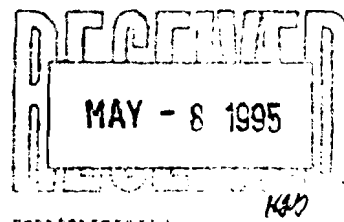


May 7, 1995



Report to Delegates

From: H. Willens and D. Siemer

Re: Constitutional provisions that may be legislative in nature

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As requested by the delegates at the meeting on May 4, 1995, this memorandum summarizes our views regarding provisions in the current constitution that may be legislative in nature. We have provided an analysis below.

Constitutional provisions may be "legislative" in nature because (1) they are a very detailed treatment of a subject expected to change over time, or (2) they require regulation or enforcement which is not easily provided through a constitutional mechanism, or (3) they include the proviso "as provided by law" in a way that delegates the essential decision-making to the legislature.

A previous memo covered constitutional provisions which may need to be updated. Some of those also fall in the category of legislative provisions, but are not included here.

The constitutional provisions noted below are taken from the annotated constitution that identifies, by underlining, the amendments adopted on the recommendation of the 1985 constitutional convention or thereafter by legislative initiative.

Article I, Section 9

Section 9: Clean and Healthful Environment.

Each person has the right to a clean and healthful public environment in all areas, including the land, air, and water. Harmful and unnecessary noise pollution, and the storage of nuclear or radioactive material and the dumping or storage of any type of nuclear waste within the surface or submerged lands and waters of the Northern Mariana Islands, are prohibited except as provided by law.

[Note: 1985 Constitutional Convention Amendment 1 amended Article I, Section 9, by adding the underlined language]

This provision includes the standards "harmful" and "unnecessary" with respect to noise pollution that may require definition by the legislature in order to be meaningful prohibitions. The storage of nuclear or radioactive material is subject to federal authority under the Covenant, and thus is not a subject on which the constitution can include a total ban.

Article II, Section 17

Section 17: Legislative Bureau.

There is hereby established a legislative bureau in the Northern Marianas Commonwealth Legislature.

a) The bureau shall be headed by a director to be appointed by the joint leadership of the legislature consisting of the presiding officers, vice presiding officers, floor leaders, and the chairman of the standing committee.

b) The director shall employ all necessary staff, other than personal staff of the members of the legislature, pursuant to budgetary allocations. The staff members shall include legal counsel and other administrative staff.

c) The bureau shall provide all required services to the legislature in connection with duties and responsibilities during sessions and committee meetings. It shall maintain all records, files, library and other documents of the legislature.

d) The director may be removed by a majority of the members of each house of the legislature with or without cause.

e) The bureau shall be free from any political harassment or pressure.

[Note: 1985 Constitutional Convention Amendment 10 amended Article II by adding Section 17(a) - (e).]

f) The legislative bureau shall have a budget sufficient to permit it to fully and adequately perform its duties as specified in this section. The funds budgeted shall be independent of the budget ceiling established for the legislature under section 16 of this article, but in no event shall the funds appropriated exceed eight hundred thousand dollars in any fiscal year.

[Note: 1989 Legislative Initiative No. \_\_\_\_ amended Article II, Section 17, by adding subsection (f).]

This provision may have been intended to serve the wholly laudable objective of requiring the legislature to hire qualified and non-political professional staff to assist it. Because a budget ceiling had been imposed previously on the legislature, it may also have been intended as a means of providing funds for the legislature over and above the budget ceiling. Even though it was proposed by the legislature and accepted as a constitutional provision, the organization of the legislature's staff is not a constitutional matter. The legislature should be free to organize its staff as it determines most useful without restraints imposed by the constitution that may not withstand the test of time.

#### Specified budget amounts

The current constitution provides specific dollar amounts for the budgets of various government institutions:

- (1) \$2.8 million for the legislature (exclusive of the salaries of members) [Article II, Section 16(a)]
- (2) \$700,000 for the legislature in an election year during the election period [Article II, Section 16(b)]
- (3) \$500,000 for the public auditor [Article III, Section 12]

Specified dollar amounts generally are regarded as "legislative" in the sense that they require periodic amendment of the constitution to adjust the dollar amounts for inflation, changed circumstances, or other factors. The provision of adjustment for inflation or substitution of a ratio or percentage would allow flexibility without periodic constitutional amendment. On the other hand, a fixed dollar amount ensures that the activity will not grow beyond its current size without increased efficiency.

#### Executive assistants

The constitution specifies certain individual assistants to the governor:

- (1) an Executive Assistant for Carolinian Affairs [Article III, Section 18]
- (2) a Special Assistant for Women's Affairs [Article III, Section 22]

(3) a Resident Executive for Indigenous Affairs [Article III, Section 23]

Specified jobs or "offices" that are appointed rather than elected generally are regarded as "legislative" because they do not rise to the level of institutions of government that are appropriate for constitutional treatment. The Executive Assistant for Carolinian Affairs was created by the First Constitutional Convention after extended discussion in order to provide some assurance to the Carolinian community that their interests would be protected under the new Commonwealth. The other two offices were proposed by the 1985 constitutional convention. In considering whether to retain these provisions, the delegates will want to evaluate whether these offices need to be included in the constitution. It is usually the function of the legislature and the governor to provide for such specialized offices and assistants as are needed to protect the interests of minorities or to deliver services to the public. To the extent that the legislature or governor fails to do so, the electorate may choose to vote them out of office.

