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KOSRAE STATE ELECTION COMMISSION

In the Matter of Lieutenant Governor Gerson Jackson's Application to Run for Reelection in the November 2002 Election)	Lieutenant Governor Gerson Jackson's Submittal of Evidence in Support of His Application to Run for Reelection in the November 2002 Election
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**LIEUTENANT GOVERNOR GERSON JACKSON'S SUBMITTAL OF EVIDENCE
IN SUPPORT OF HIS APPLICATION TO RUN FOR REELECTION IN THE
NOVEMBER 2002 ELECTION**

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I. INTRODUCTION.

This memorandum is submitted in response to the invitation of the Kosrae State Election Commission in its letter dated August 8, 2002 to Lieutenant Governor Gerson Jackson to present evidence regarding his qualifications to be a candidate for Lieutenant Governor in the November 2002 election. In the August 8 letter, the Commission reported that its "initial determination" was that Lieutenant Governor Jackson was "not a qualified candidate for the office of Lt. Governor," but also said that this was not a "final finding" and invited Lieutenant Governor Jackson "to present evidence you believe supports that position that you are qualified to seek election as Lt. Governor in the next election."

The Commission's August 8 letter acknowledged that: "The provisions of the Kosrae State Constitution are not explicit as to term limit applications to the Lt. Governor." Nonetheless, the Commission's "initial determination" was that Lieutenant Governor Jackson was not qualified to run in the November 2002 election because (1) he has held the office of Lieutenant Governor for two consecutive terms, (2) the 1995 Constitutional Convention's "Committee Report for proposed Amendment 3 included language that the proposed amendment would limit the Lt. Governor to hold office for two consecutive terms," and (3) "a significant risk of electoral uncertainty would arise if you were permitted to seek re-election as Lt. Governor, win election and then be challenged by a defeated candidate or other citizen on the basis that you were not a qualified candidate."

Lieutenant Governor Jackson agrees that it is important to avoid "electoral uncertainty,"

and thus is submitting this memorandum in support of his position in order to obtain an expedited final ruling by the Commission, which would be followed by, if necessary, an expedited judicial ruling. The Lieutenant Governor appreciates the assistance of the Commission and the courts in addressing these issues quickly in order to have a final determination before the filing deadline of October 1, 2002.

II. THE CONSTITUTIONAL LANGUAGE AND THE LEGISLATIVE HISTORY.

of the Kosrae State Constitution

Article V, Section 6 says that the Lieutenant Governor must have the same qualifications as the Governor and that: "The Lieutenant Governor is elected at the same time and for the same term." This provision contains no language whatsoever regarding any term limit that applies to the Lieutenant Governor. The words "same term" refer to the beginning and ending dates of the four-year term of office established in Article V, Section 3, and it would not be logical or

appropriate to consider those words as referring to term limits, which is a separate and distinct

subject matter.¹

It has been argued by some, however, that these two words "same term" should be interpreted to impose on the LG all the requirements and limitations that apply to the Governor. A simple example will illustrate why such an interpretation would be

Article V, Section 3, by sharp contrast, contains explicit language imposing term limits

on the Governor: "A Governor may not hold the same office for more than two consecutive terms and is eligible to hold the office of Governor only after one full term has intervened since his last

day in office." Article IV, Section 4, as revised after the 1995 Con Con, is just as clear in

the words
¹ To illustrate why "same term" cannot be viewed as referring to term limits, consider a Lieutenant Governor who is elected for the first time in an election with a Governor who is reelected for a second term. The Lieutenant Governor and the Governor have the "same term," i.e., a four-year term beginning and ending on the same day. The Governor must leave office after the second four-year term, but the Lieutenant Governor could run again *even if a two-term limit were imposed upon the Lieutenant Governor*. The words "same term" can thus refer only to the four years that they each serve together after their election, and it makes no logical sense to link the words "same term" to notions of term limits.

