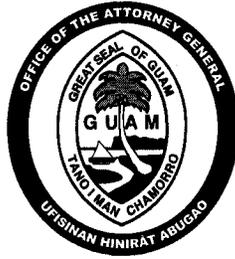


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## OFFICE OF THE ATTORNEY GENERAL

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February 25, 2011

### HAND DELIVER

### OPINION

Ref: AG 09-0170

**TO:** Honorable Eddie B. Calvo  
Governor

**FROM:** Attorney General

**RE:** **Organicity of *I Kumision Guåhan Fine'nana* (Guam First Commission); P.L. 29-128, codified at 1 GCA § 2401 *et seq.***

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In 2009, former Governor Felix P. Camacho first made a written request for a legal opinion from the Attorney General with respect to the organicity of *I Kumision Guåhan Fine'nana* (Guam First Commission) created by P.L. 29-128, now codified at 1 GCA § 2401 *et seq.*, as amended by P.L. 30-21. Then Governor Camacho subsequently informed the Attorney General's office both publicly and via his legal counsel that he did not intend to implement P.L. 29-128 which called for the creation of the Guam First Commission.

Although former Governor Camacho did not implement P.L. 29-128, according to recent news reports which were verified by the Governor's legal counsel, Governor Eddie Baza Calvo intends to implement the law. As a result, the Attorney General is issuing this opinion as requested by former Governor Camacho.

### I. FACTUAL BACKGROUND

#### A. Executive Order 2006-10

In preparation for anticipated increases in United States military presence on Guam due to the planned realignment of over 8,000 military personnel and their dependents from Okinawa, Japan to Guam by the year 2014, Executive Order 2006-10, signed by Guam Governor Felix P. Camacho on April 26, 2006, created a "Civilian/Military Task Force" (C/MTF or CMTF). As expressed in EO 2006-10, a diversity of "public and private entities, including the Guam Chamber of Commerce, the Guam Board of Realtors, the media, GovGuam utility agencies, GovGuam employment and training agencies and health and human service entities, [had] been communicating with the U.S. military on matters that are important to the interests of these entities." The Governor decided that "the U.S. Military should be afforded an opportunity to discuss its expansion plans with a single entity to ensure that the myriad of concerns are comprehensively addressed"; and that there was "a need to coordinate public agency

activities to ensure consistency in the application of government-wide policy and to ensure that these policies are not adversely affected in the legitimate pursuit of specific agency interests.”

The CMTF’s original charge was to “[d]evelop an integrated comprehensive master plan that would accommodate the expansion of military personnel, operations, assets and missions and to maximize opportunities resulting from this expansion for the benefit of all the People of Guam.” The Master Plan is intended to focus on: how the public and private sectors can support expansion; how to maximize positive effects and mitigate potentially adverse effects; infrastructure requirements; improvements in military-civilian relations; land and other natural resource requirements; and the integration of the military community as part of the community of Guam. EO 2006-10 authorized the CMTF to meet with congressional, Defense and other representatives to demonstrate Guam’s commitment to the U.S. military; to serve as a focal point from which the military can discuss its plans; and to apply for federal grants-in-aid.

The CMTF is composed of 21 members from the private and public sectors, and includes the Speaker of the Legislature; a member nominated by the Legislative Minority; the chairpersons of four Legislative committees (Finance, Taxation and Commerce; Tourism, Maritime, Military and Veterans Affairs; Health and Human Services; and Aviation, Immigration, Labor and Housing); Guam’s Delegate to Congress; the Chairperson of the Consolidated Commission on Utilities; a member of the Armed Forces Committee of the Guam Chamber of Commerce, nominated by the members of the Committee; a member of the Guam Board of Realtors, nominated by the President of the Guam Board of Realtors; and two representatives of the community-at-large, selected by the Governor of Guam. Also serving in an advisory capacity are the commanders of the Naval Forces Marianas; Anderson Air Force Base; the U.S. Coast Guard Marianas Sector; the Adjutant General, Guam National Guard; and the commanders of the U.S. Army Reserves and U.S. Air Force Reserve. The membership also includes civilian advisors to the military; the president of the Guam Hotel and Restaurant Association; and the president of the Mayor’s Council of Guam.

The CMTF is authorized to be divided into subcommittees and to include other members such as the Director of the Guam Department of Labor; the Administrator of the Guam Economic Development Authority; the Director of the Office of Homeland Defense; the Administrator, Guam Environmental Protection Agency; the Director, Bureau of Statistics and Plans; the Director, Department of Revenue and Taxation; the Director, Guam Ancestral Lands Commission; and the General Manager, Guam Visitors Bureau. All government of Guam agencies have been ordered to coordinate activities associated with military expansion with the CMTF; and the Guam Economic Development Authority and the Bureau of Statistics and Plans are ordered to provide technical support.

#### **B. Bill No. 33(EC) – 29<sup>th</sup> Guam Legislature**

On October 10, 2007, a year and a half after the CMTF was established by EO 2006-10, the Legislature passed Substitute Bill No. 33 (EC), “AN ACT TO ADD A NEW CHAPTER 23 TO TITLE 1 GUAM CODE ANNOTATED, RELATIVE TO CREATING *KUMISION GUÁHAN FINE’NANA* (THE GUAM FIRST COMMISSION) ON THE MILITARY MISSION IN GUAM.” In its “Statement of Legislative Findings and Intent,” the Legislature found that it was important to present a “unified front” and a “Team Guam” approach to the Government of Guam’s dealings with the federal government:

*I Liheslatura* has determined that it is in the people of Guam’s interest to bring our serious concerns to the forefront in talks with Congress and the Department of Defense, as the U.S. military buildup in Guam continues. It is important that Guam have

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a unified front when it deals with representatives of the Federal Government in order to properly and more effectively coordinate policies affecting or related to Guam's political, social, economic, environmental, and infrastructural concerns on an ongoing basis, with the goal of developing strategies to first reach greater mutual understanding and then to achieve measurable results on those concerns that directly affect the *Chamorro* people. Although the military classifies its bases in Guam as "overseas," Guam is part of the United States and we are American citizens carrying U.S. passports. Guam is an American community and at the very least, we deserve to be treated in the same manner as any other American community that co-habitates an area with military interests.

It is the intent of *I Liheslatura* that these goals be directly addressed and solutions sought by adopting a "Team Guam" approach to issues regarding federal-local relations and the military mission in Guam.

It is additionally the intent of *I Liheslatura* to establish in law a commission to assume the duties of the Governor's Civilian Military Task Force created in Executive Order No. 2006-10, and to refine and deliver the "Team Guam" message that puts the needs of Guam first in coordinating all aspects of government and private sector efforts to achieve the best results possible for the people of Guam.

It was the Legislature's specific intent to replace the Civilian Military Task Force created by EO 2006-10 with a different body composed of thirteen voting members and three ex-officio non-voting members that would have included some of the same, but also some different members, and with a somewhat modified agenda. "There is hereby established a '*Kumision Guåhan Fine'nana* on the Military Mission in Guam' (the '*Kumision*'). The *Kumision shall* replace and assume the duties of the Governor's Civilian Military Task Force created in Executive Order No. 2006-10." Bill No. 33 § 2 (emphasis in original). The goals and purposes of the *Kumision* in Bill No. 33 were as follows:

The *Kumision shall* have the following purposes:

(a) The formation of a "Team Guam" approach in all dealings with the Congress of the United States and the Department of Defense relative to the military buildup and relations with the Armed Forces.

(b) Development of a plan that envisions Guam fifteen (15) years and more into the future. The plan should take into account the needed and necessary construction, upgrades and expansion of Guam's economy, infrastructure and government services. The plan shall include positions for negotiation, discussion and resolution with the Federal Government on Federal and local issues that the *Kumision* determines are of significant concern, including, but not limited to, the following:

- (1) Political status;
- (2) Return of ancestral lands;
- (3) Chamorro self-determination;
- (4) Cleanup of environmental hazards;
- (5) Investigation of serious health problems possibly related to federal activity;
- (6) Immigration policies and controls;
- (7) Section 30 and Compact Impact funding;
- (8) Mass transit and public transportation;

- (9) Utilities and telecommunications;
- (10) Public education;
- (11) Public health;
- (12) Public safety and homeland security;
- (13) Protecting the environment;
- (14) Economic development;
- (15) War reparations.

(c) Conducting local scoping hearings and town meetings on each aspect of the military buildup.

(d) Meeting with Federal officials and representatives and serving as the focal point for all discussions with the Federal Government on the military buildup.

(e) Seeking Federal funding and grants-in-aid to achieve the goals and objectives of the *Kumision*.

Bill 33 § 2 (emphasis in the original).