Article III, Section 20

Section 20: Retirement System.

a) Membership in an employee retirement system of the Commonwealth shall constitute a contractual relationship. Accrued benefits of this system shall be neither diminished nor impaired.

b) An employee who has acquired not less than twenty years of creditable service under the Commonwealth retirement system shall be credited an additional five years and shall be eligible to retire. An employee who elects to retire under this provision may not be reemployed by the Commonwealth government or any of its instrumentalities or agencies, for more than 60 calendar days in any fiscal year without losing his or her retirement benefits for the remainder of that fiscal year.

[Note: 1985 Constitutional Convention Amendment 19 amended Article III by adding Section 20.]

A retirement system, like the Social Security system, requires periodic adjustment and re-evaluation. Because any government retirement system is a large factor in the economy, the judgments of elected officials should be reflected in its expansion and operation.

Article III, Section 21

Section 21: Board and Commissions.

In every case where the governor appoints a board or commission to perform a regulatory or administrative function or direct the activities of an agency, authority, or public or quasi-public corporation in the performance of a regulatory or administrative function, the members of such a board or commission shall be independent and may be removed only on grounds of gross neglect or dereliction of duty, breach of fiduciary duty, conviction of a felony, or mental or physical incapacity. Upon the expiration of the term of a member of a board or commission, such person shall cease to be a member unless reappointed in the manner prescribed by law. The governor shall make appointments within ninety days to fill any vacant seats on a board or commission. This section does not apply to boards and commissions that serve a purely advisory function or, except to the extent specifically required by federal law, to boards and commissions created in order to comply with federal law.

[Note: 1985 Constitutional Convention Amendment 20 amended Article III by adding Section 21.]

This provision refers to regulatory and administrative boards which, by definition, are created by the legislature. It is the enabling act for such boards that should deal with these issues. The extent to which any particular board or commission should be "independent" or subject to direction by the governor should be left for resolution by the legislature and executive branches in the normal political process.

Article VII, Section 3

Section 3: Domicile and Residence.

The legislature shall implement section 1 by providing the criteria by which domicile and residence shall be determined for voting purposes and specifying the length of residence within the Commonwealth that shall be required.

This provision was included in the 1976 Constitution because the Constitutional Convention made the the decision that these matters should be left to the legislature. This directive to the legislature was to ensure that action was taken. That has been done, and this kind of directive in the constitution is no longer required.

Article VIII, Section 3

Section 3: Election Procedures.

The legislature may provide for the registration of voters, nomination of candidates, absentee voting, secrecy in voting, administration of elections, resolution of election contests, and other matters with respect to election procedures.

This provision was also included in the 1976 Constitution as a directive to the legislature. This has been carried out, and the directive in the constitution is no longer required.

Article X, Section 1

Section 1: Public Purpose.

A tax may not be levied and an appropriation of public money may not be made, directly or indirectly, except for a public purpose. The legislature shall provide the definition of public purpose.

[Note: 1985 Constitutional Convention Amendment 28 amended Article X, Section 1, by adding the underlined language.]

The directive to the legislature in the last sentence to define public purpose is unnecessary. The general language limiting taxes and appropriations to those for a public purpose restates the principle long upheld by the U.S. Supreme Court, applying the Fourteenth Amendment, that public funds derived from tax revenues cannot be expended for private purposes. The courts will generally defer to a legislative determination (reflected in a decision to levy taxes or appropriate public funds) that a public purpose does exist, but the courts can look to judicial precedent in deciding that the legislature has stepped over the line.

Article X, Section 8

Section 8: Control of Public Finance.

The Department of Finance or its successor department shall control and regulate the expenditure of public funds. The department shall promulgate regulations including accounting procedures that require public officials to provide full and reasonable documentation that public funds are expended for public purposes.

[Note: 1985 Constitutional Convention Amendment 31 amended Article X by adding Section 8.]

This provision is a directive to the Department of Finance that does not add to what this department, subject to the law and the direction of the governor, would have as its duty.

Article XII, Section 3

Section 3: Permanent and Long-Term Interest in Real Property.

The term permanent and long-term interests in real property used in Section 1 includes freehold interests and leasehold interests of more than fifty-five years including renewal rights, except an interest acquired above the first floor of a condominium building. Any interests acquired above the first floor of a condominium building is restricted to private lands. Any land transaction in violation of this provision shall be void. This amendment does not apply to existing leasehold agreements.

[Note: 1985 Constitutional Convention Amendment 35 amended Article XII, Section 3, by adding the underlined language. Formerly was forty years with no provision for condominiums.]

The provision for the interests acquired above the first floor of a specified type of real estate interest (a condominium) is at the level of detail usually more appropriate for legislative acts. The provision voiding transactions is unnecessary in light of Section 6. The language with respect to an "amendment" is technically incorrect once the amendment is incorporated into a constitutional provision.

