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CONSTITUTIONAL CONVENTION

of the territory of Guam

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Dear

The time has come for the people of Guam to begin looking at their island in a new light. With increasing expressions of good faith, the United States Congress has granted to Guam more and more sovereignty, culminating last year in the passage of the Elective Governorship Act.

If these steps are an indication, the future of Guam most certainly promises increased autonomy. How is this autonomy to be shaped? What political status will Guam assume? Now is the time to begin thinking about these questions so that preparations may be made and the legal groundwork may be laid for taking on a new role.

The Political Status Committee of the First Constitutional Convention has been studying alternative courses of action which Guam might take in the future and has proposed five such alternatives: incorporating the territory, becoming a commonwealth, becoming a state, affiliating with another nation, or assuming complete independence.

The consequences of each of these will be discussed at a public hearing to be held in your village. The committee members hope that you will come to express your thoughts on the future of our island. The hearing will

COMMENTS ON BILL NO. 335, A BILL TO ESTABLISH
THE OFFICE OF OMBUDSMAN FOR THE GOVERNMENT OF GUAM

Section 1400. Short Title.

The word "Ombudsman" is a Swedish word which has broad meaning and embraces almost any kind of deputy or agent. For the purpose of this bill, he could be designated as an agent of the Guam Legislature whose main responsibility is to serve as a "grievance man". As such, he receives complaints from the citizens of Guam concerning grievances which they have against any administrative action.

Section 1401. Definitions.

The Ombudsman's jurisdiction under Section 1405 extends to the investigation of the administrative acts of any agency. Since "administrative agency" and "agency" are often referred to in the bill, they are defined in this section for convenience. Six governmental entities have been omitted so that it will encompass only the territory's administrative agencies. Giving the Ombudsman jurisdiction over courts serves no useful purpose and might interfere with the functioning of the legal system. The Governor and the Legislature are excluded to avoid the intrusion of the Ombudsman into political process. Also, since he will need the cooperation of both to perform his duties, investigating them might prejudice his working relationship with them. Federal entities are excluded for obvious reasons.

The definition of "agency" includes personnel of the agencies acting or purporting to act in the exercise of their official duties. The purpose is to ensure that the Ombudsman does not investigate such personnel even in cases of grave misconduct, unless official duties are involved.

The definition of "administrative act" covers an entire spectrum of agency activity. It includes not only agency

process of formulating legislation, after an investigation he can recommend that a statute on which an administrative act is based be changed.

Section 1402. Ombudsman -- office establishment, appointment, tenure, removal, qualification, vacancy.

This section provides for the appointment of an Ombudsman by a majority of the members of the legislature. This is recommended since the Ombudsman will be investigating executive agencies.

This section also provides that no person may serve as an Ombudsman if he has been a member of the Legislature at any time during the two preceding years. This deters from using the office as a payment for past political favors and detaches the office from politics to that extent. It also makes the Ombudsman ineligible to serve if he is a candidate for, or holds, any other office. The prohibition to engage in any other occupation for reward of profit does not prohibit the Ombudsman from engaging in sporadic activities such as writing articles and giving lectures as long as if they do not conflict with the duties of his office. A six-year term gives sufficient time for the Ombudsman to become acquainted with the office, provides a measure of independence from politics and is long enough to interest qualified persons in the office. A three-year term limitation prevents an individual from becoming so identified with the office that it will not be able to function effectively after his departure.

A two-thirds vote of the members of the Legislature could remove, or suspend, the Ombudsman but only for neglect of duty, misconduct or disability.

This section also provides for filling a vacancy should it exist. It does not automatically provide that his assistant will succeed him.

Section 1403. Assistance, staff, delegation.

The Ombudsman is authorized to appoint his staff without the intrusion of any agency or government in order to insure the independence of his office. Any such appointment, however, is always subject to the limits of available appropriations. This section also allows the Ombudsman to delegate any of his duties except his duties to make recommendations to the agency, the Governor, the Legislature, or the public. These are the Ombudsman's only means for securing changes in administrative acts, and this section assures that such reports will be his responsibility.

Section 1404. Procedure.