The Governor vetoed Bill No. 33(EC) on October 26, 2007 and returned it to the Legislature with the following message:

Today I have vetoed Bill No. 33 (EC) which, if enacted, would take the Government of Guam down a path which compromises a concerted effort by all stakeholders in our community to adequately plan for the pending military buildup planned by the U.S. Department of Defense over the next 15 years, address our challenges, identify available resources and, leveraging those resources to maximize our ability to meet pre build-up needs, actual needs during the construction period but, more importantly, determine what is required to sustain the build up for the benefit of our people.

A "Team Guam" [sic] approach has already been undertaken since the establishment of the Civilian Military Task Force (CMTF) in April of 2006, recognized by all military commands, federal officials, Government of Japan and private sector stakeholders as the central point for all information and planning efforts for the Guam buildup as well as identifying the challenges we face.

Current efforts by the CMTF, of which the Guam Legislature is an active participant, has yielded significant results in the creation of an Infrastructure Forecast, Scoping Plan and Needs Assessment for the Government of Guam in response to the Environmental Impact Statement Process required under federal law.

These products were formulated based on input from all sectors of our community through hearings and town meetings related to the relocation of military forces to the Western Pacific. Members of my Administration have actively participated in every meeting of the CMTF and, taken every opportunity to engage the Interagency Group on Insular Areas to address the needs of the civilian and military communities on Guam.

The goals of the *Komision* [sic] are the goals of the CMTF. I fully understand and recognize that there are outstanding concerns but, we should all focus our efforts, energy

and resources to meeting the needs of the build up for the benefit of future generations. The other concerns raised in Bill No. 33 (EC) are important to the people of Guam and, as such, deserve their own attention and can stand on their own merit. Whether they are addressed individually, which I recommend, or collectively, it would only serve to enhance the importance of these issues to our national leaders. We must not however, detract or minimize our efforts on the single most important event for our people. This event which we must capitalize on to ensure that it is ultimately used to improve the quality of the lives of our people far into the future may never come again. After all, it is not the end of the journey that matters most but, it is what we do along the way. Let us not jeopardize or squander this opportunity for our people.

I have been engaged with officials at the highest levels of our government, from the White House, U.S. Department of the Interior and the U.S. Department of Defense on this important matter to the people of Guam. I will continue to advocate for the mutually beneficial outcomes of what is the largest move of military forces since the end of World War II and, I continue to hope that we can all do this together and in concert with each other not just to ensure that positive benefits accrue to our people and that Guam will finally be recognized as being strategically important for the security of our nation.

Coordination has and continues to progress and I commit to continue working with the Guam Legislature to make the military buildup on Guam a successful one for the people of Guam and the men and woman of the armed services who continue to protect democracy and our great nation in this part of the world.

### **C. Executive Order 2008-09**

Subsequent to his veto of Bill No. 33, Governor Camacho amended Executive Order 2006-10. On May 27, 2008, the Governor signed and promulgated Executive Order 2008-09, which retained the original membership of the CMTF as contained in EO 2006-10, but augmented the organizational structure of the CMTF with a "CMTF Executive Committee ... to ensure that the policy direction provided by the Governor are carried out and that the work conducted in support of the CMTF is consistent with that policy direction." Also, in response to "a request by the United States Department of Defense to establish a Guam single point to contact for the military expansion," EO 2008-09 created a "Guam Buildup Office (GGO)" within the Office of the Governor "as Guam's local counterpart to the [United States] Joint Guam Program Office (JGPO)." Now, "[a]ll JGPO interaction with the government of Guam should originate from the GBO, subject to the policy guidance of the Office of the Governor." The GBO "is expressly tasked with monitoring all federal and international activities relative to the military expansion and providing all relevant information to the Executive Committee." Its responsibilities are: to "be the initial contact point for public information, official requests and any other inquiries regarding the buildup"; to "serve as program oversight office for the Guam Buildup planning and implementation"; to "manage all operational and administrative support functions for CMTF relative to the Buildup as necessary"; to "serve as the central clearinghouse for all communications and policy directives relative to the Buildup, providing policy synchronization, oversight, and integration planning for the Guam Buildup subject to the supervision of the Governor"; and to "monitor all policies, plans and activities relative to the Buildup from the U.S. federal govt., U.S. Congress, DOD, local government, Legislature, or any other organization and provide regular reports to the Governor, the Chairman of the CMTF and the Executive Committee regarding all relevant developments relative to the Guam Buildup."

With the establishment of the CMTF Executive Committee and the creation of the Guam Buildup Office within the Office of the Governor, the CMTF's renewed mission is the development of an "integrated Guam Buildup Master Plan to implement all necessary improvements and expansions to accommodate the needs of the entire Guam community, both civilian and military, and to maximize opportunities resulting from this expansion for the benefit of all the people of Guam." It was the Governor's intent in EO 2008-09 that the Guam Buildup Master Plan should include advice and recommendations in the following areas: public and private support for expansion; maximizing positive effects and mitigating potentially adverse effects; infrastructure requirements; land and other natural resources requirements; identifying Guam's total buildup needs and to serve as the focal point for all discussions with federal and military officials regarding Guam's need for funding support to accommodate those needs; applying for federal grants-in-aid or any other federal or other funding sources; exploring opportunities for outsourcing government of Guam buildup requirements in those areas where surge-capacity requirements will exceed future sustained demand from the government of Guam for the island community; and improving civilian-military/federal relations.

#### **D. Bill No. 378 (EC) – 29<sup>th</sup> Guam Legislature**

On November 21, 2008 the 29<sup>th</sup> Guam Legislature passed and on November 25, 2008 submitted to the Governor Bill No. 378 (EC), "AN ACT TO ADD A NEW CHAPTER 23 TO TITLE 1, GUAM CODE ANNOTATED, RELATIVE TO CREATING *I KUMISION GUÅHAN FINE'NANA* (THE GUAM FIRST COMMISSION) ON THE MILITARY MISSION IN GUAM; AND TO *AMEND* §2105 OF TITLE 4, GUAM CODE ANNOTATED, RELATIVE TO REPRESENTATION OF BOTH GENDERS ON BOARDS AND COMMISSIONS." The Legislature's stated intent was, again, to replace and assume the duties of the Civilian Military Task Force established in EO 2006-10 with a "Guam First Commission," and also to replace and assume the duties and responsibilities of the Guam Buildup Office established by EO 2008-09: "There is hereby established a '*Kumision Guåhan Fine'nana* (Guam First Commission) on the Military Mission in Guam' (the *Kumision*). The *Kumision* shall replace and assume the duties of *I Maga'lahi's* Civilian-Military Task Force (CMTF) created in Executive Order No. 2006-10 and restructured by Executive Order 2008-09; the role and duties of the Guam Buildup Office (GBO), also established by Executive Order 2008-09; and those duties as further directed by this Act." With only slight differences in the composition of the members of the commission, and incorporating the assumption of duties the Governor had assigned to the Guam Buildup Office in EO 2008-09, Bill No. 378 (EC) is essentially the same as Bill No. 33 (EC) that had previously been vetoed by the Governor on October 26, 2007, thirteen months earlier.

Similar to its findings that preface Bill No. 33 (EC), Bill 378's intent is that the diversity of stakeholders having an interest in the military buildup on Guam should present a "unified front," to "speak with one voice" and to present a "Team Guam" approach in its dealings with the United States government:

*I Liheslatura* has determined that, as the U.S. military buildup in Guam continues, it is in the people of Guam's interest to have a unified front when we bring our serious concerns to the forefront in talks with Congress and the Department of Defense. Guam must speak with one voice when it deals with representatives of the Federal Government in order to properly and more effectively coordinate policies affecting or related to Guam's political, social, economic, environmental, and infrastructural concerns on an ongoing basis.

Guam's people and government must have the goal of developing strategies to first reach greater mutual understanding and then to achieve measurable results on those concerns that directly affect the *Chamorro* people. It is the intent of *I Liheslatura* that these goals are directly addressed and solutions are developed by adopting a "Team Guam" approach to issues regarding federal-local relations and the military mission in Guam.

It is additionally the intent of *I Liheslatura* to establish in law a commission to assume the duties of *I Maga'lahi's* Civilian-Military Task Force created in Executive Order No. 2006-10, and to refine and deliver the "Team Guam" message that puts the needs of Guam first in coordinating all aspects of government and private sector efforts to achieve the best results possible for the people of Guam.

Bill No. 378 (EC), Statement of Legislative Findings and Intent.

By comparison, the 29<sup>th</sup> Guam Legislature's Bill 33 as amended and reintroduced as Bill 378 differs from EO 2006-10 and EO 2008-09 in two substantive ways: the first is the composition of the membership of Guam First Commission compared to the Governor's Civilian Military Task Force; the second pertains to the emphasis of its agenda, which is much broader in scope than that established by the Governor.