imposing term limits on Senators in the Kosrae Legislature – “a Senator may not hold the same office for more than three consecutive terms and is ineligible to hold the same office until at least four years have passed since his last day in office.” It is evident, therefore, that the drafters of the Kosrae Constitution knew how to articulate term limits when they wanted to impose such limits on an elected official, and the absence of any term-limit language directed at the Lieutenant Governor must mean that this office has no such limits. The term limits for the Governor were established in language proposed by the 1983 Constitutional Convention. The discussion in support of that proposal focused on the goals of limiting the ability of a Governor to abuse power and allowing new individuals to take their turn in office, and the legislative history made no reference whatsoever to a term limit for the Lieutenant Governor, Journal of the Kosrae Constitutional Convention of 1983, at 481-82 (quoted below). *the reasons offered apply directly to the Governor, but not to the LG, and* *more quotes here?* *INSERT*

The main reason for the Electoral Commission's ^{ion} ~~initial~~ ^{apparently} determination regarding Lieutenant Governor Jackson's eligibility to run for reelection concerned language used by the delegates to the 1995 Kosrae Constitutional Convention during their deliberations. The written record reveals that the delegates' focus during these deliberations was on a proposal to limit the terms of Senators in the Kosrae Legislature to three consecutive terms, and this proposal was adopted and added to Article IV of the Kosrae Constitution. The delegates also debated the idea of extending the terms of the Governor and Lieutenant Governor ^{from} four to six years. This deliberation started with Proposal No. 2-95-079 submitted by Delegate Roldon Timothy, which would have accomplished those two things, but ^{it} made no direct reference to the Lieutenant Governor. In Committee Report S.C.R. No. 2-95-059, issued by the Committee on Government Structure and Functions on February 8, 1995, the Committee approved the proposal regarding limiting the terms of Senators,

but rejected the idea that the Governor and Lieutenant Governor should have six-year terms, and proposed allowing the Governor to be able to have three consecutive four-year terms in office, in order to “make the term limitations provisions for Senators, Governor, and the Lt. Governor consistent with each other.” Although the language in this committee report refers to the Lieutenant Governor, the proposed language put forward by the committee to amend the Kosrae Constitution did not make any reference to the Lieutenant Governor.

The following week, on February 15, 1995, Delegate Moses Mackwelung proposed Floor Amendment No. 30, which ^{renewed the idea of} ~~advocated~~ extending the term of the Governor from four to six years and would have limited the Governor to only one consecutive term in office. Significantly, the language and purpose statement of Floor Amendment No. 30 refers only to the Governor, and makes no mention of the Lieutenant Governor. That same day, and then two days later, Delegate Canney Palsis introduced Floor Amendments Nos. 35 and 38 (which were essentially the same) which advocated maintaining the four-year term for the Governor, and also maintaining the term limit of two consecutive terms. The purpose statement underneath these proposed amendments both say that the goal of the amendment is “to allow the Governor (and Lt. Governor) to hold the same office for no more than two consecutive terms,” but ~~it is significant that~~ the language proposed in these amendments ^{solely and} refers exclusively to the Governor, ^{textual reference} with no mention whatsoever ^{to} of the Lieutenant Governor.

In the end, the delegates decided against extending the Governor’s term to six years and put the language found in Floor Amendments Nos. 35 and 38 ^{the} into proposed Amendment 3, which had the effect of maintaining the status quo (two four-year terms for the Governor), and which contained ^{textual} language referring only to the Governor. ^{As finally proposed to the voters,} Amendment 3 thus contained certain

language changes designed ^{to} streamline Article V (“The Executive”), but these language changes were completely nonsubstantive in nature. The language presented to the voters in Amendment 3 referred to the Lieutenant Governor in its title, but made no mention whatsoever of the Lieutenant Governor in its operative text. The only substantive change included in Amendment 3 concerned Article IV, and it explicitly limited Senators in the Kosrae Legislature to three consecutive terms.