This section gives the Ombudsman broad discretion in regulating his office and complaint procedures, although he may not charge a fee. One of the purposes of the Ombudsman is to aid people who through ignorance or limited finances cannot seek their own redress through the agency. This objective will be defeated by permitting fees, since even a nominal amount discourages people from filing bonafide complaints.

Section 1405. Jurisdiction.

This section specifies that the jurisdiction of the Ombudsman extends to the investigation of all administrative acts of agencies. Section 1401 should be consulted for definitions of those terms. Section 1405 also allows the Ombudsman to investigate even though the agency action is deemed final by statute or law. However, as will be seen in the discussion of Section 1413, the Ombudsman has no power to revise any agency action or impose any sanction on any agency that disagrees with his recommendations. He can only send his opinion, along with the agency's reply, to the Governor or the Legislature and make it public.

Section 1406. Investigation of complaints.

In general, the Ombudsman has the duty to investigate any complaint which discloses the existence of an appropriate

are other complaints more worthy of his attention. He may also decline to investigate if another remedy is available to the complainant. Since the number of complaints the Ombudsman would receive is an unknown quantity, such a provision is necessary to enable him to make most effective use of his powers. They in no way preclude from investigating any agency under his jurisdiction. Often the Ombudsman will prefer to investigate in a case where the statute permits him to refuse. For instance, if he believes that recourse to a legal remedy would be futile or overly burdensome he might wish to render assistance. He might also want to proceed on a public-spirited citizen who discloses administrative inefficiency, even though the complainant is not personally injured. These examples are not exhaustive. However, in the vast majority of cases, the Ombudsman can be expected to rely on the standards implicit in this section.

This section also empowers the Ombudsman to investigate on his own motion. However, since he must have reasons to believe an agency action comes within Section 1408, he does not have power to conduct a "fishing expedition" through agency files. An implied corollary of this power is the right of the Ombudsman to continue on his own motion if he discovers another agency action not mentioned in the complaint which he believes justifies investigation.

Section 1407. Notices to complainant and agency.

This section requires the Ombudsman to inform the complainant when he decides whether or not to investigate. With one limited exception, this requires that notifications of a decision not to investigate be accompanied by a statement of the reason for the Ombudsman's decision. In cases where the Ombudsman declines to investigate because the complain shows on its face that the agency's action was proper, this explanation could lead to better relations between agency and the complainant in any future dealings between them. However, there may be cases when an explanation will serve no useful purpose. In such cases, the Ombudsman is authorized to omit the reasons for his decision. However, the language of the statute is designed to inform the Ombudsman that his duty to give

inform the agency. This gives the agency an opportunity to supply the Ombudsman on its own initiative with information it considers relevant to the case. It also avoids the problem of agency personnel feeling that the Ombudsman is investigating behind their backs.

Section 1408. Appropriate subjects for investigation.

This section states what administrative acts are appropriate subjects for investigation by the Ombudsman, whether he proceeds on his own motion or by complaint. Item (1) permits the Ombudsman to investigate if a complaint discloses that administrative acts of an agency might be contrary to law. However, he has no power to revise any decision. Where a minor matter is involved and an agency has clearly acted without legal authority, the Ombudsman may be very effective in persuading the agency to remedy the wrong, thus saving the complainant the delay and inconvenience of going to court.

The remaining provisions of this section cover every type of maladministration. Item (2) authorizes the Ombudsman to investigate agency actions performed according to statute. Item (3) is self-explanatory. Item (4) permits the Ombudsman to investigate when he suspects that an otherwise unimpeachable agency action was taken for improper reasons. Item (5) permits him to investigate an agency's failure to explain its actions. This provision applies to administrative acts involving adjudication and promulgation of regulations, but its most frequent use will probably involve less administrative matters, such as those where an individual is refused information or assistance without being told the reasons.

Item (6), dealing with administrative inefficiency, relates to every aspect of an agency's practices or procedures. This provision permits the Ombudsman to be of service to many agencies. In his work, he will have an opportunity to observe many agencies in action. The knowledge he obtains about the operation of the successful agencies should be shared with others that need improvement. Item (7) permits the Ombudsman to investigate when he suspects that an agency has made a mistake, even though the

Section 1409. Investigation procedures.