#### **E. Membership Comparison between the CMTF and the *Kumision***

The Governor serves as the chairman of the Task Force and the Legislature places the Governor as the chair of the *Kumision*. The Governor's Task Force provides for six members of the Legislature to participate: the Speaker; a member of the Legislative Minority nominated by the Legislative Minority; and the chairpersons of four different Legislative committees. The Guam First Commission on the other hand reduces legislator participation to four, with voting privileges: a member selected by the Legislative minority; a member appointed by the Speaker, who may appoint himself; the Chairperson of the standing committee with specific jurisdiction over Federal Affairs; and the Chairperson of the standing committee with specific jurisdiction over Military Affairs.

Both Task Force and *Kumision* provide that Guam's Delegate to the United States Congress (or her designee in the case of the Task Force) shall be members, but the *Kumision* places the delegate in the category of ex-officio non-voting member. Both provide that the Chairperson of the Consolidated Commission on Utilities (or his designee in the case of the Task Force) shall be members, but again, the *Kumision* relegates him to the status of ex-officio non-voting member.

The Governor's Task Force includes a member of the Armed Forces Committee of the Guam Chamber of Commerce, to be nominated by the members of the Committee; the Guam First Commission provides merely for a member from the Chamber of Commerce. The Task Force provides for two representatives of the community-at-large, selected by the Governor of Guam, whereas the Commission provides for the Governor's appointment of three members who are representative of specific interest groups or demographics without a specific reference to any particular public or private entity, institution, or organization: a member of the general public who is not an employee of the government of Guam or the Federal Government at any time during his tenure on the *Kumision*; a member of a Chamorro rights organization who has been selected by the combined memberships of the various organizations; a senior citizen who is not an employee of the government of Guam or the Federal Government at any time during his tenure on the *Kumision*. And whereas the *Kumision* includes the Adjutant General of the Guam

National Guard, again as an ex-officio non-voting member, the Governor's Task Force reserves places for the commanders of the Naval Forces Marianas; Anderson Air Force Base; the U.S. Coast Guard Marianas Sector; the Adjutant General, Guam National Guard; and the commanders of the U.S. Army Reserves and U.S. Air Force Reserve, all to serve in an advisory capacity. The Task Force reserves a place for the president of the Mayor's Council of Guam, whereas the *Kumision* provides that one member shall be appointed by the Mayors Council from among the membership of the Mayors Council.

Membership on the CMTF is also extended to civilian advisors to the military, and the president of the Guam Hotel and Restaurant Association, neither of which is listed on the *Kumision* as members. On the other hand, the *Kumision* has members not included on the CMTF, each of whom the Legislature has determined has something unique to contribute including: a member appointed by the Chief Justice of the Supreme Court of Guam, who may appoint himself; a member to represent the youth of Guam to be appointed from among the qualified members of the Guam Youth Congress by the Speaker of the Youth Congress, who may appoint himself; a member to represent *Fuetsan Famalao'an* (Chamorro for "Strength of Women") a women leaders group, founded to address the social and cultural impact to women and young girls and the island of Guam due to a massive influx of 8,000 marines and families) to be selected by the organization from among its membership; the Administrator of the Guam Economic Development Authority or his designee; and the General Manager of the Guam Visitors Bureau or his designee, all of whom have voting privileges on the *Kumision*.

#### **F. Comparative Purposes and Responsibilities – Civilian Military Task Force and the *Kumision***

The *Kumision's* responsibilities as Guam's "single point of contact" mirror those of the Governor's Civilian Military Task Force and Guam Buildup Office.

Among other things, the *Kumision shall*:

- (a) Be the government of Guam's single point of contact for the military expansion;
- (b) Act as Guam's local counterpart to the Joint Guam Program Office (JGPO). All JGPO interaction with the government of Guam *shall* originate from the *Kumision*, subject to the laws of Guam;
- (c) The *Kumision* is also tasked with monitoring all federal and international activities relative to the military expansion and providing all relevant information to *I Maga'lahi'* and *I Liheslatura*. The *Kumision* will be the initial contact point for public information, official requests, and any other inquiries regarding the buildup;
- (d) The *Kumision* will serve as program oversight office for the Guam Buildup planning and implementation;
- (e) The *Kumision* may manage all operational and administrative support functions for CMTF relative to the buildup as necessary;
- (f) The *Kumision* will serve as the central clearinghouse for all communications and policy directives relative to the buildup, providing policy synchronization, oversight, and integration planning for the Guam Buildup; and
- (g) The *Kumision shall* monitor all policies, plans and activities relative to the buildup from the U. S. Federal Government, U.S. Congress, DOD, the local government, *I Liheslatura* (Legislature), or any other organization regarding all relevant developments relative to the Guam Buildup.

The *Kumision's* goals and purposes as defined in Bill 378 are approximately the same as those currently assigned to the CMTF and GBO by Executive Order. But the Legislature has added to the Governor's list a number of additional local and socio-cultural concerns. Additional agenda items the Legislature has tasked the *Kumision* to consider include: political status; return of ancestral lands; Chamorro self-determination; immigration policies and controls; Section 30 and Compact Impact funding; and war reparations. With one minor editorial deletion, the goals and purposes of the *Kumision* in Bill 378 are the same as those contained in Bill 33, except that Bill 378 adds one additional mission statement: "(f) To participate in the procurement process, to include, but *not be limited to*, the development of scope of work, the selection and evaluation process, and to provide *I Maga'láhen Guahan* with a recommendation for an award of contract with any procurement by the government of Guam associated with the military buildup." Bill 378 § 2 (emphasis in original).

**Goals and Purposes of *I Kumision*.** The *Kumision* shall have the following purposes:

(a) The formation of a "Team Guam" approach in all dealings with the Congress of the United States and the Department of Defense relative to the military buildup and relations with the Armed Forces.

(b) Development of a plan that envisions Guam fifteen (15) years and more into the future. The plan should take into account the needed and necessary construction, upgrades and expansion of Guam's economy, infrastructure and government services. The plan *shall* include positions for negotiation, discussion and resolution with the Federal Government on Federal and local issues that the *Kumision* determines are of significant concern, including, *but not limited to*, the following:

- (1) Political status;
- (2) Return of ancestral lands;
- (3) *Chamorro* self-determination;
- (4) Cleanup of environmental hazards;
- (5) Investigation of serious health problems possibly related to federal activity;
- (6) Immigration policies and controls;
- (7) Section 30 and Compact Impact funding;
- (8) Mass transit and public transportation;
- (9) Utilities and telecommunications;
- (10) Public education;
- (11) Public health;
- (12) Public safety and homeland security;
- (13) Protecting the environment;
- (14) Economic development; and
- (15) War reparations.

(c) Conducting local scoping hearings and town meetings on each aspect of the military buildup.

(d) Meeting with Federal officials and representatives and serving as the focal point for all discussions with the Federal Government on the military buildup.

(e) Seeking Federal funding and grants-in-aid to achieve the goals and objectives of the *Kumision*.

(f) To participate in the procurement process, to include, but not be limited to, the development of scope of work, the selection and evaluation process, and to provide *I Maga'láhen Guahan* with a recommendation for an award of contract with any procurement by the government of Guam associated with the military buildup.

Bill 378 § 2 (emphasis in the original).

### G. Corporate Structure of the *Kumision*

With the Governor as the chair of the *Kumision*, the Legislature has provided for the *Kumision's* selection of its own vice-chairman, and authorized it to form its own subcommittees at its own discretion. "The *Kumision shall* choose a vice-chairperson from among the voting members of the *Kumision*. The *Kumision* may form subcommittees as necessary at its own discretion. A member of the *Kumision shall* chair each subcommittee." Bill 378 § 2 (emphasis in the original).

The Legislature's vision of how a "unified front," Guam's "one voice" and a "Team Guam" approach is best decided or determined is perhaps the most critical distinction between the *Kumision* and the Governor's Task Force and Guam Buildup Office. The CMTF and GBO are at all times answerable to none other than the Governor. That is not at all self-evident with the *Kumision*. Bill 33, which was vetoed, and which originally provided for thirteen voting members and three ex-officio non-voting members, established a quorum of seven members and required the affirmative vote of seven members for the passage of any motion or resolution. Bill 378 provides for a quorum of eight, and the affirmative vote eight members to pass a motion or resolution. "Eight (8) members of the *Kumision shall* be required for a quorum. *No meetings shall* be held if a quorum is *not* present. Eight (8) affirmative votes are required for passage of any *Kumision* motion or resolution." Bill 378 § 2, codified at 1 GCA § 2306 (emphasis in the original). The *Kumision's* mix of voting and ex-officio members, raises constitutional questions about the *Kumision's* corporate design. If the *Kumision* passed a resolution or motion by the requisite number of votes in the name of Team Guam, Bill 378 contains no mechanism by which its motions may be enforced, nor any means by which resolutions are articulated or expressed to the federal government past the point of merely making recommendations to the Governor and the Legislature. There are no consequences in the bill should the Governor take a position contrary to that "voiced" by the *Kumision*.

