cannot reclaim the office if the disability is temporary.

Response: Section 8(b) puts the responsibility with the Supreme Court "to determine all questions regarding the disability of the governor and the existence of a vacancy" and the Supreme Court could decide the disability was a temporary one (eg. the use of anesthetic or a temporary coma) that the vacancy would be temporary.

14. Comment: Article 3, Section 9(a)(2) provides that in the event there is no budget approved by the beginning of the fiscal year, and projected revenues for the current year are less than projected revenues for the past year, the lower current year projected revenues shall be allotted proportionally to each agency based on the each agency's share (less any extraordinary or non-recurring expenditures) of the prior year appropriations. Can this proportional allotment be overcome by the Governor's reprogramming authority.

Response: Yes.

15. Comment: Article 3, Section 9(a)(3) provides that in the event there is no budget approved by the beginning of the fiscal year, each person who authorizes expenditures is personally liable if such expenditures are not within the level of funding authorized. The use of the term "authorized" in these two different senses creates confusion, and also conflicts with the concept of authorization as different from appropriation. (See comment on Article 2, Section 5(a). If the legislature adopts an "authorization" bill, as distinct from the appropriation bill, then it could authorize 10 times likely spending (without appropriating anything) and take these people who spend money off the hook.

Response: The term "level of funding authorized" as used here means the level of funding permitted under the constitution's plan for proportional allocation. The phrase "person authorizes expenditures" means a person signs a document that permits government money to be spent.

16. Comment: Article 3, Section 9(a)(4) provides that in the event there is no budget approved by the beginning of the fiscal year, all revenues in excess of the amount of the last appropriation shall remain in the general fund until appropriated by the legislature. What does this mean? There may be several appropriations bills during a fiscal year. What is the control intended by the reference to the "last" appropriation bill?

Response: Projected revenues are allocated to the agencies based on each agency's share of the prior year's overall appropriations for the operation of the government. If projected revenues are allocated on this basis, and actual revenues turn out to be higher than anticipated, the agencies may not get access to those extra revenues until they are appropriated by the legislature.

17. Comment: Article 3, Section 10 provides for the Governor's emergency powers. The Analysis says that the emergency powers should be used by the governor only with respect to "emergencies that have already occurred". This language is not supported by the constitutional language and may be a problem if it prevents the Governor from a preemptive strike against a calamity that is about to occur. What is intended with respect to such preemptive strikes? Does the Governor's emergency powers override limits on reprogramming authority found in other parts of the Constitution?

Response: If the calamity is, for example, a typhoon that has not yet hit the islands or a volcano that is showing signs of eruption but has not yet actually erupted, that is an emergency that has already occurred. The Governor can evacuate people or spend money for shelters under his emergency powers before the typhoon hits or the volcano erupts. The Governor may not, however, build shelters under his emergency powers when there is no typhoon on its way. The Legislature must have acted in that instance. The Governor's constitutional emergency powers override legislative limits on reprogramming but do not override constitutional limits on reprogramming.

18. Comment: Article 3, Section 11 requires the Attorney General to be a member of the CNMI bar. That prevents the appointment of anyone from the States.

Response: The requirements for admission to the CNMI bar are administered by the Supreme Court under Article 4, Section 9(c). If the Governor wants to appoint someone as Attorney General who is not a member of the CNMI bar, the Governor would ask the Supreme Court to waive the bar exam and make this person a member of the bar based on prior bar admissions and credentials.

19. Comment: Article 3, Section 12 assumes that the Public Auditor only does audits. It does not provide for investigations. The provision that the Public Auditor shall not duplicate professionally acceptable audits may interfere with investigative activities. Who determines whether an audit is "professionally acceptable"?

Response: The Analysis recognizes, at page 20, the

investigative responsibilities of the Public Auditor. The provision that the Public Auditor shall not duplicate professionally acceptable audits only means that completed audits will not be done over again. It does not mean that a separate investigation of facts, part of which may have been covered by an audit, may not be completed. The Public Auditor determines (in the first instance) whether an audit is "professionally acceptable".