This section gives the Ombudsman broad authority to make inquiries and to obtain relevant information. It also gives him authority to enter and inspect the premises of an agency without notice, since in some situations advance notice might thwart an investigation. This is most likely to be true of agencies holding persons in custody. However, since the goodwill and cooperation of agencies are necessary to the Ombudsman's effectiveness, as a practical matter he is unlikely to use this power except in extraordinary circumstances. This section also permits the Ombudsman to hold private hearings. He is given no power to hold public hearings because publicity is reserved as the Ombudsman's ultimate sanction to be used only after investigation has established the existence of a wrong and after all other attempts at obtaining agency cooperation have failed.

Section 1410. Powers.

Since one of the basic functions of the Ombudsman is investigation, he must be able to compel information and testimony. Under Items (1) and (2), the Ombudsman may subpoena and obtain sworn testimony, documents, papers, and objects from any person if the Ombudsman believes they relate to a matter under investigation. This section applies whether or not the witness is affiliated with an agency over which the Ombudsman has jurisdiction. Since an investigation often will involve persons other than the complainant and agency personnel, limiting the Ombudsman's powers to obtain information to those persons would severely hamper his effectiveness. However, it does preserve the same evidentiary privileges in proceedings before the Ombudsman that witnesses have in the Island Court.

This section also gives the Ombudsman authority to sue in Island Court to enforce his powers listed foregoing. While this procedure might cause some delay, there are constitutional problems in allowing the Ombudsman to punish for contempt if

Section 1412. Procedure after investigation.

The Ombudsman is not required to notify an agency of his findings unless he has a recommendation to make. However, he may not take any coercive action, such as appealing to the public, unless the agency is first notified and thus given a chance to respond. In some cases, he will recommend a modification of an agency action or procedure even though no act of the agency is clearly erroneous or otherwise defective under the standards of Section 140C. Even if an agency act is not erroneous, for example, he may still recommend, under paragraph (1), that the agency further consider the matter or, under paragraph (5), that other action be taken.

However in the vast majority of cases, the Ombudsman would recommend further action only if in his opinion the administrative act is subject to criticism under the standards of Section 140C. However, this provision does not change the doctrine of finality as applied to administrative agencies. What action is available to the agency when the Ombudsman recommends a change of decision will depend on its procedures as to when a decision can be reopened. Where the agency is free to reconsider the matter, or where no one would be adversely affected if it did so, the view of the Ombudsman may often be of direct help to the complainant. However, even in the case where the agency cannot or will not reopen the question, it will frequently consider the Ombudsman's comments on the matter when future cases arise.

Paragraph (3) requires the Ombudsman to report to the agency if he believes a statute or regulation on which an administrative act is based should be altered. He is not a law revision commission, however, he can make recommendations relating only to a case he has investigated. This advisory function of the Ombudsman may often work to the advantage of an agency. For example, if an agency needs support for a proposed change in its governing statute, the Ombudsman's opinion will be persuasive evidence from an impartial source that such a modification is desirable. This section further provides that the Ombudsman may request the agency to notify

Section 1413. Publication of recommendations.

A reasonable time after his report to the agency, the Ombudsman may present his opinion and recommendation, with comments, to the Governor, the legislature, or the public - any or all of them. This section applies even if the agency complies with the Ombudsman's recommendations. In many cases, the Ombudsman may desire to publish a favorable report, if the agency has shown itself willing to acknowledge mistakes or reconsider past practices. Conversely, even though the agency has followed the particular recommendation, the Ombudsman's investigation may have revealed matters which should be made known. Furthermore, it is important to the Ombudsman to be able to demonstrate his success, to justify his office to the legislature, and to convince the public that it is worthwhile to file complaints with him.

The Ombudsman must allow a reasonable time to elapse before proceeding under this section. This allows the agency to consider the matter and take remedial action if it desires. As a protection for the agency, the Ombudsman must attach any reply it makes, when submitting any report under this section. This guarantees that whoever reads the Ombudsman's opinion and recommendations will have the agency's response as well.

After the Ombudsman has made use of Section 1413, his ability to influence the administrative act of an agency is at an end. His success in accomplishing his goals will depend not upon naked power but on his ability to convince the Governor, the legislature, or the public, that a change is required.