Article XII, Section 6

Section 6: Enforcement.

Any transaction made in violation of Section 1 shall be void ab initio. Whenever a corporation ceases to be qualified under Section 5, a permanent or long-term interest in land in the Commonwealth acquired by the corporation after the effective date of this amendment shall be immediately forfeited without right of redemption to the government of the Commonwealth of the Northern Mariana Islands. The Registrar of Corporations shall issue regulations to ensure compliance, and the legislature may enact enforcement laws and procedures.

[Note: 1985 Constitutional Convention Amendment 36 amended Article XII, Section 6, by adding the underlined language.]

The reference to "amendment" is technically incorrect once the amendment is incorporated into a constitutional provision. The directive to the Registrar of Corporations and the legislature is a legislative provision.

Article XV, Section 1

Section 1: Elementary and Secondary Education.

a) Every person in the Northern Mariana Islands has the right to free, compulsory and public elementary and secondary education within age and educational levels provided by law. The educational system shall provide maximum educational and training opportunities and be sensitive and responsive to the needs and desires of the community as it pursues its central objective of developing human potential. The educational system shall also provide support and guidance for students in assessing areas of interest and ability, in clarifying values and goals, and in providing students with clear and accurate information so they may gain the most from their educational experience. The educational system shall recognize the distinct and unique cultural heritage and indigenous way of life of the people and shall be committed to provide for the language needs of the people and the preservation of their cultural integrity within a global community.

[Note: 1985 Constitutional Convention Amendment 38 amended Article XV, Section 1(a), by adding the underlined language.]

The underlined language added by Amendment 38 is legislative in nature. It is by way of direction to the school system as to certain goals to be achieved. Although this statement is praiseworthy, it does not cover all the goals of the educational system and the delegates have to consider how it will appear in 20 years, when the community may have changed and different educational goals may be in vogue. In listing this as a "legislative" provision, we note that it does not require any specific and measureable action to be taken and does not provide for any enforcement mechanism.



Article XV, Section 2(b)

b) The mission of the college shall be to provide the best quality and meaningful postsecondary and adult educational opportunities for the purpose of improving the quality of life for the individual and for the Commonwealth as a whole. The college shall be responsible for providing education in the areas of adult and continuing education, postsecondary and adult vocational education and professional development for the people of the Commonwealth.

[Note: 1985 Constitutional Convention Amendment 38 amended Article XV by deleting the former subsection 1(b) and substituting this Section 2. Former subsection 1(b) provided generally for higher education as provided by law.]

The underlined language added by Amendment 38 is legislative in nature for the same reasons outlined above. It is by way of direction to the Northern Marianas College as to the overall goals to be achieved.

Article XIX, Section 1

Section 1: Code of Ethics

The legislature shall enact a comprehensive code of ethics which shall apply to appointed and elected officers and employees of the Commonwealth and its political subdivisions, including members of boards, commissions, and other instrumentalities. The code of ethics shall include a definition of proper conduct for members of the legislature with conflicts of interest and a definition of the proper scope of debate in the legislature, shall require disclosure of financial or personal interests sufficient to prevent conflicts of interest in the performance of official duties, shall define the offense or corrupt solicitation of public officials, and shall provide for punishment of offenses by fine and imprisonment.

[Note: 1985 Constitutional Convention Amendment 40 added Article XIX, which combined the second sentence of Article II, Section 15, which applied to the legislature and the second sentence of Article III, Section 6, which applied to the executive branch and added the underlined language. Note that "offense or corrupt solicitation" may be a typo.]

Article XIX is a direction to the legislature about a legislative subject. The delegates have the option to substitute specific

ethical standards that must be followed by all public employees at certain levels. This is usually addressed by legislation, however, because judicial interpretations and changing circumstances and public demands often require reexamination of ethical standards and practices.

Article XXI, Section 1

Section 1: Prohibition.

Gambling is prohibited in the Northern Mariana Islands except as provided by Commonwealth law or established through initiative in the Commonwealth or in any senatorial district.

[Note: 1985 Constitutional Convention Amendment 42 added Article XXI.]

This provision, although a general prohibition, enables the legislature to define the terms under which gambling can be conducted within the Commonwealth. For that reason, it is a legislative provision as drafted even though the general subject might be appropriate for constitutional treatment and directing that gambling be permitted only by initiative might not be considered "legislative" in nature.

May 5, 1995

Herman --

Here are the proposals from the "updating" briefing. We have set them out as proposals by the chair "by the direction of the Convention delegates" with respect to updating measures.

There are four "updating" provisions covered in the briefing (and in the memo) that are NOT included in this set of proposals:

- (1) Composition of the House of Representatives  
(Art. II, Sec. 3(a))

This is likely to be the subject of delegate proposals with respect to the size and cost of the legislature.

- (2) Local laws  
(Art. II, Sec. 6)

This is likely to be the subject of delegate proposals with respect to the powers of the mayors.

- (3) Judiciary  
(Art. IV)

The Chief Justice's proposal can be used as the basis for debate.

- (4) Public lands  
(Art. XI)

There are likely to be delegate proposals to reinstate the Public Land Corporation.

Deanne