20. Comment: Article 3, Section 13 does not provide the Secretary of Education with any power over the local school boards. Instead of having 5 elected board members ruling the school system, we will now have 15 of them. And they will be free to do whatever they want.

Response: Section 13 provides for a strong central governance of the school system through an appointed Secretary. The Secretary issues policies, rules, and regulations. The local boards must operate within these restrictions. In effect, the local school boards have only the powers that the Secretary gives them. Each individual school is now responsible to a central school board of 5 members. That remains the same under the proposed amendments. Each individual school will now be under a local board of 5 members rather than a central board of 5 members. From the point of view of the schools, this should be a more responsive system, but it does not increase the number of board members who are involved with the school.

21. Comment: Article 3, Section 13 does not make any provision for school principals, yet the Analysis delineates the responsibilities of principals. In this respect, the Analysis goes beyond the Constitution.

Response: The Constitution specifies that decentralization is primarily to schools, not to school boards. Appropriations for instruction go directly to schools. The Secretary can withhold money if a school is not in compliance with the Secretary's regulations and policies. The Schedule on Transitional Matters, Section 2(a)(6) provides that the Secretary governs the transition of administrative functions to individual schools, not school boards. The transition takes place over time, but no time limit is provided. Principals are in charge of schools. It is on that basis that the Analysis delineates the responsibilities of principals.

22. Comment: Article 3, Section 13 deletes the guarantee of a free education but retains a compulsory education. This means that poor parents are required to send their kids to school, but

they may not have the money to pay the education fees. How are poor parents to meet the expenses of their children's education?

Response: The Legislature may provide exemptions from fees for those who are unable to pay. The delegates believed that when parents invest in their children's education, they are more likely to be involved with the school and with their child's progress in school. The desirability of these objectives and the availability of a legislative solution outweighs the possibility of an adverse effect.

23. Comment: The residence requirement for the Secretary of Education will prevent the Governor from choosing the most qualified person and upgrading education in the public schools.

Response: If the Governor needs to bring someone from outside the Commonwealth, he can make that person the Deputy Secretary or the Assistant Secretary. There are no residence requirements for subordinate jobs. It is important to utilize the local talent, developed over the past 30 years, for the position of Secretary.

24. Comment: Article 3, Section 14 contains a new restriction that provides no person may serve as an "acting" department head for more than 90 days. May the Governor appoint an acting head for 90 days, then appoint another acting head for 90 days, then go back to the first acting head for 90 days, without submitting any nomination to the Senate?

Response: No.

25. Comment: Article 3, Section 14 provides that a nominee rejected by the senate may not be renominated. If an election intervenes, may a rejected nominee be nominated?

Response: Yes.

26. Comment: Article 3, Section 16(a) provides that the civil service includes all persons who are employed by or whose salaries are paid by the Commonwealth. The Analysis says this includes the Legislative Bureau and the staff of the judicial branch. This creates a separation of powers problem under the Covenant.

Response: The Civil Service Commission may elect to provide guidelines for the legislative and judicial branches, but otherwise to exempt their employees. The Legislature may elect to create excepted positions for the professional and managerial

employees of the Legislative Bureau and judiciary. In any event, this is not a separation of powers problem. Section 203(a) of the Covenant requires only that there be a republican form of government with separate executive, legislative, and judicial branches. It does not require that the branches have no powers respecting one another. A prime example is the power of the legislature to decide the budget of the judiciary. This does not violate the separation of powers and, for the same reason, the power of the civil service commission to set fair standards applicable to the judicial branch for the treatment of secretarial employees also does not violate the separation of powers. The Analysis of Section 203 of the Covenant says: "While the Northern Marianas Government will have to have three separate branches, the people of the Northern Marianas will be free to ... define the precise powers which each branch of government will have."

