THE CONSTITUTION OF THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS; SPECIAL ISSUES IN CONSTITUTIONAL LAW AND GOVERNANCE

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1. *Commonwealth Organisation and Governance.*

Upon completion of the negotiations for commonwealth status for the Northern Marianas Islands, the United States acquired new territory, politically severed from the Trust Territory of the Pacific Islands.1 Commonwealth status was one of three political options open to the Northern Marianas and proved to be the most attractive alternative for several reasons.2 First, substantial economic benefits from the United States would accrue to the island economy under controlled conditions, particularly in the free movement of commercial goods and in lease rentals to government agencies. Second, the people of the Northern Marianas would enjoy all the rights, privileges and immunities of American citizenship or nationality, especially in socio-economic federal programs. Third, the neo-Chamorros would be able to maintain a cultural relationship with the neo-Chamorros of Guam without the obstructions caused by international boundaries or differences.3

The Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States (hereinafter "Commonwealth Covenant') is the organic document setting forth the primary elements of the political relationships and obligations of commonwealth status. Among the most important elements are:

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1. For discussion on the negotiations for commonwealth status see William E. Tagupa, "The Northern Marianas; Secession from Trusteeship and Accession to Commonwealth", *The Journal of Pacific History*, Vol. 12 (1-2, 1977), pp. 81-85 and Peter Bergsman, "The Marianas, the United States and the United Nations: The Uncertain Status of the New American Commonwealth", *California Western International Law Journal*, Vol. 16 (1977) pp. 382-411.

2. *Report of the Future Political Status Commission*, Congress of Micronesia (1969) p 33, *Public Speeches*, Office of Legislative Counsel, (July-August 1968), p.97.

3. The Third Mariana Islands District Legislature, Fourth Regular Session, Resolution No. 12-1970 cited in *Territories Orientation Briefing: Hearing before the Sub committee on Territorial and Insular Affairs of the Committee on Interior and Insular Affairs*, House of Representatives, 92nd Congress, 1st Session, (April 20, 1971), pp.33-34.

1. The Northern Marianas will become a "self-governing commonwealth ... in political union with and under the sovereignty of the United States of America."

2. The relations between the Northern Marianas and the United States "will be governed by this Covenant [which] together with those provisions of the Constitution, treaties and laws of the United States applicable to the Northern Mariana Islands will be the supreme law of the Northern Mariana Islands."

3. The United States may enact legislation in accordance with its constitutional processes which will be applicable to the Northern Marianas, but if such legislation cannot also be made applicable to the several States of the Union, the Northern Marianas must be specifically named for it to become effective. The authority of the United States is limited with respect to the right of self-government guaranteed by the Covenant, which may be modified only with the consent of the United States and the Northern Marianas.4

The nature of commonwealth status in law and the American political experience is both novel and highly uncertain. It is generally agreed that an American commonwealth arises out of a mutually consented-to political relationship between two political units usually set forth in specific provisions such as a Covenant or Compact.5 American constitutional authority for the formation of such a unique political arrangement arises under both the treaty-making and disposition of territory powers of the federal government.6 Whether a commonwealth compact or covenant is a treaty within the meaning of Article VI, the "Supremacy Clause" of the U.S. Constitution, has never been judicially decided. There is some doubt on this particularly critical point of consitutional definition since the U.S. Supreme Court has held that a treaty can be made only between or among sovereign independent nations.7 To say the least, commonwealth status is sufficiently unique to be classified in law as *sui generis*.8

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4. Commonwealth Covenant, Art. I, ss.101-105.

5. *Americana of Puerto Rico v. Kaplus*, 368 F.2d 431 (D.C. Cir. 1968), *Mora v. Mejias*, 206 F.2d 377 (1st Cir. 1953).

6. U.S. Const., Art. VI, s.3.

7. *Cherokee Nation v. State of Georgia*, 5 Pet. 1 (1831); *Missouri v. Holland*, 252 U.S. 416 (1920).

8. Arnold H. Leibowitz, "The Applicability of Federal Law to the Commonwealth of Puerto Rico", *The Georgetown Law Journal*, Vol. 56, No. 2 (December 1967), p.222.

It can be said, however, that among the important characteristics of commonwealth status is that there at least has been a partial transfer of sovereignty on matters concerning relations with foreign states and that federal authority in this matter is absolute.9 Residual sovereignty in local matters is primarily, if not entirely, within commonwealth jurisdiction as provided by the commonwealth covenant.10 Above all, provisions of the commonwealth covenant can be altered only with the mutual agreement of both the federal and commonwealth governments. It is important to mention that judicial interpretation of commonwealth status has been quite uncertain, if not bewildering, and that under such circumstances there is considerable reason to believe that much of the ambiguities will be resolved not by either the commonwealth or federal governments, but by the Supreme Court as the interpreter of the Constituion.11 Since an American commonwealth is not an incorporated territory, i.e. an integrated political entity of the American Union destined for eventual Statehood, commonwealth status may be terminated by legislative enactment as was the case with the Phillipines in 1946.