It is thus crystal clear that the drafters knew how to draft unambiguous language imposing term limits on elected officials, and it is equally clear that they ~~chose~~ ^{did} not to propose ^{any textual} language that would have imposed term limits on the Lieutenant Governor. It may be that some, ~~or even all~~ of the delegates to the 1995 Con Con wished to impose a term limit on the Lieutenant Governor, but it is equally evident that they ~~failed completely in including such~~ ^{did not act on this intention to propose any textual} language into their proposed amendments to the Kosrae Constitution. ^{that would have had the effect of amending the Kosrae Constitution to impose term limits on the L.G.}

III. WHEN CONSTITUTIONAL LANGUAGE IS CLEAR, COURTS IN THE FSM DO NOT LOOK BEYOND THE PLAIN LANGUAGE AND DO NOT EXAMINE LEGISLATIVE HISTORY.

The courts of the FSM have been clear and consistent in holding that the “plain language” of constitutional provisions governs, and that unless the meaning of the language is unclear courts should not examine the legislative history found in constitutional convention journals. *See, e.g., FSM v. Tipen*, 1 FSM Intrm. 79, 82 (Pon. 1982) (“Analysis of the Constitution must start with the words of the constitutional provision. If these words are clear and permit only one possible result, the Court should go no further.”); *Ponape Federation of Cooperative Associations v. FSM*, 2 FSM Intrm. 124, 126-27 (Pon. 1985) (ruling that because the constitutional language was “plainly sufficient,” “our search may go no further. Constitutional

interpretation must start and end with the words of the provision when the words themselves plainly and unmistakably provide the answer to the issue posed....The Court may not look to constitutional history...in these circumstances.”); *Panuelo v. Pohnpei*, 3 FSM Intrm. 76, 81 (Pon.S.Ct.App. 1987)(“the words of the Constitution are words used in common and are to be taken in their natural and ordinary meaning”); *Nena v. Kosrae (III)*, 6 FSM Intrm. 564, 568 (App. 1994)(“The petitioner, in order to make his arguments based on the legislative history of the constitutional provision, must first show the ambiguity in the constitutional provision. Only if the constitutional language is unclear or ambiguous can a court proceed to consult the constitutional convention journals and this historical background.”); *State v. Sigrah*, Traffic Case No. 212-01 (Kosrae State Court)(ruling that testimony of constitutional convention delegates is not admissible evidence to determine the intent of the framers).

III (?)

^{terms on a}
~~In~~ The present case, ~~we have an apparent~~ conflict between language in the Kosrae Constitution and language in a committee report of 1995 Constitutional Convention. The Kosrae State Court has stated clearly that the language in the Constitution must prevail in such a situation: “In the FSM, Constitutional analysis always starts with the words of the Constitution. *Semens v. Continental Airlines*, 2 FSM Intrm. [131,] at 139 [(Pon. 1985)]....Where a committee report or the understanding of a minority number of delegates conflicts with the language of the Constitution, then the actual wording of the Constitution prevails. *Bank of Guam v. Semes*, 3 FSM Intrm. 370, 374 (Pon. 1988).” *Nena v. Kosrae*, 5 FSM Intrm. 477, 422 (Kos. S.Ct.Tr. 1990). It is obvious why this rule, so clearly articulated by Chief Justice Harry H. Skilling in the *Nena* case, is the correct approach. Committee reports, and the purpose statements attached to

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proposed amendments, are ^{frequently} ~~generally~~ drafted by staff rather than the delegates themselves. ^{They may} reflect the views of some delegates, but are not voted upon or adopted by the entire body. ^{More importantly,} committee reports are ^{not} presented to or examined by the voters, who ^{make the} ~~give~~ final approval to decision regarding whether a constitutional amendment should be adopted.

Although staff will try to reflect the wishes of the delegates, ^{only} it is the actual language ^{formally} adopted by the delegates that ~~must be deemed to reflect their true intentions.~~ *reflects the compromises inherent in the legislative process and that can be deemed to have been*

IV IF DELEGATES TO THE 1995 CONVENTION WANTED TO IMPOSE TERM LIMITS ON THE LIEUTENANT GOVERNOR, THEY MADE A MISTAKE WITH REGARD TO THE LANGUAGE PRESENTED TO THE VOTERS OF KOSRAE, AND THE AMENDMENT ACTUALLY ADOPTED DOES NOT IMPOSE ANY SUCH TERM LIMITS ON THE LIEUTENANT GOVERNOR.