Finally, Bill 378 not only directs all government of Guam departments and agencies to cooperate fully and coordinate all activities with the *Kumision*, but Bill 378 reaches directly into the Governor's office and conscripts staff committed to the Guam Buildup Office in order to staff the *Kumision* and provide it technical support.

#### Coordination of Activities; Technical and Staff Support.

All government of Guam departments and agencies *shall* extend their full cooperation to the *Kumision*, and shall coordinate activities associated with the military buildup with the *Kumision*. The members of *I Maga'láhi's* Civilian-Military Task Force created in Executive Order No. 2006-10 and amended by Executive Order No. 2008-09, along with the Guam Economic Development Authority, the Bureau of Statistics and Plans, and the staff of the GBO originally established in the Governor's Office by Executive Order No. 2008-09, *shall* provide technical and staff support to the *Kumision*."

Bill 378 § 2 (emphasis in the original). It is unclear by what authority or legal precedent the Legislature is authorized by the Organic Act to press into the service of the *Kumision* “the staff of the GBO originally established in the Governor’s Office by Executive Order No. 2008-09,” and direct that it “provide technical and staff support to the *Kumision*.”

On December 2, 2008, acting Governor Michael W. Cruz, M.D. vetoed Bill No. 378 and returned it to the Legislature with the following veto message:

Though I fully understand the Legislature’s desire to make Guam “first” in all matters concerning the pending Guam Buildup, I am forced to veto this legislation because its passage would irrevocably compromise the work already being done to achieve that goal. As written, this legislation would unseat all CMTF sub-committee Chairs and potentially impede or undo nearly three years of progress. In that time, the CMTF has produced Guam’s revised needs assessment which reflects the financial and infrastructural needs of our island, resulting from a large and rapid increase to our population. The CMTF have also assisted in the publication of a port improvement plan, as well as the 2030 transportation plan. This is just some of the crucial work that has become the basis of our data-driven FY 2010 budget request, presently with the Office of Management and Budget.

Since its inception, the CMTF has undertaken a “Team Guam” approach to all matters concerning the Guam Buildup. Stakeholders from every sector of our community have been working diligently to understand the complex challenges facing Guam—actively seeking sustainable solutions that improve our people’s quality of life. A tangible plan to move our island forward is taking shape—as a result of each subcommittee’s work. These plans include meeting pre-buildup requirements, enhancing our capacity to deal with challenges during the buildup’s construction phase, and more importantly, making this buildup work first for the people of Guam and the region.

CMTF subcommittee chairs and their members represent decades of subject-matter expertise, spanning nearly every area of importance cited in this legislation. Each of them possesses the institutional knowledge and individual expertise to advocate our needs, meet our challenges and execute plans with vigor and purpose.

Every CMTF meeting has been open to the public. Every member of the legislative branch remains welcome to be an active participant in this process. Since the inception of CMTF, Senators have been named as members of the CMTF. Subcommittees can be added, membership can be expanded and a more proactive communications approach is already underway.

Like you, I share the legislature’s valid need to advance issues related to Guam’s political relationship with the United States, but the CMTF must not abdicate its responsibility to plan for tomorrow specifically for the buildup, while we actively work to settle the sensitive issues of our past. For nearly thirty years our island’s leaders have made political status, the return of ancestral lands, Chamorro self-determination, and war reparations the basis of our federal policy agenda. Theses issues are of the utmost importance to me and the members of my administration, but the complexity of these issues and their importance deserve our full attention, and that is why our statutes created the Committee on Decolonization, the former Land Re-use Authority, and the

congressionally empowered Sub-committee on war reparations. Though I strongly empathize with all of these concerns, our community remains divided on the approaches we must take to resolve these longstanding and complex issues. These issues must and should stand on their own merit.

The CMTF must remain focused on the tangible outcomes necessary to benefit from the Guam buildup and therefore it is not the most efficient venue for the resolution of these concerns.

We are all concerned with Guam's future, we all want to ensure the right decisions are made for our people but I cannot ignore the body of work already produced by the CMTF or its momentum going forward.

Twenty days after the acting Governor's veto, on December 22, 2008. Bill No. 378 became Public Law 29-128 by legislative override and is now codified at 1 GCA Chap. 24, § 2401, *et seq.*

## II. ANALYSIS

The issue raised by the Governor's opinion request is whether Public Law 29-128, codified at 1 GCA § 2401 *et seq.*, as, violates the Organic Act and Constitutional doctrine of separation of powers.

In 1928, the United States Supreme Court discussed the doctrine of separation of powers with respect to the Organic Act of the Philippine Islands. The case involved a statute that authorized the Philippine Legislature to appoint its own members to the boards of two government owned corporations, a national coal company and a national bank. It was the contention of the Governor that "that the election of directors and managing agents by a vote of the government-owned stock was an executive function intrusted by the Organic Act of the Philippine Islands to the Governor General, and that the acts of the Legislature divesting him of that power and vesting it, in the one case, in a 'board,' and, in the other, in a 'committee,' the majority of which in each instance consisted of officers and members of the Legislature, were invalid as being in conflict with the Organic Act." *Springer v. Philippine Islands*, 277 U.S. 189, 199-200 (1928).

It may be stated then, as a general rule inherent in the American constitutional system, that, unless otherwise expressly provided or incidental to the powers conferred, the Legislature cannot exercise either executive or judicial power; the executive cannot exercise either legislative or judicial power; the judiciary cannot exercise either executive or legislative power. The existence in the various Constitutions of occasional provisions expressly giving to one of the departments powers which by their nature otherwise would fall within the general scope of the authority of another department emphasizes, rather than casts doubt upon, the generally inviolate character of this basic rule.

*Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions. It is unnecessary to enlarge further upon the general subject, since it has so recently received the full consideration of this court..*

Not having the power of appointment, unless expressly granted or incidental to its powers, the Legislature cannot ingraft executive duties upon a legislative office, since that would be to usurp the power of appointment by indirection, though the case might be

different if the additional duties were devolved upon an appointee of the executive. *Here the members of the Legislature who constitute a majority of the 'board' and 'committee,' respectively, are not charged with the performance of any legislative functions or with the doing of anything which is in aid of the performance of any such functions by the Legislature.* Putting aside for the moment the question whether the duties devolved upon these members are vested by the Organic Act in the Governor General, it is clear that they are not legislative in character, and still more clear that they are not judicial. *The fact that they do not fall within the authority of either of these two constitutes logical ground for concluding that they do fall within that of the remaining one of the three among which the powers of government are divided.*

*Springer*, 277 U.S. at 201-03 (1928) (citations omitted; emphasis added).

#### A. Separation of Powers and the Organic Act of Guam

There is abundant legal authority and precedent analyzing the separation of powers doctrine under Guam's Organic Act. "[U]nder the Organic Act, the government of Guam is comprised of three separate but co-equal branches of government." *In re Request of Gutierrez*, 2002 Guam 1 ¶ 32; *Hamlet v. Charfauros*, 1999 Guam 18 ¶ 9; *Taisipic v. Marion*, 1996 Guam 9 ¶ 6.

The applicability of the separation of powers doctrine is evident in the language of the Organic Act itself, which provides that "[t]he government of Guam shall consist of three branches, executive, legislative, and judicial..." 48 U.S.C. § 1421a (1992); *see also Hamlet*, 1999 Guam 18 at ¶ 9 ("By its very language, therefore, the Organic Act requires application of the constitutional doctrine of separation of powers to government of Guam functions.") (citation omitted)."

*Villagomez-Palisson v. Superior Court*, 2004 Guam 13 ¶ 14 (editorial brackets in the original).

The issue before us is clearly an Organic Act issue. This is because of the well-established principle in this jurisdiction that the Guam Legislature cannot enact laws which are in derogation of the provisions of the Organic Act

We underscored this principle in *In re Request of Governor Gutierrez*, when we stated that the legislature may not enact a law encroaching upon the Governor's authority and powers which are mandated by the Organic Act.

The Ninth Circuit Court of Appeals also recognizes that Guam's self-government is constrained by the Organic Act and therefore, courts are compelled to invalidate Guam statutes in derogation of the Organic Act. Thus, the Legislature's powers are broad, but are constrained by the provisions of Organic Act of Guam, and in turn, this court's interpretation of such law. The court must declare a legislative enactment unconstitutional if an analysis of the constitutional claim compels such a result.

*Underwood v. Guam Election Comm'n*, 2006 Guam 17 ¶¶ 19-21 (editorial brackets, internal quotation marks and citations omitted; editorial ellipsis supplied).