The uniqueness of commonwealth status was likewise reflected in the constitutional decision-making process. Under Article II of the Commonwealth Covenant, a Constitutional Convention was to draw up the primary document setting forth the foundations for the commonwealth government within the principles outlined in the Commonwealth Covenant. The Convention delegates convened in October 1976, consisting of elected delegations from the island districts of Saipan, Rota and Tinian. The Convention was organised into three major committees: Finance; Local Government and Other Matters; and Personal Rights and Natural Resources, which would reflect the organisational content of the final constitutional draft. The Convention retained the services of the Washington, D.C. law firm of Wilmer, Cutler and Pickering, who drafted briefing papers describing and suggesting methods of constitutional organisation as well as outlining relevant legal authorities.

The political organisation of the Commonwealth government is typically tripartite in nature, consisting of Executive, Legislative and Judicial branches of government. The chief executive officer, the Governor, shall be elected by popular vote. The Governor possesses important appointive powers, including appointments to cabinet posts and to the Commonwealth Courts.12 One of the more significant of the cabinet posts is the Office of the Executive Assistant for Carolinian Affairs. The appointment of the Executive Assistant shall be made,

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9. Commonwealth Covenant, Art. I, s.104. The U.S. Court of Appeals for the Ninth Circuit in *McComish v. Commissioner of Internal Revenue*, No. 76-1486 (Slip Opinion August 28, 1978) held in part that sovereignty does not rest with the United States as administering power. See also Francis B. Sayre, "Legal Problems Arising under the United Nations Trusteeship System," *The American Journal of International Law*, Vol.42, No.2 (April 1948) p.271-72.

10. *Ibid.*, Art. I, s.103.

11. *Marbury v. Madison*, 1 Cran. 137 (1803).

12. Commonwealth Const. Art. III, ss. 11-14; Art. IV, s.4.

inter alia, on criteria "acceptable to the Carolinian community within the Commonwealth".13 The duties of the Executive Assistant would be to "advise the governor on matters affecting persons of Carolinian descent within the Commonwealth" as well as to "investigate complaints regarding matters affecting persons of Carolinian descent" with the purpose of reporting findings and making recommendations on such matters to the Governor.

The importance of the Executive Assistant cannot be over-emphasised. Since the Northern Marianas has a significant and identifiable Carolinian community, who had severe mis-givings about commonwealth status, some concern over their welfare was evidenced in the negotiations with respect to the neo-Chamorro dominated islands.14 Considerable reasssurances were given to Carolinian community leaders concerning effective political participation by the Carolinians in government.15

The Legislative Branch is bicameral, with the Senate consisting of nine members elected at large from the three senatorial districts of Rota, Tinian and Aguiguan, and Saipan and the islands to the north of it.16 In addition to legislative power, the Senate would have the power to confirm gubernatorial appointments to cabinet positions and to the Commonwealth bench. The House of Representatives, unlike that of the Senate, is a creation of the Commonwealth Constitution.17 House members shall be fourteen in number, with twelve elected members from Saipan and the islands to the north of it, one from Rota, and one from Tinian and Aguiguan.18 Since House representation is based upon population, it is subject to reapportionment according to changes in population on a decennial basis. Under such Constitutional conditions, the Commonwealth is subject to U.S. Supreme Court rulings on such matters, particularly the "one man one vote" doctrine.19

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13. *Ibid.*, Art. III, s.18.

14. Statements by Ambassador F. Hadyn Williams cited in *Marianas Political Status; Hearings before the Subcommittee on Territorial and Insular Affairs of the Committee on Interior and Insular Affairs*, House of Representatives, 94th Congress, 1st Session, (April 14, 1975), pp. 417-419. *Report of the Future Status Commission, op. cit.*, p.249.

15. *Ibid.*

16. Commonwealth Const. Art. II, s.2.

17. *Ibid.*, Art. II, s.3.

18. *Ibid.*

19. *Baker v. Carr*, 369 U.S. 186 (1962), *Reynolds v. Sims*, 377 U.S. 533 (1964), *Burns v. Richardson*, 384 U.S. 73 (1966).