27. Comment: Article 3, Section 16(a) provides that the civil service shall be "independent". What does independent mean in this context? Are civil servants independent if they follow the orders of political appointees?

Response: This provision with respect to the independent nature of the civil service has been in the Constitution since 1976. "Independent" in this context has the dictionary meaning of not being subject to bias or influence, but acting for the public good. A civil servant follows the orders of a political appointee who is the head of the department, but does not perform his or her tasks with a bias toward or against a particular political party and does not respond to the influence of political party members who are not employed by the department or agency.

28. Comment: Article 3, Section 16(c) provides that the Civil Service Commission may exempt positions from classification where necessary to serve important government interests. Can the Commission make different rules for different types of entities (such as government corporations)?

Response: Yes.

29. Comment: The Analysis with respect to the Civil Service provision refers to contracts with government employees and consultants. Consultants should be deleted from the Analysis. The legislature modified the Compensation Adjustment Act to take out bona fide independent contractors.

Response: The reference to consultants is an example. The Legislature can create exceptions for consultants if necessary.

30. Comment: Article 3, Section 17 provides that "public services" are headed by a resident department head on Rota and Tinian. This does not say that the whole office of a particular department on Rota or Tinian (which may have service responsibilities and enforcement responsibilities) must be headed by someone who is responsible to the mayor. Can the Governor appoint a resident department head to supervise "services" and appoint someone else to head up the whole office?

Response: The language in this section was not changed by the Convention. The answer to this question is in the court's opinion in the Inos case.

31. Comment: Article 3, Section 19 on the retirement system refers to "accrued benefits" and says they may not be diminished or impaired. Does this mean that the formula for payment of retirement benefits cannot be changed?

Response: No. It means that the formula cannot be changed retroactively.

32. Comment: Article 3, Section 20(d) provides that the Council on Indigenous Affairs is to promote Chamorro and Carolinian interests. The Arts Council, which receives federal funds, has been folded into the Council. The Arts Council will not be eligible for federal funds if there is a restriction to Chamorro or Carolinian interests.

Response: The Analysis provides, at page 33: "Any programs funded by federal agencies will be administered by the Council in accordance with applicable U.S. laws and regulations." This takes care of the Arts Council's potential problem.

33. Comment: Article 3, Section 20(e) says that: "The Council shall be provided the funding necessary...". Does that mean the Legislature has no discretion?

Response: No. Article 11, Section 8(c) and the Analysis of that section explain that despite the language in Article 3, Section 20(e), the Council must submit a budget and the Legislature has discretion to appropriate the interest income from the Trust to the Council or to capital improvement projects.

34. Comment: Article 4, Section 2 vests the Supreme Court only with appellate jurisdiction. Could the legislature confer on the Supreme Court jurisdiction to review final decisions of government agencies?

Response: No. But the courts could, with their rule-making powers, provide for an abbreviated proceeding in the Superior Court to assure that the necessary record was assembled and that there were no issues of fact requiring hearings or a trial, and then the matter could be sent to the Supreme Court as an appellate matter.

35. Comment: Article 4, Section 8 provides that a judge may not participate in a political campaign. This is an abridgement of freedom of speech. A judge should not be prevented from campaigning on his or her own behalf.

Response: The language with restricting judges from participating in political campaigns has been in the Constitution since 1976. It was not added by the Convention. There is no abridgement of the freedom of speech involved. A judge is also restricted from commenting on pending cases and talking with lawyers about pending matter without the other side present. These restrictions are necessary to preserve the impartiality of the judiciary, and are a part of the duties of office to which the judge agrees when he accepts an appointment.

36. Comment: Article 4, Section 9(c) provides rule-making power to the Supreme Court. The Analysis says that the Legislature may not legislate in the areas reserved to the court rules. The Analysis is not supported by the language of the Constitution which simply says that the Supreme Court has administrative and policy authority with respect to the judicial branch. This does not give the court exclusive jurisdiction over these areas.