Section 1414. Notice to the complainant.

Within an appropriate time, the Ombudsman shall notify the complainant of the actions taken by him and by the agency. This does not preclude the Ombudsman from keeping a complainant informed during a long investigation, or from answering requests from individuals about the status of their complaints.

can only refer the matter to the appropriate authority, usually the agency itself, the civil service commission, or the attorney general. Giving the Ombudsman greater power has political disadvantages and interferes with the discretion traditionally lodged in prosecuting officials.

Section 1416. Annual report.

The annual report keeps the legislature and the public informed about the Ombudsman's activities. It also gives the Ombudsman an opportunity to call problems to their attention, and to suggest that the legislature broaden or reduce his powers if experience proves that such a change is needed.

Section 1417. Judicial review.

This section prevents an agency or official from securing judicial review of the Ombudsman's recommendations. Since the Ombudsman has no power to revise agency actions, it is unlikely that anyone would be held to have standing to object to his recommendations. However, since the institution is new, one cannot be certain how the law will develop: This provision is included to guarantee that the Ombudsman will not be frequently involved in litigation when an agency disagrees with his appraisal of its actions.

The Ombudsman is given the immunities from civil and criminal prosecution that are enjoyed by a judge. The most significant of these is immunity from liability for defamation arising out of statements made in the exercise of his duties.

This section also encourages people to cooperate with the Ombudsman, without fear that he will divulge information disclosed to him in confidence. This section also protects the Ombudsman and his staff from the embarrassment and interruption of having to testify in regard to cases they have investigated. However, since the Ombudsman may need recourse to the courts to perform his duties under this act,

agencies that hold people in custody from opening or relaying complaints to the Ombudsman. Those in custody must be able to speak without fear of reprisal.

Section 141C. Penalty for obstruction.

This section penalizes only willful obstruction of the Ombudsman.

FINAL REPORT

of the

THIRTY-SECOND AMERICAN ASSEMBLY

At the close of their discussions the participants in the Thirty-second American Assembly on The Ombudsman reviewed as a group the following statement. The statement represents general agreement; however no one was asked to sign it, and it should not be assumed that every participant necessarily subscribes to every recommendation.

Millions of American view government as distant and unresponsive, if not hostile. Though often the targets of the resentment which ensues, government officials are usually not the cause of remoteness, but sometimes its victims. Dehumanized government derives from the impersonality of modern mass society. Improving the means by which individual citizens can voice dissatisfaction with governmental action or inaction will make for a more democratically effective society.

Many devices--governmental and private, formal and informal--already serve to amplify the voice of the individual in the halls of government. Administrative agencies may provide him internal avenues of appeal. Courts may hear his case. Elected representatives may handle his complaint. Public legal aid may be available. News media or private organizations may take up his cause.

All these means of access to government are useful. We should strive further to improve them. Because these existing devices have important functions to serve other than handling citizens' complaints, there is a need, in today's large and complex government for mechanisms devoted solely to receiving, examining, and channeling citizens' complaints, and securing expeditious and impartial redress. We believe that American utilization of the Ombudsman concept will help to fill that need.

WHAT IS AN OMBUDSMAN

The Ombudsman is an independent, high-level officer who receives

WHAT DOES AN OMBUDSMAN DO?

When the Ombudsman receives a complaint which seems to him to have validity, he asks the agency for an explanation. If necessary he consults further with the complainant and again with the agency. He reports his findings to those concerned. He may suggest a specific remedy to correct individual injustices and he may suggest an improvement in agency procedure.

After consideration, if he finds a complaint to be unfounded, he may discover that the agency has failed adequately to explain its action to the citizen. In this case he may urge the agency to improve its techniques of communication. In other cases he may report to the complainant why his grievance was unfounded. In addition to handling individual complaints, the Ombudsman may make studies and recommendations for the improvement of administration.

The Ombudsman proceeds without cost to the complainant. He is able to operate informally and expeditiously without formal hearing procedures.

ESTABLISHMENT OF AN OMBUDSMAN

We recommend that Ombudsman offices be established in American local and state governments. We do not recommend the establishment of a single office of Ombudsman for the entire federal government, but we do recommend that applications of the concept be undertaken at the federal level.