This doctrine, derived from the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution, mandates that a vote must be "weighted equally with those of all other citizens in the election of members of one house of a bicameral ... legislature ...".20 Under *Reynolds v. Sims*, the Supreme Court held that the federal Constitution protected voter rights in local government elections on the basis that the "prime reason for bicameralism ... is to insure mature and deliberate consideration of, and to prevent precipitate action on, proposed legislative measures".21 The right to exercise the vote franchise in a "free and unimpaired manner" is part of the basic civil rights of citizenery and "a fundamental matter in a free and democratic society".22

The relevance of the *Reynolds* decision and its progeny to the Northern Marianas is particularly important with respect to the Carolinian community since the Constitutional Convention did not specify as to whether sub-districts would be designated within each of the three house districts. Such an issue will undoubtedly confront the Commonwealth legislature since under the recent trend of Supreme Court decisions, minority voting effectiveness cannot be diluted.23 The problem with respect to the Carolinian community does not appear to be particularly troublesome since it is statistically concentrated in villages which would make districting comparatively simple.24 Since residency and domicile requirements for voting are explicit, the voting population would necessarily and permissibly exclude transients from political participation.25

The Judicial Branch of government is regarded as "less controversial".26 The Covenant provided that a federal district court

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20. *Reynolds v. Sims*, 377 U.S. 533, 535 (1964).

21. *Ibid.*

22. *Ibid.*

23. *United Jewish Organisations, Inc. v. Carey*, 432 U.S. 144 (1976). *White v. Regester*, 412 U.S. 755 (1973).

24. Neal Bowers, *Resettlement on Saipan, Tinian and Rota, Marianas Islands*, University of Hawaii Extention Division, (1953) pp. 35-36. Alexander Spoehr, *Saipan: The Ethnology of a War-Devastated Island* Chicago Natural History Museum, (1954), pp. 55-61. The ethnic stratification in recent times has become less obvious, though ethnically identifiable areas still persist and are manifest in voter results.

25. *Howlett v. Salish and Kootenai Tribes*, 529 F.2d 233 (9th Cir. 1976), *Alexander v. Kammer*, 363 F.Supp. 324 (S.D. Mich. 1973), *Chimento v. Stark* 353 F.Supp. 1211 (D.N.H. 1973), *Draper v. Phelps*, 351 F. Supp. 677 (W.D. Okla. 1972).

26. Howard P. Willens and Deanne C. Siemer, "The Constitution of the Northern Mariana Islands, Constitutional Principles and Innovation in a Pacific Setting", *The Georgetown Law Journal*, Vol. 65, No. 6 (August 1977), p.144. This comprehensive but optimistic article is a product of the attorneys retained by the Constitutional Convention and represents the general position of the Convention with respect to existing constitutional law.

would be created in the Commonwealth.27 As part of the Ninth Circuit, the federal court would have both trial and appellate jurisdiction over commonwealth cases in addition to jurisdiction over federal cases. There were two considerations for such a unique situation. First, it was felt that a substantial savings would result if a federal court would initially carry the caseload burden. Second, the high reputation of competence attributed to the federal judiciary would better facilitate effective judicial administration.28 The Commonwealth Constitution, however, does provide for a Commonwealth bench, consisting of both trial and appellate divisions.29 A "special division" for land cases was created in response to the particular concern over speedy and just reolution of such cases as well as the overall desire of the Constitutional Convention delegates to permit a special court to develop expertise in land matters which hopefully would result in more uniform judicial decision-making.30 There is good reason to believe that the current lack of qualified lawyers in the islands from which judicial appointments could be made indicates that intensive recruitment among qualified non-islanders is inevitable.31

II. *Constitutionally Protected Rights.*

Particular civil and criminal law rights were given constitutional recognition and protection, some of which are also protected under the federal Constitution. The advantages of a specific enumeration of such rights permit potential litigants to vindicate particular claims in either the Commonwealth or federal courts under the Commonwealth or federal Constitutions. The Commonwealth Constitution, moreover, may recognise certain rights in areas where the federal Constitution is either silent or inapplicable. In addition, the Commonwealth Constitution may seek to preserve certain rights and standards of judicial review when the same rights under the federal Constitution are either amended or judicially reversed.

The primary purpose of the Personal Rights Article of the Commonwealth Constitution is to "protect its people against the abuses of local government".32 Among the various rights protected are those

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27. Commonwealth Covenant, Art. IV. Curiously, the language of this Covenant Article denominates the court of record as the "District Court for the Northern Mariana Islands" and omits any designation of the court as either a United States District Court or a federal court. The import of such distinctions may give rise to the question as to whether the court is an Article I tribunal or an Article III court under the United States Constituion, though the intent appears to create an Article III court which has full and plenary power in all cases and controversies arising under the Constitution.