Response: The purpose of the new Article 4 is to give a constitutional basis to a separate judicial branch. In that context, Section 9(c) gives the Supreme Court exclusive jurisdiction over the subject matters consigned to its administrative authority.

37. Comment: Article 4, Section 9(d) leaves out the District of Columbia, so that the Chief Justice may not use judges from the District of Columbia to hear cases in the Commonwealth.

Response: The District of Columbia is treated as a territory under the U.S. system and is covered by Section 9(d).

38. Comment: Article 4, Section 10 provides for an automatic succession to office that deprives the Governor of his power to appoint. If the acting chief justice succeeds to the office after 90 days passes and the legislature has not acted, is he or she permanently in office?

Response: Yes. But this does not deprive the Governor of the power of appointment. When the acting chief justice moves up, there is a vacancy on the court and the governor can appoint someone to fill that vacancy.

39. Comment: Article 5, Section 1 requires the member or delegate to Congress, should one be authorized by Congress, to make an annual report to the people. This is an ultra vires act, because a member or delegate to Congress is a federal official and the Commonwealth cannot control federal officials.

Response: Section 1 sets out the priority of the Commonwealth in achieving permanent representation in the United States Congress. In connection with this priority, the people of the Commonwealth have expressed their desire for an annual report from their elected representative. That member or delegate surely will honor this request.

40. Comment: Article 6, Section 2(b) provides that mayors may not serve more than two terms. This is an attainder problem for the same reasons as are applicable to Article 3, Section 4.

Response: This is not an attainder problem as explained in connection with Article 3, Section 4.

41. Comment: Article 6, Section 3(b) provides detailed procedures for the exercise of the veto power. This conflicts with Article 6, Section 5(a) which says the procedures for the exercise of the veto power are to be agreed between the mayor and the municipal council.

Response: Section 3(b) deals with the exercise of the veto power. Section 5(a) does not mention the veto power. It deals with all the other procedures such as single subject rules, required public hearings on certain subjects, number of readings, and other procedural guarantees of fairness that are sometimes put into constitutions but more often are included in legislation enacted by the legislative authority and approved by the executive authority.

42. Comment: Article 6, Section 3(g) provides that the mayor shall coordinate any extension of federal programs. What does "coordinate" mean in this context? What does "extension" mean in this context?

Response: This language was added by the 1985 Convention. There is no legislative history about it, and we do not know what it means.

43. Comment: Article 6, Section 4(c) provides that municipal council members may be paid for attendance at meetings as provided by law or ordinance, and then provides that they can be paid only from locally raised revenues. These two concepts, in the same Section, are inconsistent.

Response: This section covers two possibilities: first, that municipal council members serve on a part time basis and second, that municipal council members serve on a full time basis. If they serve on a part time basis, they can be paid for attendance at meetings as provided by Commonwealth law or by municipal ordinance, and they can be paid from Commonwealth funds if the Legislature agrees. If they are converted to a full time basis, then they must be paid from local funds and they can be paid only up to an amount recommended by the salary commission.

44. Comment: Article 6, Section 4(c) refers to an amount recommended by the advisory commission on compensation. Is this amount binding?

Response: This is the same system as is set out in Article 2, Section 9 for Commonwealth officials. The salary commission's recommendation is a cap; the salary may be decreased or the commission's recommendation may be rejected, but the salary may not be increased over the amount recommended by the commission.

45. Comment: Article 6, Section 5(a) conflicts with Article 6, Section 3(b).

Response: There is no conflict, as noted above in connection with Section 3(b).

46. Comment: Article 6, Section 5(b) uses a formulation of a 2/3 vote of the municipal council to override the mayor's veto. The 2/3 formula works for a three-person council as at present, but not for a five-person council as contemplated by the amendments. For example, on a five-person council, if all five are present, then a 2/3 majority is 3.3, presumably rounded to 3 members. That is also a majority. If only 4 are present, then a 2/3 majority is 2.67, presumably rounded to 3 members, which is the same requirement. If only 3 are present, which is a majority and therefore presumably a quorum, then a 2/3 majority is 2, which is also a majority.