Example 1)

The language proposed, committee reports, and other journal entries related to the 1983 Kosrae Con Con provide no support whatsoever for the view that the delegates to that first constitutional convention wanted to impose term limits on the Lieutenant Governor. At the second 1995 Kosrae Con Con, as explained above, language in one committee report (SCREP No. 2-29-059) and in the purpose clause to two floor amendments (Nos. 35 & 38) do indicate that at least some delegates at the 1995 Con Con did wish to impose term limits on the Lieutenant Governor. But it is also clear that the actual language the delegates proposed to the voters did not provide any reference the Lieutenant Governor nor any indication that they sought to impose term limits on that office, and hence it must necessarily follow that the voters' approval of Amendment 3 in 1995 cannot be viewed as the adoption of term limits for the Office of the Lieutenant Governor.

approved by the voters for inclusion in the Constitution's Courts are therefore limited to the actual language in the court in resolving controversies

It cannot be argued, therefore, that any term limits were imposed on the L.G. prior to 1995.

It may be that the delegates to the 1995 Convention made a mistake with regard to their drafting. But, whether or not a mistake was made, it must be concluded that the actual language the voters approved governs, rather than the intent of the delegates. It would be totally inappropriate for a commission or court to correct the "mistake" made by the delegates, because no changes can be made to the Kosrae Constitution without the explicit approval of the voters.

An almost exact parallel situation was experienced by the State of Hawai'i after its 1978

Constitutional Convention. That convention proposed 34 amendments, many of them complicated in nature. The full texts of the amendments could not be put on the ballot itself, but were included in a booklet that was available to the public in advance and at the voting booths, ^{and} which was said to be “part of this ballot.” But the texts of certain ^{amendments proposed} ~~proposals~~ adopted by the convention’s 102 delegates were inadvertently excluded from the booklet, and the Hawai`i Supreme Court subsequently ruled that these omitted proposals had not been validly adopted. *Kahalekai v. Doi*, 590 P.2d 543 (Hawai`i 1979). The court ruled that the key question was “whether the election resulted in a valid expression of the will of the electorate.” *Id.* at 554. Because the ballot and the informational booklet “failed to reveal the substantive nature and effect of a proposed amendment, the voter will be deemed to have been uninformed with respect to that particular amendment.” ^(emphasis added) *Id.* (citing *Kohler v. Tugwell*, 292 F.Supp. 978, (D.La.), *aff’d*, 393 U.S. 531 (1968)). ^{As a result,} ~~And~~ these omitted amendments did not become part of the Hawai`i Constitution. Among the proposals ruled not adopted were ones that would have deleted references to promoting home ownership and would have defined the terms “Hawaiian” and “native Hawaiian.” *Id.* at 554-55.

The Hawai`i ruling means that if constitutional convention delegates intended to present a certain proposal to the electorate but failed to implement their intentions in a way that was clearly understood by the voters, then the proposed change sought by the delegates cannot be deemed to have become part of the constitution. In Hawai`i, it was evident what the convention delegates wanted to accomplish with regard to these proposals, but the court ruled the proposals had not been adopted because the voters were not clearly presented with the proposed language. No matter how obvious the intent of the delegates might be, a constitutional provision will not be

deemed to have been adopted unless it was approved by the voters in a manner that is "a valid expression of the will of the electorate." ^{Some of} The delegates to Kosrae's 1995 Convention may ~~not~~ have wanted to impose a term limit on the Lieutenant Governor, but the language presented to the electorate did not do so, ^{the voters did not approve such limits} and hence such a limitation cannot be deemed to be found in the Kosrae Constitution.

V. IMPORTANT POLICY REASONS – AND THE PRACTICES IN MANY OTHER POLITICAL COMMUNITIES – SUPPORT IMPOSING TERM LIMITS ON A GOVERNOR BUT (NOT) ON A LIEUTENANT GOVERNOR.