28. Willens and Siemer, *op. cit.*, pp. 1441-1442.

29. Commonwealth Const. Art IV, ss. 2 and 3.

30. Willens and Siemer, *op. cit.*, pp. 1441.

31. *Ibid.*

32. Briefing Paper No. 7, Wilmer, Cutler and Pickering (Washington D.C., 1976), p.3.

of freedom of religion, speech, press and assembly.33 While the establishment of religion is prohibited by both the Commonwealth and federal Constitutions, the Commonwealth is free to set the standards of church-state relations in a manner not offensive to the federal Constitution.34 This particular distinction is important in the area of public aid to religious educational institutions whereby public aid to such institutions is permissible under the federal Constitution so long as the students are directly benefitted.35

Other civil rights that are afforded protection are Due Process and Equal Protection of laws. Though such rights are also recognised in the federal Constitution, the Commonwealth may extend such rights into a Micronesian context, especially in matters concerning inheritance and real property cases where resort to island custom is virtually inevitable. On the other hand, the Commonwealth Constitution has recognised the right to a "free compulsory and public elementary and secondary education"36 which is not recognised under the federal Constitution.37 Likewise, the right to a "clean and healthful public environment" is a provision typical of the Convention's concern for the preservation of the islands' ecosystem.38

In areas of criminal protections, the Constitutional Convention has taken a highly comprehensive position. Among the specific rights enumerated are:

1. The accused has the right to assistance of counsel and, if convicted, has the right to counsel in all appeals.

2. The accused has the right to be confronted with adverse witnesses and to have compulsory process for obtaining favourable witnesses.

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33. Commonwealth Const. Art. XV. s.1.

34. *Spears v. Honda,* 449 P.2d 130 (1968).

35. *Roemer v. Maryland Board of Public Works,* 426 U.S. 736 (1976), *Board of Education v. Allen,* 392 U.S. 236 (1968).

36. Commonwealth Const. Art. XV, s.1.

37. *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1 (1973).

38. Commonwealth Const., Art. 1, s.9. The concern for environmental protection extends also to marine resources, and island sites of historical and cultural significance to the island people as set forth in Art. XIV, which mandates legislative management, control, and protection of such designated areas.

3. No person shall be compelled to give self-incriminating testimony.

4. No person shall be put in double jeopardy for the same offense regardless of the governmental entity that first institutes prosecution.

5. Excessive bail shall not be required.

6. Excessive fines shall not be imposed.

7. Cruel and unusual punishment shall not be inflicted.

8. Capital punishment is prohibited.

9. Persons who are under eighteen years of age shall be protected in criminal judicial proceedings and in conditions of imprisonment.39

Although the Fourteenth Amendment of the U.S. Constitution requires that the Sixth Amendment right to jury trials be implemented in the several States of the Union,40 there is considerable doubt that such a right applies to the other possessions of the United States where trial by jury has not been part of the criminal justice system.41 In a recent case, *King v. Morton*, such a long-held doctrine is under renewed attack.42 Though the *Insular Cases*43 have held, in one degree or another, that the right to a jury trial in criminal cases is not a fundamental right under the federal Constitution, the plaintiff-appellant in the *King* case is attempting to assert that such a right is inherent in American citizenship even if it is asserted in an American territory. The central issue in the *King* case, however, is whether an impartial jury can be assembled from a venire in places like American Samoa where the community is so demographically small as to make impartiality highly questionable. Such circumstances make the issues in the *King* case relevant to the Northern Marianas. The Convention, however, saw fit to leave the question to the legislature as to whether extensive research and fact-finding on jury trials would be necessary.44

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39. *Ibid.*, Art. 1, s.4.

40. *Duncan v. Louisiana*, 391 U.S. 145 (1968).

41. *Downes v. Bidwell*, 182 U.S. 244 (1901), *Balzac v. People of Puerto Rico*, 258 U.S. 298 (1922).

42. *King v. Morton*, 520 F.2d 1140 (D.C. Cir. 1975).

43. The *Insular Cases* refer to a series of Supreme Court decisions concerning the status of American overseas teritories under the Constitution, which include *Balzac v. People of Puerto Rico*, 258 U.S. 298 (1922), *Rassmussen v. United States*, 197 U.S. 197 (1903), *Downes v. Bidwell*, 182 U.S. 244 (1901), *Armstrong v. United States*, 182 U.S. 243 (1901), *Dooley v. United States*, 182 U.S. 222 (1901) and *Delima v. Bidwell*, 182 U.S. 1 (1901).