The separation of powers doctrine exists to "prevent[] the abuses that can flow from centralization of power." *Mo. Coalition for Env't v. Joint Comm. on Admin. Rules*,

948 S.W.2d 125, 132 (Mo.1997) (en banc) (citation omitted); *see also Book v. State Office Bldg. Comm'n*, 238 Ind. 120, 149 N.E.2d 273, 293 (1958) (recognizing that the purpose of separating the powers of each branch is “to preclude a commingling of these essentially different powers of the government in the same hands”) (citation omitted). The concentration of the separately delineated powers in the hands of one branch “may justly be pronounced the very definition of tyranny.” *Beckert v. Warren*, 497 Pa. 137, 439 A.2d 638, 642 (1981).

*In re Request of Governor Gutierrez, Relative to the Organicity and Constitutionality of Public Law 26-35*, 2002 Guam 1 ¶ 33 (editorial brackets in original).

We recognize that, under the separation of powers doctrine, one branch of government is prohibited from either delegating its enumerated powers to another branch of the government or aggrandizing its powers by reserving for itself the powers given to another branch. (citations omitted) At least one court has noted that “the *taking* of power is more prone to abuse and therefore warrants an especially careful scrutiny.” *Communication Workers*, 617 A.2d at 232 (emphasis added). Even absent a finding that one branch has usurped a power exclusively reserved for another branch, a separation of powers violation may be found if “one branch unduly interferes with another branch so that the other branch cannot effectively exercise its constitutionally assigned powers.” *Armadillo Bail Bonds v. State*, 802 S.W.2d 237, 239 (Tex.Crim.App.1990) (citations omitted); *see Perez*, 1999 Guam 2 at 17.

*In re Request of Governor Gutierrez*, 2002 Guam 1 ¶¶ 34, 35 (indicated citations omitted; footnote omitted; emphasis supplied by the court).

As articulated in *Territorial Prosecutor v. Superior Court*, “the legislature may not enact a law encroaching upon the Governor’s authority and powers which are mandated by the Organic Act.” *Territorial Prosecutor*, 1983 WL 30224, at \* 5, 6 (invalidating section 7100(b) of the Territorial Prosecutor’s Act because it “impermissibly encroaches upon the Governor’s removal powers...”). This limitation on the Legislature’s power is specifically set forth in the Organic Act, which prohibits the Legislature from enacting laws that are “inconsistent with the provisions of this chapter and the laws of the United States applicable to Guam.” 48 U.S.C. § 1423a (1992) (emphasis added). The “chapter” referred to is the Organic Act; therefore, the Legislature is prohibited from enacting laws that are inconsistent with the Organic Act, including the Organic Act’s grant of power to the other branches of the government. *See id.*; *see also Territorial Prosecutor*, 1983 WL 30224, at \* 5 (discussing a Ninth Circuit case that held that section 1423a limits the legislative power to enact legislation to subjects not inconsistent with the Organic Act). The problems inherent in allowing the Legislature to enact laws which encroach upon the executive’s or Governor’s powers are evident:

If ... [the courts] were to permit the legislature to do so, not only would it render the concept of the separation of powers meaningless and be inconsistent with mandate of the Organic Act, but it could possibly result in the Governor being divested of his executive authority and power at the whim of the legislature.

*Territorial Prosecutor*, 1983 WL 30224, at \* 5.

*In re Request of Governor Gutierrez*, 2002 Guam 1 ¶ 36 (editorial brackets and ellipses in original).

## **B. Legislative versus Executive Powers in the United States Supreme Court**

It has long been held by the United States Supreme Court that both the Constitution and the Organic Act of a territory prohibit the encroachment of one branch of government upon the powers conferred upon the other branches.

It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers intrusted to government, whether State or national, are divided into the three grand departments, the executive, the legislative, and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other.

*Kilbourn v. Thompson*, 103 U. S. 168, 190-91 (1880).

Assuming, for present purposes, that the duty of managing this property, namely, the government-owned shares of stock in these corporations, is not sovereign but proprietary in its nature, the conclusion must be the same. The property is owned by the government, and the government in dealing with it, whether in its quasi sovereign or its proprietary capacity, nevertheless acts in its governmental capacity. *There is nothing in the Organic Act, or in the nature of the legislative power conferred by it, to suggest that the Legislature in acting in respect of the proprietary rights of the government may disregard the limitation that it must exercise legislative and not executive functions. It must deal with the property of the government by making rules, and not by executing them.* The appointment of managers (in this instance corporate directors) of property or a business, is essentially an executive act which the Legislature is without capacity to perform directly or through any of its members.

*Springer v. Philippine Islands*, 277 U.S. at \*203 (emphasis added).

And we are further of the opinion that the powers asserted by the Philippine Legislature are vested by the Organic Act in the Governor General. The intent of Congress to that effect is disclosed by the provisions of that act already set forth. Stated concisely, these provisions are: That the supreme executive power is vested in the Governor General, who is given general supervision and control over all the departments and bureaus of the Philippine government; upon him is placed the responsibility for the faithful execution of the laws of the Philippine Islands; and, by the general proviso, already quoted, all executive functions must be directly under the Governor General or within one of the executive departments under his supervision and control. These are grants comprehensive enough to include the powers attempted to be exercised by the Legislature by the provisions of law now under review.

*Springer*, 277 U.S. at \*205-06. (citation omitted).

### C. Legislative versus Executive Powers in the Organic Act

The Organic Act authority of the Guam Legislature is set forth at 48 U.S.C. § 1423a, which provides: “The legislative power of Guam shall extend to all subjects of legislation of local application not inconsistent with the provisions of this chapter and the United States applicable to Guam. . . .” The Governor’s powers, at 48 U.S.C. § 1422, provide, in relevant part: “The executive power of Guam shall be vested in an executive officer whose official title shall be the ‘Governor of Guam’.” Section 1422 of Guam’s Organic Act further provides:

The Governor shall have general supervision and control of all the departments, bureaus, agencies, and other instrumentalities of the executive branch of the government of Guam. He may grant pardons and reprieves and remit fines and forfeitures for offenses against local laws. He may veto any legislation as provided in this chapter. He shall appoint, and may remove, all officers and employees of the executive branch of the government of Guam, except as otherwise provided in this or any other Act of Congress, or under the laws of Guam, and shall commission all officers he may be authorized to appoint. He shall be responsible for the faithful execution of the laws of Guam and the laws of the United States applicable in Guam.

In *Bordallo v. Baldwin*, 624 F.2d 932 (9th Cir. 1980), the issue presented was “whether, when the Governor is specifically charged by Section 1421g(a) of the Organic Act with the responsibility for establishing, maintaining, and operating hospitals, the Legislature may, within the terms of that act, reduce his function with respect to the governance of the Hospital to the mere ministerial function of validating the appointments made by others to the Hospital’s governing body.” The Ninth Circuit Court of Appeals said the Legislature could not reduce the Governor’s authority in such a manner. In its decision, the court rejected the Legislature’s argument that Congress’ inclusion of the phrase “except as otherwise provided in this chapter or the laws of Guam” in § 1422c(a), as well as inclusion of the phrase “subject to the laws of Guam” in § 1421g(a) was intended to authorize the Legislature to limit the Governor’s general powers of appointment.

Defendants argue that the Governor’s general appointive power as set forth in Section 1422c(a), was clearly intended to be subject to legislative action, otherwise Congress would not have included the phrase “except as otherwise provided in this chapter or the laws of Guam”, and that his specific responsibility with respect to hospitals is restricted by the inclusion in Section 1421g(a) of the phrase “subject to the laws of Guam”. But they failed to recognize that legislative power is limited by Section 1423a to subjects “not inconsistent with the provisions of this chapter”. The legislature may, of course determine whether a hospital shall exist at all, where and how large it shall be, the size and qualifications for appointment to the governing body, and a wide variety of other matters establishing the laws of Guam “subject to” which the Governor perform his function with respect to the hospital, but it may not negate the command of the Organic Act that the ultimate responsibility for the governance of the Hospital be in the Governor. This is what it has purported to do by the disputed legislation. The Legislature has in effect, taken over the entire power to establish, maintain and operate the Hospital by dictating who the governing trustees shall be. The Governor is stripped of all power to have any voice in the policies, management or procedures of the Hospital, despite the mandate of the Organic Act to the contrary. The Legislature has exceeded its power.

*Bordallo*, 624 F.2d at 934-35. Thus, even though the Legislature's power may be plenary, it is always constrained "by Section 1423a to subjects 'not inconsistent with the provisions of this chapter,' ". *id.* This means the Legislature's power is always subject to the doctrine of separation of powers expressed in § 1421a which provides that "[t]he government of Guam shall consist of three branches, executive, legislative and judicial."