The Ombudsman must be selected in a manner which assures public confidence in his independence, impartiality and professional attainments. He should be given a salary which will reinforce his high status in the community.

The Ombudsman should designate his own subordinates. The Ombudsman's term of office should be sufficiently long to minimize his preoccupation with reappointment and should not be coterminous with that of the selecting authority. Provision for his removal from office for cause should be made in such manner as not to interfere with his independence while in office.

The authority of the Ombudsman should extend to public agencies exclusive of courts, legislatures and chief executives. On the other hand, the experience of California and other states with a commission on judicial qualifications--an ombudsmanlike institution--should be given serious consideration as a means for reducing the abuse of judicial authority.

HOW FAR DOES THE OMBUDSMAN GO?

An Ombudsman, concerned with mistaken or imperfect action, is a valuable resource. But an Ombudsman often can not provide all the help a citizen may need when confused by or in conflict with the officials who administer public affairs.

At times the citizen must have recourse to an active advocate who can press a demand on his behalf or plan a defense against governmental action. This need is for adequate legal services. Then, too, citizens require information about governmental services. This need is more properly provided by easily accessible information and referral agencies.

Of course, neither an Ombudsman nor legal and information services can eliminate profound social and economic injustice, which calls for essentially political solutions.

While the Ombudsman does not make policy, his office has two important indirect effects on policy-making. First, the Ombudsman's findings provide the Legislature and the Executive with additional significant information and advice upon which to base major policy improvements. Secondly, the legislative process is enhanced to the extent that the Ombudsman existence permits and encourages legislators to give increased attention to lawmaking.

CONCLUSION

We urge the prompt enactment of laws to create the special office required to handle citizens' complaints---the Ombudsman.

ning of statutory provisions that cause unexpectedly harsh administration.

Section 14. *Publication of recommendations.* The Ombudsman may publish his conclusions, recommendations, and suggestions by transmitting them to the [title of chief executive], the [name of legislative body] or any of its committees, the press, and others who may be concerned. When publishing an opinion adverse to an administrative agency or official he shall (unless excused by the agency or official affected) include the substance of any statement the administrative agency or official may have made to him by way of explaining past difficulties or present rejection of the Ombudsman's proposals.

COMMENT. Bringing his views into the open is the Ombudsman's sole means of gaining the public's support. This section permits publication even when an agency has accepted a recommendation. Publicity may be needed to call other administrators' attention to current developments and also to remind the public at large that the Ombudsman is functioning for the citizenry's benefit. Publicity, however, occurs at the end and not at the beginning of discussions with the agency involved. Persuasion is the chief instrument in gaining administrative agencies' favorable response to suggestions. Only when persuasion fails will the Ombudsman begin to think about mobilizing the force of public opinion. To guard against one-sidedness, the Ombudsman is required to disclose the criticized agency's or official's view of the matter along with his own, when the two views differ.

Section 15. *Reports.* In addition to whatever reports he may make from time to time, the Ombudsman shall on or about February 15 of each year report to the [name of legislative body] and to the [title of the chief executive] concerning the exercise of his functions during the preceding calendar year. In discussing matters with which he has dealt, the Ombudsman need not identify those immediately concerned if to do so would cause needless hardship. So far as the annual report may criticize named agencies or officials, it must also include the substance of their replies to the criticism.

Section 16. *Disciplinary action against public personnel.* If the Ombudsman has reason to believe that any public official, employee, or other person has acted in a manner warranting criminal or disciplinary proceedings, he shall refer the matter to the appropriate authorities.

Section 17. *Ombudsman's immunities.* (a) No proceeding, opinion, or expression of the Ombudsman shall be reviewable in any court;

COMMENT. Subsection (a) precludes judicial review of the Ombudsman's work. This preclusion simply recognizes that the Ombudsman issues no orders and takes no steps that bar anyone from pursuing preexisting remedies.

(b) No civil action shall lie against the Ombudsman or any member of his staff for anything done or said or omitted, in discharging the responsibilities contemplated by this Act;

COMMENT. Subsection (b) extends to the Ombudsman's office the immunity from harassment by lawsuit that is shared by judges and many other officials. It does not preclude criminal prosecution where serious misconduct ever to be brought to light; moreover, Section 6 provides for removal from office where the Ombudsman to be found miscreant.