A. Policy Reasons.

Term limits are imposed in many political communities on the top executive official because of concerns about the power wielded by the holder of this office and the potential for abusing this power. The committee report issued by the Committee on Government Structure and Functions at the 1983 Kosrae Con Con ^{quoted above in Section —, focused on the} said, for instance that: ^{potential to abuse power,}

- 1) Unlimited re-election gives the Governor the opportunity to build a political machine which could be used to perpetuate re-election. Unlimited continuation in office would allow a Governor to amass too much political power.
- 2) The Office of the Governor would be available to new persons with new ideas more often, and keep the Governor more responsive to the wishes of the people.
- 3) In fostering self-perpetuation, a Governor may do what is necessary to win re-election rather than what is right.
- 4) It could be difficult to defeat an incumbent regardless of his qualifications.

None

SCREP No. 1-83-10, J.Kos.Con.Con (1983). These concerns are unique to the top executive official, who exercises considerable discretion in making appointments and expending funds, and can utilize these powers to the detriment of the community. Significantly, this 1983 committee report made no reference whatsoever to the Lieutenant Governor, who has much less

discretionary authority. The occasional references to the Lieutenant Governor in the 1995 Con Con documents give no particular reasons why term limits should be imposed upon this office.

B. The Practices in Other Political Communities.

The United States adopted the 22nd Amendment to its constitution in 1951 imposing a two-term limit on the U.S. President, but no comparable term limit has been imposed upon the Vice President of the United States, ~~who~~ ^{and individuals holding that office are} entitled to run for reelection indefinitely. Similarly, Article X, Section 1 of the FSM Constitution imposes a two-consecutive-term limit on the FSM President, but no term limits ^{of any sort} imposed upon the FSM Vice President. The Pohnpei and Yap Constitutions impose limits of two consecutive full terms on their Governors, but impose no term limits on their Lieutenant Governors. Pohnpei Const., art. IX, sec. 3(2); Yap Const., art. VI, sec. 1, para. 6. Within the FSM, only the State of Chuuk imposes a term limit on the Lieutenant

Governor, Chuuk Const., art. VI, sec. 8. In the Republic of Palau, the President is limited to two consecutive terms, but no term limits are imposed upon the Palauan Vice President. Palau Const., art. VIII, sec. 4.

VI. SUMMARY AND CONCLUSION.

No language in the Kosrae Constitution imposes a term limit on the Lieutenant Governor. Although some delegates to the 1995 Kosrae Con Con may have favored such limits, they did not propose language to the Kosrae voters that, in fact, proposed amending the Kosrae Constitution to establish such limits. If they intended to accomplish such a result, they made a mistake, and the will of the electorate did not indicate support of such a change. It would be inappropriate for a commission or court to correct such a "mistake," because constitutional change can result only from an unambiguous vote by the electorate.

Because a constitutional right of fundamental importance ^{is} ~~held to be~~ involved in this case the government bears a heavy burden to justify any restrictions on the exercise of those rights. The right of voters to support the candidates of their choice and the right of candidates to seek elective office, have uniformly been recognized to be rights of the very highest importance in a democracy.

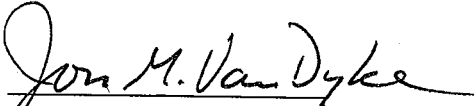
limit the exercise of these rights only if its restriction is necessary to achieve a compelling governmental interest, and every presumption must be given in favor of protecting these rights.

and it does so in clear and unmistakable language

Term limits for the top executive official have been adopted in many political communities to avoid concentrations and abuses of power, but it is much less common to impose a term limit on a Vice President or Lieutenant Governor, because such officials have considerably less power and offer much less possibility for abusing power. In the FSM, all the states and the national government impose a term limit on their top executive official, but only the State of Chuuk imposes a term limit on its Lieutenant Governor.

For these reasons, it is clear that Lieutenant Governor Gerson Jackson is entitled to run for reelection in the November 2002 election.

DATED: Honolulu, Hawai'i, ~~August 27, 2002.~~ *Sept. 15, 2002*

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