In *Santos v. Calvo*, 1982 WL 30790 (D.Guam A.D. 1982), the appellate division of the district court of Guam was presented with the question whether the Governor was required to seek legislative approval and a special appropriation before executing a settlement agreement which provided for the payment of severance pay to the Attorney General. The superior court had previously found that the agreement violated a provision of Guam law which provides: "No officer or employee of the government of Guam including the Governor of Guam, shall: "Involve the government of Guam in any contract or other obligation, for the payment of money for any purpose, in advance of an appropriation made for such purpose." On appeal, the appellate division of the district court framed the issue this way:

The primary issue is whether the Governor exceeded his authority by offering severance pay to North in exchange for his resignation. Appellee Santos argues that section 6118(a)(3) prohibits the Governor from offering severance pay to North without a specific appropriation from the legislature. He contends that because there was no appropriation authorizing severance pay, the Governor exceeded his statutory authority and is subject to a permanent injunction. Appellants, however, claim that the Governor was authorized to enter into the severance pay agreement and that both the "Claims Fund" and the "personnel services" account are proper sources for the payment of the severance pay promised to North.

*Id.*, 1982 WL 30790 \*1. The court noted the general rule that whereas legislatures have plenary power over appropriations, and may attach conditions to the expenditure of appropriated funds, once those funds are appropriated, the legislature's involvement ends. And it would be an unconstitutional exercise of executive powers for the legislature to attempt to retain authority to oversee the expenditure of those funds once appropriated.

Thus, the legislature has plenary or absolute power over appropriations, and it may attach conditions upon the expenditure of appropriated funds. *See MacManus v. Love*, 179 Colo. 218, 499 P.2d 609, 610 (Colo.1972); *State ex rel. Meyer v. State Board of Equalization and Assessment*, 185 Neb. 490, 176 N.W.2d 920, 926 (Neb.1970). The doctrine of separation of powers, however, restricts the power of the legislature to legislative functions. As a general rule, the legislature cannot exercise executive power, and the executive branch cannot exercise legislative power. *Springer v. Philippine Islands*, 277 U.S. 189, 202 (1928). Legislative power extends to making laws, but not to enforcing them. *Id.* In a recent opinion, the United States Supreme Court recognized that although total separation of the three branches is never mandatory, the separation of powers is a "vital check against tyranny;" each branch should avoid assuming the "constitutional field of action of another branch." *Buckley v. Valeo*, 424 U.S. 1, 121-22 (1976).

*Id.*, \* 3. The court quoted the Nebraska Supreme Court's decision in *State ex rel. Meyer v. State Board of Equalization and Assessment*, 185 Neb. 490, 176 N.W.2d 920, 926 (Neb.1970) with approval:

“The Legislature has plenary or absolute power over appropriations. It may make them upon such conditions and with such restrictions as it pleases within constitutional limits. There is one thing, however, which it cannot do, ... [i]t cannot administer the appropriation once it has been made. When the appropriation is made, its work is complete and the executive authority takes over to administer the appropriation to accomplish its purpose, subject to the limitations imposed.”

*Santos*, \*5. The court also quoted with approval a decision from the Supreme Court of West Virginia:

“Were this action not permitted by the Governor the Legislature could restrict the executive branch in the operation of its various functions thereby exercising an executive prerogative in direct conflict with the precept of our Constitution which prohibits one branch of government from encroaching upon or performing the duties of another.”

*Id.*, \*6 (quoting *State ex rel. Brotherton v. Blankenship*, 157 W.Va. 100, 207 S.E.2d 421, 435 (W.Va.1973)). The court then found that conditioning the expenditure of appropriated funds on specific prior approval from the Legislature in order to settle government claims would work an intolerable intrusion on the Governor’s authority under 48 U.S.C. § 1422 to supervise and control the executive branch and to see to it that the laws of Guam and of the United States are faithfully executed.

Similar problems would arise if we were to find, as *Santos* urges, that section 6118(a)(3) requires a specific legislative appropriation for each expenditure by the executive department. Such a requirement would impede the operations of the executive branch by prohibiting it from exercising its discretion regarding expenditures in performing executive duties. The legislature would be able to restrict the operations of the executive branch by denying requests for appropriations. The result would be legislative encroachment upon the Governor’s duty “to supervis[e] and control ... the executive branch” and “to faithful[ly] execut[e] the laws of Guam.” 48 U.S.C. § 1422. Allowing the legislature to perform executive acts in this manner would violate the separation of powers concept established in the Organic Act of Guam.

*Santos*, \*5.

In *Territorial Prosecutor for the Territory of Guam v. Superior Court*, 1983 WL 30224 (D.Guam A.D.), the Appellate Division of the District Court of Guam considered whether the Territorial Prosecutor Act was inconsistent with the Organic Act because it placed limitations on the Governor’s authority to remove the territorial prosecutor. The Territorial Prosecutor Act provided that the “Governor may remove the Territorial Prosecutor, but only for conviction of felony involving moral turpitude or for willful misconduct in office, willful and persistent failure to perform prosecutorial duties, or any conduct which is prejudicial to the administration of justice or which brings the Territorial Prosecutor’s office into disrepute.” It was argued that the Territorial Prosecutor Act was “inconsistent with the Organic Act since it negates the command of the Organic Act that the Governor have supervision and control of all executive departments, have authority to appoint and remove all officers of the executive branch and be responsible for the faithful execution of the laws of Guam.” *Id.*, 1983 WL 30224 at \*4. Relying on the Ninth Circuit’s decision in *Bordallo*, the court found the limitations placed on the Governor’s removal authority to be inorganic:

The effect of the ruling in *Bordallo v. Baldwin*, *supra*, is clear; the legislature may not enact a law encroaching upon the Governor's authority and powers which are mandated by the Organic Act. If we were to permit the legislature to do so, not only would it render the concept of the separation of powers meaningless and be inconsistent with mandate of the Organic Act, but it could possibly result in the Governor being divested of his executive authority and power at the whim of the legislature.

Hence, we determine that § 7100(b) of the Territorial Prosecutor's Act is inconsistent with the mandate of the Organic Act in that it impermissibly encroaches upon the Governor's removal powers as set forth in 42 USC § 1422.

*Id.*, 1983 WL 30224 \*5, 6 (footnote omitted).

In *Nelson v. Ada*, 878 F.2d 277 (9th Cir. 1989), the court held that legislation which provided that members of the school board be elected rather than appointed by the Governor violated the Organic Act, 48 U.S.C. § 1421g(b), which provided that the "Governor shall provide an adequate public educational system of Guam, and to that end shall establish, maintain, and operate public schools at such places in Guam as may be necessary." When the case was heard, § 1421g(b) had been amended to require that the "Government" rather than the "Governor" shall provide an adequate public educational system, but the amendment was held to apply prospectively only, and it was necessary to answer the question whether the Legislature's elected school board violated the Governor's executive powers of appointment.

Citing its decision in *Bordallo v. Baldwin* as dispositive, the court of appeals held that the Legislature was not authorized under the Organic Act to undermine the Governor's exclusive authority to provide an adequate public educational system by creating an elected school board.

Petitioners thus contend that we should interpret the original Organic Act of Guam to allow the legislature to remove the ultimate executive authority for the Department of Education from the governor and transfer it to the elected school board. This argument, however, is foreclosed by this court's decision in *Bordallo v. Baldwin*, 624 F.2d 932 (9th Cir.1980). In *Bordallo*, the governor of Guam challenged the actions of the legislature in amending Guam Government Code § 49004(a), which had previously provided that the Board of Trustees of the Guam Memorial Hospital would be appointed by the governor with the consent of the legislature. The amended statute provided that the appointees to the Board of Trustees would be designated by a number of specified private groups. *See Bordallo*, 624 F.2d at 933. The effect of the amendment was to eliminate all of the governor's discretion in appointments and require that he appoint the persons designated by the private organizations. *Id.*

We held in *Bordallo v. Baldwin* that, because the governor was specifically charged by section 1421g(a) of the Organic Act with the responsibility for establishing, maintaining and operating hospitals, the legislature could not reduce his function to that of validating appointments to the Board of Trustees made by others. *Id.* at 934. We rejected the principal argument made by the legislature that it could enact a different process for selection, an argument similar to that made by petitioners here. That argument was that the governor's powers of appointment under the Organic Act were qualified by section 9 of the Organic Act, 48 U.S.C. § 1422c(a), which stated that the governor's power of appointment was limited and had to be exercised in accordance with the Organic Act and "the laws of Guam." We also rejected the argument that the governor's

specific responsibility with respect to the hospital was restricted by the phrase in section 1421g(a) requiring that the governor exercise his authority over the public health system "subject to the laws of Guam." *Id.*

*Nelson v. Ada*, 878 F.2d 279.

In *Bordallo v. Reyes*, 610 F.Supp. 1128 (D.Guam 1984), *aff'd* 763 F.2d 1098 (9th Cir. 1985), the Governor filed a federal complaint challenging the creation by the Legislature of the public corporation known as the Guam Visitors Bureau as inorganic and in violation of 48 U.S.C. § 1422. That section provides: "The Governor shall have general supervision and control of all the departments, bureaus, agencies, and other instrumentalities of the executive branch of the government of Guam." The Governor argued that the law was a nullity, and specifically that the section of the law providing for the composition and appointment of the Board of Directors was in derogation of his authority to supervise and control an instrumentality of the Executive Branch of the Government of Guam. *Reyes*, 610 F.Supp. 1129.