(c) Neither the Ombudsman nor any member of his staff shall be required to testify or produce evidence in any judicial or administrative proceeding concerning matters within his official cognizance, except in a proceeding brought to enforce this Act.

COMMENT. Subsection (c) saves the Ombudsman's office from the awkwardness of interrupting its on-going work in order to testify about matters concerning which it may have received information (often given in confidence). The subsection does not, however, preclude the Ombudsman's testifying in proceedings needed to enforce the Act, such as an action to compel compliance with a subpoena or a prosecution against a violator under Section 19, below. The subsection does prevent his being used as an adjunct to private litigation.

Section 18. *Rights and duties of witnesses.* (a) A person required by the Ombudsman to provide information shall be paid the same fees and travel allowances as are extended to witnesses whose attendance has been required in the courts of this state;

(b) A person who, with or without service of compulsory process, provides oral or documentary information requested by the Ombudsman shall be accorded the same privileges and immunities as are extended to witnesses in the courts of this state, and shall also be entitled to be accompanied and advised by counsel while being questioned.

(c) If a person refuses to respond to the Ombudsman's subpoena, refuses to be examined, or engages in obstructive misconduct, the Ombudsman shall certify the facts to the [insert name of suitable court]. The court shall thereupon issue an order directing the person to appear before the court to show cause why he should not be punished as for contempt. The order and a copy of the Ombudsman's certified statement shall be served on the person.

Mr. President put the question whether the Convention would agree to the advancement of said proposition and it was determined in the affirmative, a majority of the delegates elected to the Convention and present voting in favor thereof.

Ordered, That Proposition No. 16A be placed on the order of third reading.

Proposition No. 27A

Mr. Gregorio M. Borja moved to place Proposition No. 27A on the order of third reading. Seconded and discussion held thereon.
Mr. Francisco R. Santos moved to amend said proposition as follows:

Page 1, line 5, strike out the words "within the legislature".
Motion seconded and discussion held thereon.

Mr. President put the question whether the Convention would agree to Mr. Santos' motion and it was determined in the affirmative, a majority of the delegates elected to the Convention and present voting in favor thereof.

Mr. Joseph F. Ada moved to amend said proposition as follows:
Page 1, line 8, strike out the word "six" and insert the word "four".

No second, motion defeated.

Mr. Joseph F. Ada moved to amend said proposition as follows:
Page 1, line 10, after the word "administrative" insert the words "legislative and judicial".

No second, motion defeated.

Mr. Francisco B. Aguon moved to amend said proposition as follows:
Page 1, line 9, strike out the word "three" and insert the word "two".

No second, motion defeated.

Mr. Francisco B. Aguon moved to amend said proposition as follows:

Page 1, line 7, strike out the words "at the general election last preceding his election".

Page 1, line 10, strike out the words "of agencies and departments".
(Seconded)

Mr. President put the question whether the Convention would agree to said amendment and it was determined in the affirmative, a majority of the delegates elected to the Convention and present voting in favor thereof. (Discussion continued)

Mr. Adrian C. Sanchez moved to refer said proposition back to the Executive Committee. Seconded and discussion held thereon.

Mr. President put the question whether the Convention would agree to said motion and it was determined in the negative, a majority of the delegates elected to the Convention and present not voting in favor thereof. (Discussion continued)

Mr. Adrian C. Sanchez moved to pass said proposition on file until next session. Seconded.

Mr. President put the question whether the Convention would agree to said motion and it was determined in the affirmative, a majority of the delegates elected to the Convention and present voting in favor thereof.

Proposition Nos. 19 & 30

Mr. Joseph F. Ada moved to pass Proposition Nos. 19 and 30 on file. Seconded.

Mr. President put the question whether the Convention would agree to said motion and it was determined in the affirmative, a majority of the delegates elected to the Convention and present voting in favor thereof.

Proposition No. 7

Mr. Gregorio M. Borja moved to pass Proposition No. 7 on file. Seconded.

Mr. President put the question whether the Convention would agree to said motion and it was determined in the affirmative, a majority of the delegates elected to the Convention and present voting in favor