44. Commonwealth Const. Art. I, s.8.

Search and seizure protections were outlined to prohibit wiretapping, electronic eavesdropping "or other means of surveillance" except pursuant to warrant.45 An explicit waiver of Commonwealth sovereign immunity was provided so as to permit an individual with a grievance to sue for damages as a result of unlawful governmental intrusion into such protected rights.46

III. *Special Issues in Law and Governance.*

As mentioned previously, there are certain fundamental questions concerning the unique character of commonwealth status which strike deeply into American constitutional law. The *Insular Cases* have only addressed constitutional issues relevant to American territorial possessions. It can be again be said that an American commonwealth enjoys political status higher than that of the existing American territories of Guam, American Samoa, and the Virgin Islands. The major and all-important difference is the bilateral nature of a commonwealth relationship which governs the affairs of both the commonwealth and federal governments *vis-a-vis* one another. The American territories, on the other hand, are governed virtually by congressional fiat.47

Under the Covenant, the President will appoint a seven member Commission on Federal Laws whose purpose would be to:

> .... survey the laws of the United States not applicable to the Northern Mariana Islands which should be made applicable and to what extent, and in what manner.

Moreover:

> In formulating its recommendations, the Commission will take into consideration the potential effect of each law on social conditions within the Northern Mariana Islands, the policies embodied in the law and the provisions and purposes of this Covenant.48

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45. *Ibid.*, Art. I, s.3.

46. *Ibid.*

47. *Insular Cases, op. cit.*, Congressional authority is derived from Art. IV, s.3 of the Constitution.

48. Covenant, Art. V, s.504. The provisions of the U.S. Constitution that apply to the Commonwealth are Art. I, s.9 (specifically the privilege of a writ of habeas corpus), s.10 (treaty power, coinage, customs and duties), Amendments 1 through 9 inclusive (Bill of Rights), Amendments 13 and 14 (prohibition against involuntary servitude, due process and equal protection of the laws) Amendment 15 (right of citizens to vote regardless of race, colour or previous condition of servitude), and Amendment 26 (voting age minimum of eighteen years).

The Puerto Rican experience under a similar provision in their Commonwealth Compact has resulted in some litigation resulting from ambiguity of the Compact's provisions.49 Whether the Northern Marianas Commission can avoid similar problems is, at this time, premature. There are however, certain differences between the Puerto Rican and Northern Marianas situations which deserve comment in resolving the proper approach in clarifying commonwealth-federal relations.

The Puerto Rico commonwealth, a legacy of the Spanish-American War, was "born of necessity, midwifed by guile, and grew as an orphan looking for guardians who would remove its legal validity."50 Sovereignty over the Spanish possessions in the Carribean was ceded to the United States under the 1898 Treaty of Paris. In short, Puerto Rico was acquired by right of conquest governed by the principles of the U.S. Constitution.51

The Northern Marianas, as a former part of the Trust Territory of the Pacific Islands is the result of a Trusteeship Agreement under the United Nations Charter having treaty status and enforceable as such.52 Though the question of ultimate sovereignty concerning the Trust Territory has never been fully resolved with finality, the Micronesians have always claimed that it rests ultimately with the Micronesians themselves.53 Hence, it can be argued that the Trusteeship Agreement has legal significance independent of the termination of the trust relationship.54 In *Ralpho v. Bell*, the Court of Appeals for the District of Columbia Circuit noted that congressional power with respect to the Micronesian people emanates from the Trusteeship Agreement. The Court stated:

> Whether or not that pledge amounts to a legally enforceable guaranty of substantive rights to the inhabitants of the Trust Territory, it must be taken as an expression of moral principle not lightly to be disregarded.55

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49. *Status of Puerto Rico: Report of the United States - Puerto Rico Commission on the Status of Puerto Rico*, Government Printing Office (April 1966), p.23.

50. Arnold H. Leibowitz, *Colonial Emancipation in the Pacific and Carribean; A Legal and Political Analysis*, Praeger Press: New York (1977), p.63.

51. Treaty of Paris, 30 U.S. Stat. 1754 (1899); see *American Ins. v. Canter*, 1 Pet. 511 (1828).

52. *Saipan v. Dept. of Interior*, 502 F.2d 90 (9th Cir. 1974).

53. *Report of the Political Status Delegation*, Congress of Micronesia (July 1970), pp.9-10. See Footnote 9.