The district court denied relief and held that despite the fact that the Guam Visitors Bureau was a public corporation; that its employees were entitled to membership in the Guam Retirement Fund; that the Legislature had made the Administrative Adjudication Act applicable to the Board; and that the Personnel Rules provisions of 4 GCA, Chapter 4 were applicable to its employees, the Guam Visitors Bureau was nonetheless *not* an instrumentality of the executive branch of the Government of Guam.

The contention of the Governor that by virtue of Public Law 17-32 making GVB employees members of the Government of Guam Retirement Fund GVB, thus, automatically became an instrumentality of the Executive Branch of the Government of Guam is untenable and must fail. Contrariwise, the retirement law clearly indicates that employees of public corporations are not employees of the Government of Guam.

In its totality, the Governor has failed to prove that, by virtue of the applicability of the Administrative Adjudication Act, the Personnel Rules provisions of 4 GCA, Chapter 4, Section 4105, as amended by Section 3 of Public Law 17-32, and the laws relating to Retirement of Public Employees under 4 GCA, Chapter 8, GVB is an instrumentality of the Executive Branch of the Government of Guam.

*Id.*, 610 F.Supp. 1133. The court next canvassed a number of Guam statutes creating public corporations, and distinguished between those established as instrumentalities of the government that were created to serve a governmental function and those that were not.

Public corporations such as GAA [Guam Airport Authority], GTA [Guam Telephone Authority], GPA [Guam Power Authority], and PAG [Port Authority of Guam], *supra*, are the only public corporations wherein each one is specifically designated as an *instrumentality of the government of Guam*. It is construed that the legislature, in expressly designating each one of the four public corporations as an instrumentality of the government, had determined that the other public corporations not so designated are not instrumentalities of the government. Ergo, GVB is not an instrumentality of the Executive Branch of the government.

Absent definitions of “public corporation” and “instrumentality of government” in our local statutes, a determination of what a public corporation and instrumentality of government is has to be made.

Generally, a public corporation is organized for certain governmental purposes, such as counties, townships, school districts, cities, and incorporated towns, the so-called *municipal or political corporations*. Guam’s public corporations cannot be categorized as public corporations in the true sense of municipal corporations.

Guam’s legislatively-created public corporations are not public in the sense of being organized for governmental purposes; nevertheless, their operations contribute to the comfort, convenience, or welfare of the general public. They perform functions ordinarily undertaken by private enterprises such as electric, telephone, and water companies. In essence, these private enterprises are said to be “affected with a public interest” and, for that reason, they are subject to legislative regulation and control to a greater extent than corporations not of this character. These are usually designated as “public service corporations” or “quasi-public corporations.”

\* \* \*

Though it could be concluded that Guam’s public corporations do not primarily perform governmental function; nevertheless, they cater to certain needs and convenience of the public. GVB as a public corporation fits within one of these categories. It does not perform any governmental function. To maintain that it is an instrumentality of the Executive Branch of the government, though devoid of governmental functions, defies the basic concept of government.

*Id.*, 610 F.Supp. 1135 (emphasis in italics in original; emphasis in underline added).

We believe the analysis of the district court in *Bordallo v. Reyes* – affirmed on appeal to the Ninth Circuit – is applicable to the question whether the *Kumision Guåhan Fine'nana* (Guam First Commission) is inorganic. There is no separation of powers problem if the *Kumision* is not an instrumentality of the Government of Guam. And it is not an instrumentality of the Government of Guam if it does not perform a governmental function. But the *Kumision* does perform a governmental function. Bill 378 does not employ the term “instrumentality of the government of Guam.” But the *Kumision*, is specifically intended to serve as Guam’s “unified front,” to be the “one voice,” and the face of “Team Guam” for the Government of Guam in its dealings with the federal government. As such, the *Kumision* performs a governmental function. “The *Kumision shall*: (a) Be the government of Guam’s single point of contact for the military expansion; [and] (b) Act as Guam’s local counterpart to the Joint Guam Program Office (JGPO). All JGPO interaction with the government of Guam shall originate from the *Kumision*, subject to the laws of Guam.” 1 GCA § 2301.

#### **D. A Framework for Analysis of Separation of Powers Doctrine**

The next case in the development of the doctrine of separation of powers doctrine in Guam, following *Bordallo v. Reyes* and *Nelson v. Ada*, is *People of Guam v. Perez*, 1999 Guam 2. In *Perez*, the Guam Supreme Court adopted the United States Supreme Court’s framework for analyzing claims that the doctrine of separation of powers has been violated:

The United States Supreme Court set forth a framework for evaluating separation of powers challenges:

In determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. Only where the potential for disruption is present must we then determine whether the impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.

*Nixon v. Administrator of General Services*, 433 U.S. 425, 443, 97 S.Ct. 2777, 2790, 53 L.Ed.2d 867 (1977) (citation omitted). Thus, two separate elements must be evaluated: (1) whether the statutory provision prevents the accomplishment of constitutional functions and (2) if so, whether the disruptive impact is justified by any overriding constitutional need.

*People of Guam v. Perez*, 1999 Guam 2 ¶ 17. The opinion in *Perez* involved a challenge to a provision of the Family Violence Act which permitted the court in its discretion and on motion of the defendant, to reduce a charge of family violence from felony to a misdemeanor. “In the exercise of its discretion, the court is permitted to entertain such a motion and is statutorily required to consider the list of seven factors in its determination of the appropriateness of a felony charge of Family Violence.” 1999 Guam 2 ¶ 12 (footnote omitted). The appellant argued that the statute impermissibly encroached upon the prosecutor’s discretion in charging the crime by “allowing the court to determine whether a Family Violence charge shall proceed as a misdemeanor or felony.” *Id.*, 1999 Guam 2 ¶ 14. The Supreme Court found no usurpation of executive authority by the judiciary because once the decision to prosecute is made and the jurisdiction of the court properly invoked, “the decision to allow a case to proceed upon the felony or misdemeanor charge is a judicial function.” 1999 Guam 2 ¶ 18. Having found the first factor was not satisfied – whether the statutory provision prevents the accomplishment of constitutional functions – the Court deemed it unnecessary to reach the second question – whether the disruptive impact is justified by any overriding constitutional need.

The year following its decision in *Perez*, adopting a formal framework for analysis of separation of powers claims, the Guam Supreme Court decided *Pangelinan v. Gutierrez*, 2000 Guam 1. *Pangelinan* involved a lawsuit brought by members of the Legislature challenging the Governor’s exercise of his pocket veto authority. The decision did not turn on any separation of powers analysis, but was decided as a matter of statutory construction. Nevertheless, the Supreme Court took the opportunity to instruct the Governor and the Legislature on their respective roles in the legislative process under the doctrine of separation of powers.

The three branches of government should work together smoothly, harmoniously, and respectful of each other’s authority. Dialogue between the Executive and the Legislative Branches should be conducted in an orderly manner to better serve the people of Guam, and it is the duty of the Judicial Branch to interpret the law and thereby help preserve that orderliness. This philosophy underlies the spirit of this opinion.

This court has frequently enforced the principle of separation of powers. See *Hamlet v. Charfauros*, 1999 Guam 18; *Borja v. Bitanga*, 1998 Guam 29; *People v. Lujan*, 1998 Guam 28; *In re: Request of the 24th Guam Legislature*, 1997 Guam 15; *People v. Quenga*, 1997 Guam 6; *Taisipic v. Marion*, 1996 Guam 9. In this system of checks and

balances, the Governor must not be allowed to act in silence and the Legislature must not be allowed to subvert the Executive Branch.

*Pangelinan v. Gutierrez*, 2000 Guam 11 ¶¶ 30, 31.

#### **E. Applying the Framework for Analysis Adopted in *People v. Perez***

The first case that actually applied the two-step framework for separation of powers analysis adopted in *Perez* came three years after *Perez*. In *In re Request of Governor Gutierrez, Relative to the Organicity and Constitutionality of Public Law 26-35*, 2002 Guam 1, the Governor filed a request for a declaratory judgment invoking the Guam Supreme Court's original jurisdiction pursuant to 7 GCA § 4104. The Governor requested the Court "to declare specific provisions of Public Laws 26-35, 26-36, 26-47, 26-49, and Bill No. 205 void under both the Organic Act of Guam and the Constitution of the United States." *In re Request of Governor Gutierrez*, 2002 Guam 1 ¶ 1. Rejecting part of the Governor's challenge as not satisfying the requirements for the Court's original jurisdiction for declaratory relief under 7 GCA § 4104, the Court agreed to hear and decide the Governor's claim that various provision of the legislative enactments violated the doctrine of separation of powers contained in the Organic Act.