Response: The 2/3 requirement is imposed with respect to the members of the Municipal Council, not the members present and voting. The 2/3 requirement means that a veto can be overridden only if three of the five members vote in favor. A veto will not

be overridden by a minority of the Council members.

47. Comment: Article 6, Section 5(c) says that the Municipal Council shall confirm resident department heads and others nominated by the mayor. Does this mean that they must confirm the mayor's nominee and have no discretion to reject?

Response: No, it means that only those who are confirmed by the Municipal Council may hold office.

48. Comment: Article 6, Section 5(d) provides for the Council to raise local revenues. Are these revenues required to be deposited with the Commonwealth treasury, or may the local government have its own bank account?

Response: Locally raised revenues are managed by the local government. They may not be drawn upon by the Governor or the Legislature, except as contributions authorized by the Municipal Council. Thus, the local government may elect to use its own bank account or to establish an account with the Commonwealth Treasurer.

49. Comment: Article 6, Section 5(f) says that the Municipal Council has the power to define the structure of local government through municipal ordinances. Does this mean that the Municipal Council can change the constitutional structure of mayors and municipal councils and go, for example, to a parliamentary system or to a three-member council instead of a five-member council?

Response: No. The language goes on to specify that it is the size of the mayor's office and the structure of local government departments and agencies that the Municipal Council may define.

50. Comment: Article 6, Section 5(g) says that when the Mayor is temporarily or permanently unable to serve, the presiding officer of the Municipal Council takes over. Can this Municipal Council member continue to vote in the Municipal Council while serving as

Response: The subject of filling temporary vacancies in the Mayor's office and in Municipal Council offices is left to municipal ordinance. The Constitution provides only the basic rules. It does not govern every conceivable circumstance.

52. Comment: Article 7, Section 3 provides that a felony conviction is a bar from holding elected office or appointed office requiring legislative confirmation under the Constitution. This is an attainder problem because the penalty persists even when full civil rights have been restored. The case involving the removal of Adam Clayton Powell is an example. What happens when there is a felony conviction in the U.S. followed by a Presidential pardon? What happens when there is a felony conviction followed by a pardon on the grounds that the person was not guilty? This might happen, for example, when there was an error that was not appealed in time.

Response: This is not an attainder problem. There may be differences of opinion about whether 35 or 25 is the right age qualification for a particular office, but there is no violation of the civil rights of those under 35 when a 35 age limit is adopted. Lack of felony convictions is a qualification for office that has a rational basis. That is all that is required. The case involving Adam Clayton Powell had to do with whether the Congress could rely on the substantive allegations in a felony case or had to make independent findings in order to impeach Powell and remove him from office. That is not directly relevant here. If there is a felony conviction in the U.S. followed by a Presidential pardon, the person is still disqualified from holding these particular offices in the Commonwealth. If there is a felony conviction that is pardoned on the grounds that the felony did not occur, a court in the Commonwealth might decide that the felony disqualification did not apply. This would depend on the circumstances.

53. Comment: Article 9, Section 1(a) refers to local laws. Article 2, Section 6 that provided for local laws has been deleted from the Constitution. Article 6, Section 5(a) limits the legislative power of local governments to municipal ordinances. This is inconsistent with Article 9, Section 1(a).

Response: The language about local laws in Article 9 has been in the Constitution since 1976. The Article distinguishes between Commonwealth laws and local laws, so there is no possibility of confusion. A local law enacted by initiative is authorized by the Constitution, so there is no lapse of authority or other problem. Article 6 used different terminology but that does not cause any inconsistency in the way the constitutional provisions will be applied.

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#13/1. —

54. Comment: Article 9, Section 2(a) refers to local laws and creates the same problems as referred to with respect to Section 1(a).

Response: Same as for Section 1(a).

con0901

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TO: Herman T. Guerrero
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FROM: Deanne Siemer

MESSAGE:

Herman:

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