54. Bergsmen, *op. cit.*, pp. 386-409.

55. *Ralpho v. Bell*, 569 F.2d 607, 622 (D.C. Cir. 1977). Among the important provisions and principles of the Trusteeship Agreement are contained in Art. 6, which provides, *inter alia*, that the Administering Authority "shall give due recognition to the customs of the inhabitants in providing a system of law" and "promote the economic advancement and self-sufficiency of the inhabitants and to

Consequently, the policies of law which the Commission will take into consideration should be made with reference to the Trusteeship Agreement as an independent source of authority.56 Curiously, neither the language of the Commonwealth Covenant nor the Constitution makes any reference to the applicable human rights provisions of the Trusteeship Agreement. This may have been the result of the mutual desire of both federal and Northern Mariana officials to avoid the still pending problem of proper termination of the Trust Territory status of the islands under the United Nations Charter.57 Such developments parallel remarkably that concerning the treaty relationships between the federal government and the American Indian tribes, who have always regarded such treaties as a source of tribal sovereignty and the duties and responsibilities of the federal government.58 Once such treaties are terminated, the character of and obligations of the parties cease, unless incorporated by reference in superceding agreements or legislation.59 Conventional wisdom dictates that some measures be taken to incorporate the desirable provisions of the Trusteeship Agreement into the federal-commonwealth relationship as a restatement of moral principles and fountainhead authority for the "political union" of the Northern Marianas with the United States.

Another of the special issues unique to the commonwealth arrangement is the nature of the judiciary. As mentioned previously, the federal district court for the Northern Marianas will constitute the only judicial forum in the islands until appointments to the commonwealth bench are made under commonwealth law. Again, the most unique feature of the federal court is its trial and appellate power over cases concerning commonwealth matters. Though it is unusual for American courts to have both trial and appellate power over the same case it is provided that a panel of three judges be appointed to review cases submitted on appeal so as to avoid an appearance of impropriety or conflict of interest.60 Consequently, in fact, the

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55. continued:

this end shall regulate the use of natural resources; encourage the development of fisheries, agriculture, and industries; protect the inhabitants against the loss of their lands and resources". Trusteeship Agreement, 61 Stat. 3301, T.I.A.S. No. 1665, 8 U.N.T.S. 189 (1947).

56. An important argument can be made that the terms of Art. 6 are of a continuing nature until the legal termination of trusteeship status for the islands and, moreover, are the fundamental principles and assumptions underlying commonwealth status. See *Washington Game Dept. v. Puyallup Tribe*, 414 U.S. 44 (1972).

57. Bergsmen, *op. cit.*, p.387.

58. Lynn Kickingbird and Curtis Berkey, "American Indian Treaties - Their Importance Today", *American Indian Journal*, (Special Issue, 1976), pp.2-5.

59. *Williams v. Lee*, 358 U.S. 217 (1959); *Arizona ex rel. Merrill v. Turtle*, 413 F.2d 683 (9th Cir. 1969).

60. Commonwealth Covenant, Art. IV, s.402(c).

federal district court for the time being will also sit as the supreme court for the Commonwealth.61 In this respect, much law arising under the Commonwealth Constitution and its laws will be heard by a judge not of Northern Marianas' descent. Whether the decisions of the court, especially those concerning land matters, will be accepted as *stare decisis* by the commonwealth bench is an interesting question.

In federal matters, the federal district court will only have trial powers with appellate power vested in the Court of Appeals for the Ninth Circuit located in San Francisco, as well as in the Supreme Court. An as yet unsettled question is whether the district court will have appellate power over cases from the commonwealth appeals court concerning federal constitutional questions before appeal to the Ninth Circuit.62 Such potential power for a federal district court will likely astonish many federal jurists. In *Territory of Guam v. Olsen,* the Supreme Court held that once a federal district court has such appellate power over local cases concerning the federal Constitution, it could not lawfully transfer its jurisdiction to a territorial court without the consent of Congress.63 The Court, for the most part, based its decision on the Organic Act of Guam, and consequently special attention to jurisdictional wording is imperative for similar provisions in the Northern Marianas.

Substantial controversy is likely to arise over the strict and pervasive residency and domicile requirements for public office.64 The Convention identified such requirements as a "compelling state interest", which is the standard of review necessary to overcome challenges brought under the federal constitutional provisions for equal protection of laws.65 Recent federal decisions on the subject of residency requirements for public office have accepted such requirements as a 'compelling state interest' on the grounds that such officer holders should be acquainted with the needs and problems of the areas which they are to serve.66 It is the duration of such requirements, rather than the requirements *per se,* which are likely to precipitate controversy. The duration, it appears, must be rationally related to the "compelling state interest" in order to again pass muster under the federal Constitution.67

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61. *Ibid.*

62. Commonwealth Const., Art. IV, ss. 2 and 3.

63. *Territory of Guam v. Olsen,* 77 S.Ct. 1774 (1977). See also *People of the Territory of Guam v. Olsen,* 540 F.2d 1011 (9th Cir. 1976); *Agana Bay Development Co. Ltd. v. Superior Court,* 529 F.2d 952 (9th Cir. 1976) dissenting opinion of Kennedy, J. *Corn v. Agana Coral Co.,* 318 F.2d 622 (9th Cir. 1963).

64. The resident and domicle requirements for Governor, Senator, and Representative are seven years, five years and three years respectively. Judges, on the other hand, are required to be either citizens or nationals of the United States, though the legislature is empowered to make additional requirements.

65. Willens and Siemer, *op. cit.,* p.1431.

66. See fn. 25, *supra.*

67. Willens and Siemer, *op. cit.,* p.1431.

It must be emphasised that, at the very least, the Fifth and Fourteenth Amendments of the U.S. Constitution apply to all U.S. citizens and local governments within the jurisdiction of the United States and it is quite likely that neither the Commonwealth Covenant nor Constitution would be able to bar such fundamental provisions from applying to the Northern Marianas *ex proprio vigore*.68 The Supreme Court, however, has been willing to acknowledge that local conditions in the outlying areas of the United States may require a more flexible approach in resolving constitutional challenges. In *Downes v. Bidwell*, the Court recognised that "differences in race, habits, laws and customs .... may require action on the part of Congress that would be quite unnecessary in the annexation of contiguous territory inhabited by people of the same race ..."69 Hence, the residency duration requirement may be constitutionally permissible in the Northern Marianas, but correspondingly void in other areas. Aside from the articulated reasons for such residency requirements there may also be a *sub silentio* purpose of inhibiting in-migration to the islands, or at least inhibiting it. Newcomers to the islands would not be prohibited from voting in local elections so long as they are either U.S. citizens or nationals.70 They, however, may be a constituency without suitable political representation in local affairs.

The emphasis on restricting in-migrant interests in real property in the islands deserves commentary because of its fundamental importance. The history of negotiations for commonwealth status indicates a pervasive concern for Micronesian control over real property interests.71 Under the Covernant, therefore, the "importance of the ownership of land for the culture and traditions of the people of the Northern Mariana Islands" was recognised.72 The Commonwealth government was vested with the power to "regulate the alienation of permanent and long-term interests in real property so as to restrict the acquisition of such interests to persons of Northern Mariana Islands descent'.73 Under the Commonwealth

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68. See fn. 48, *supra*. See also *Carino v. Insular Government of the Phillipine Islands*, 212 U.S. 456 (1908).

69. *Downes v. Bidwell*, 182 U.S. 244, 248 (1901).

70. Commonwealth Const., Art. VII, s.1.

71. *To Approve "The Covenant to Establish a Commonwealth of the Northern Mariana Islands", Hearings before the Sub-Committee on Territorial and Insular Affairs*, House of Representatives, 94th Congress, 1st Session (July 14, 1975), p.51. *Marianas Political Status, op. cit.*, p.101.

72. Commonwealth Covenant, Art. X, s.805. The federal government would have the sovereign power of eminent domain over private property under Section 806. The Commonwealth government will likewise have similar power, but both governments are required by provisions under the Covenant and Commonwealth Constitution respectively to exhaust efforts for suitable alternatives before resorting to condemnation of private property including the affirmative showing that such property is necessary for public use.

73. *Ibid.*, Art. VIII, s.805. The restrictions apply for a period of twenty-five years after the termination of the Trusteeship Agreement.

Constitution, permanent and long-term interests included sale, lease, gift and inheritance (exception was made in cases where the spouse was not of Northern Marianas descent) transactions where such interests, freehold and leasehold, exceeded forty years.74

Defining "persons of Northern Mariana Islands descent" presented a special problem since some ethnic mixture between the neo-Chamorro and other groups has increased over the years. The Convention desired to draw the definition along carefully considered lines so as to exclude recent arrivals Micronesian and non-Micronesian, from the defined class of persons. The final provision defined a "person of Northern Marianas Islands descent" as:

> ... a citizen or national of the United States and who is of at least one-quarter Northern Marianas Chamorro or Northern Marianas Carolinian blood or a combination thereof or an adopted child of a person of Northern Marianas descent if adopted while under the age of eighteen years.
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> For purposes of determining Northern Marianas descent, a person shall be considered to be a full-blooded Northern Marianas Chamorro or Northern Marianas Carolinian if that person was born or domiciled in the Northern Mariana Islands by 1950 and was a citizen of the Trust Territory of the Pacific Islands before the termination of the Trusteeship with respect to the Commonwealth.75

The impact of such restrictions on real property interests and the class of persons legislatively defined presents numerous substantial federal constitutional questions. First, real property interest restrictions may affect commerce between the Commonwealth and other areas of the American Union and thus would be brought under the ambit of the Commerce Clause of the federal Constitution.76 Though it is permissible that such restrictions attempt to conserve and manage vital island resources for its own citizenry, it must be affirmatively shown that such restrictions do not impact upon interstate commerce.77 It may be argued, however, that the Commerce Clause affects commerce

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74. Commonwealth Const., Art. XII, s.3.

75. *Ibid.*, Art., XII, s.4.

76. U.S. Const., Art. I, s.8. Congressional approval may be sufficient showing that such restrictions are valid, however. See *Prudential Ins. v. Benjamain,* 328 U.S. 408 (1946).

77. *Toomer v. Witzel,* 334 U.S. 385 (1948).

between or among the several States of the Union and that its applicability to an American commonwealth is limited. Consequently, the Commission on Federal Laws may well consider whether the Commerce Clause will apply in whole or in part to the Northern Marianas.

There are, however, other grounds for a potential constitutional attack. The Privileges and Immunities Clause of the federal Constitution may transcend questions concerning interstate commerce, since certain fundamental rights inhere in national citizenship in areas within the geographical limits of the United States.78 Such rights, moreover, appear to be included in the Fifth and Fourteenth Amendments to the Constitution, which encompass the right-to-travel the "length and breadth of our land uninhibited by statutes, rules or regulations which unreasonably binds or restricts this movement".79 The right-to-travel "occupies a position fundamental to the concept of our Federal Union".80 Case law suggests that the free acquisition of real property interests is directly related, or affects the right-to-travel from one part of the United States to another.81 It must be mentioned that the two major cases, the *Guest* and *Shapiro* decisions, concerned the right-to-travel between or among the several States of the Union. Whether the Supreme Court intended the holdings of such decisions to apply to the unincorporated areas of the Union is uncertain and cogent arguments for or against the right-to-travel in areas other than the several States can be made. Given the acknowledged scarcity of land in the Northern Marianas, a "compelling state interest" argument can be adequately made in conjunction with the holdings of the *Insular Cases* to support real property restrictions in a manner sufficient to overcome the constitutional challenges.

The importance of making such distinctions between the Northern Marianas and other parts of the United States cannot be overemphasised, particularly when such distinctions are primarily political in nature. For example, in *Morton v. Mancari,* the Supreme Court dispensed with a challenge to the legality of granting employment preference to members of federally recognised Indian tribes in the federal Bureau of Indian Affairs.82 Though the challenge was based primarily against a statutory prohibition against racial preferences in employment, the Supreme Court noted that the challenged classification was in reality a political one since it was restricted to members of federally

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78. U.S. Const., Amend. XIV, s.1. See *Bolling v. Sharpe,* 347 U.S. 497 (1954), *Wheaton v. Peters,* 8 Pet. 589 (1834).

79. *Shapiro v. Thompson,* 384 U.S. 618, 620 (1968), *Nehring v. Ariyoshi,* 443 F.Supp. 778 (D. Hawaii 1977).

80. *Ibid.*

81. *United States v. Guest,* 383 U.S. 745, 757-758 (1966).

82. *Morton v. Mancari,* 417 U.S. 535 (1974), *United States v. Antelope,* 97 S.Ct. 1395 (1977).

recognised Indian tribes, which enjoy quasi-sovereign status in relation to both federal and state governments. Such judicial reasoning can be logically extended to the Northern Marianas in view of similarily applicable intentions to recognise the historical, political and cultural uniqueness of the islands which were incorporated into the language of the Commonwealth Covenant and Consttitution. There is, however, reason to believe that the Supreme Court may be reluctant to extend the holding of the *Mancari* decision to situations involving the fundamental rights of American citizenship where plenary distictions between one class of American citizens may be drawn between another when both classes reside within the geographical limits of the United States.

IV. *Conclusions and Comments.*

A comprehensive overview of the history of negotiations for commonwealth status reveal considerable optimism by both island and federal officials. The alacrity with which such negotiations were concluded and the manner in which the Commonwealth Constitutional Convention was conducted indicates that perhaps more thought should have been expended upon addressing constitutional questions rather than purely political concerns. Whether the Congress will ratify the Commonwealth Constitution is academic, since the strategic value of the islands will probably override constitutional reservations. To say that there was considerable haste in the political and constitutional processes is not an overstatement. It would also be fair to say that any future constitutional challenges to some of the aspects of either the Commonwealth Covenant or Constitution will undergo more deliberate thought and consideration in the federal judiciary.

To say the least, the questions raised in this essay are of an extraordinary nature which run the gambit of particular constitutional rights as well as fundamental definitions of the nature of the federal Union and its citizenry. In an era in which the United States is attempting to resolve questions concerning overseas possessions, the judicial process may be compelled to intervene in cases where the political process may have overreached permissible standards. On the other hand, should judicial review of constitutional challenges be favourable to the Northern Marianas, then there may be new-founded optimism for other American overseas possessions that eventually will face similar problems concerning their political future.