The Governor raised "four separation of powers challenges to the Budget Bill, each of which allege that the Legislature has either reserved for itself powers specifically given to the Governor in the Organic Act or interfered with the Governor's ability to perform his constitutional functions." *Id.*, 2002 Guam 1 ¶ 23. The specific challenges brought by the Governor were as follows:

- (1) that Appendix "C" of P.L. 26-35 and Amendments thereto violate the doctrine of separation of powers in that the legislature has attempted to set the staffing pattern of the executive branch;
- (2) that section 11 of Bill 205, which dictates the terms of a lease of office space for Family Division of the Department of Law, violates the separation of powers doctrine;
- (3) that the staffing pattern reporting requirements of P.L. 26-35, chapter IV, section 3(a), and holiday pay reporting requirements of P.L. 26-47, section 2(d), violate the separation of powers doctrine; and
- (4) that P.L. 26-47, section 7(b), which sets a specific date for filling the positions of Chief Procurement Officer and Controller, violates the separation of powers doctrine.

*Id.*, 2002 Guam 1 ¶ 33. The Supreme Court sustained the Governor's first two and the fourth challenges and found the Legislature's attempt to (1) set the staffing pattern for the executive branch; (2) dictate the terms of a lease; and (3) set a time limit on the hiring of individuals to fill certain specified positions violated the separation of powers doctrine and were, therefore, inorganic and unconstitutional. The Court held, however, that the Governor failed to meet his burden in proving the reporting requirements were inorganic.

After quoting the framework for analysis of separation of powers challenges adopted in *Perez*, the Court warned that even the best-intentioned legislative oversight can lead to unintended inorganic and unconstitutional consequences.

We recognize that, under the separation of powers doctrine, one branch of government is prohibited from either delegating its enumerated powers to another branch of the government or aggrandizing its powers by reserving for itself the powers given to another branch. (citations omitted) *Communications Workers of Am. v. Florio*, 130 N.J. 439, 617 A.2d 223, 232 (1992).<sup>5</sup> At least one court has noted that the *taking* of power is

more prone to abuse and therefore warrants an especially careful scrutiny. (citation) Even absent a finding that one branch has usurped a power exclusively reserved for another branch, a separation of powers violation may be found if one branch *unduly* interferes with another branch so that the other branch cannot *effectively* exercise its constitutionally assigned powers. (citations omitted).

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<sup>5</sup> “If, in the opinion of the people, the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the constitution designates. *But let there be no change by usurpation*; for, though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed.” *Book [v. State Office Bldg. Comm’n]*, 238 Ind. 120, 149 N.E.2d 273, 295 (1958)] (citing George Washington’s Farewell Address) (emphasis added).

*Id.*, 2002 Guam 1 ¶ 35 (indicated citations omitted; internal quotation marks omitted; emphasis in original).

The Supreme Court then discussed the respective powers and responsibilities of the executive and legislative branches.

The Legislature’s plenary power of appropriation includes the power to impose “conditions upon the expenditure of appropriated funds.” *Santos*, 1982 WL 30790, at \* 3; *Schneider*, 547 P.2d at 799 (“[T]he appropriation of money and the setting of limitations on expenditures by state executive agencies constitutes an exercise of legislative power.”). One such condition to an appropriation is the designation of positions within the government. *Communications Workers*, 617 A.2d at 235 (The legislature may “appropriate and dictate, if it desires, the services and positions designated for such appropriation.”) (citation omitted). The legislature may also designate salaries for various positions. Opinion of the Justices, 266 A.2d at 826 (“[I]n the absence of express legislative authority the Governor and [executive committee] ... may not fix salaries even of personnel which the Governor is empowered to appoint.”); *State ex rel. Meyer v. State Bd. of Equalization & Assessment*, 185 Neb. 490, 176 N.W.2d 920, 926 (1970) (“It is within the power of the Legislature to fix the amount it will appropriate for personal services in any state department or agency.”).

*However, the Legislature may not set limitations or conditions which “purport to reserve to the legislature powers of close supervision that are essentially executive in character.” See Anderson*, 579 P.2d at 624 (Colo.1978). “Staffing decisions are at the core of the Governor’s day-to-day administration of government.” *Communications Workers*, 617 A.2d at 234. Accordingly, the legislature may not set conditions to an appropriation which impinge on the executive’s power to “allocate staff and resources” for the proper fulfillment of its duty to execute the laws. *See Anderson*, 579 P.2d at 623-24.

*Id.*, 2002 Guam 1 ¶¶ 44, 45 (emphasis added). The Court recognized that conditional appropriations do not violate the separation of powers doctrine *per se*, i.e., appropriations that are released upon the satisfaction of predefined conditions subsequent. But the Court emphasized that it is the legislature’s *reservation* of authority to itself to superintend the decision-making process of the executive that concerns the courts. Writing separately with respect to another challenged provision of the law, Justice pro tempore Richard H. Benson noted, “The legislature’s power of appropriation includes the power to impose a

condition that funds lapse if not used. The limitation to this power is that the condition imposed must not create such an interference with another branch's functions so as to prevent that other branch from fulfilling its constitutionally prescribed duties." *Id.*, 2002 Guam 1 ¶ 74 (Benson, J., concurring and dissenting) (citations omitted).

The Supreme Court of Guam next cited with approval a decision from the Supreme Court of Kansas involving a "State Finance Council" composed of the Governor and eight legislators empowered to make personnel decisions typically thought of as belonging to the department of administration, an executive branch agency.

An analogous case is *State ex rel. Schneider v. Bennet*, 219 Kan. 285, 547 P.2d 786 (1976). In *Schneider*, the plaintiff challenged the constitutional validity of the law establishing the powers and duties of the state finance council ("SFC"). *See Schneider*, 547 P.2d at 790. The SFC was composed of the governor and eight members of the legislature. *Id.* at 794. In accordance with statute, the SFC had various powers, including the powers to: (1) "fix or approve the compensation paid to state officers and employees," and (2) "approv[e] of assignment of positions in the civil service to classes ... assignment of classes to salary ranges, approv[e] of the pay plan containing a schedule of salary and wage ranges and steps, approv[e] of terms upon which state agencies may furnish housing, food service and other employee maintenance to state officers and employees in the civil service, and ... determin[e] ... the cost and value of such benefits...." *Id.* at 797. The court held that these powers were "essentially executive or administrative in nature" in that they "concern the day-to-day operations of the department of administration and its various divisions." *Id.* Accordingly, the court invalidated the statute granting these powers to the SFC, holding:

The vesting of such powers in the state finance council in our judgment clearly grants to a legislatively oriented body control over the operation of an executive agency and constitutes a usurpation of executive power by the legislative department.

*Id.* The court's holding was pronounced in light of the court's agreement that "the appropriation of money and the setting of limitations on expenditures by state executive agencies constitutes an exercise of legislative power." *Id.* at 799.

*Id.*, 2002 Guam 1 ¶¶ 49. Hence, a law is constitutionally suspect when a legislature reserves to its members seats at a table whose purpose serves an administrative or executive function.

Having determined that the exercise of legislative control in *In re Request of Governor Gutierrez* to dictate staffing patterns and hiring deadlines within the Executive Branch was inorganic, the Supreme Court turned to the question whether the Legislature's attempt to dictate the terms of a lease for the rental of office space for the Attorney General's Office was inorganic as well. The Court said it was.

The provisions of Budget Bill that dictate terms of the lease are more problematic. In *Chaffin v. Ark. Game & Fish Comm'n*, 296 Ark. 431, 757 S.W.2d 950 (1988), the court was presented with a constitutional challenge to an appropriations bill. Specifically, the challenged legislation prohibited the Fish and Game Commission from entering into contracts for professional and consultant services which either extend more than 20 working days, or exceed \$5,000.00, without first seeking the advice of the

legislature. *Chaffin*, 757 S.W.2d at 956. After receiving a contract, a committee of the Legislative Council reviews the contract and stamps it favorable or unfavorable. *Id.* Although the stamp of approval or disapproval was not binding on the agency, the court found that “the ‘advice’ offered by the [legislative] committee to an agency is tantamount to a legislative order on how to execute a contract.” *Id.* The court held the requirement that the agency submit its contracts for legislative advice to be in violation of the separation of powers doctrine, and therefore unconstitutional. *Id.*

The instant case is analogous to *Chaffin*, and supports a finding of a more egregious violation of the separation of powers doctrine. In the instant case, the Legislature has not merely reserved for itself the power to give “advice” on the specifics of the contract; rather, the Legislature has dictated the exact terms of the contract. As *Chaffin* instructs, it is the executive’s function to determine how to execute a contract. *See id.* at 956-57. The execution of a contract necessarily includes determining the terms of the contract. By determining the terms of the lease, the Legislature has engaged in a clear executive function.

*Id.*, 2002 Guam 1 ¶¶ 53, 54 (footnote omitted; editorial brackets in original). As the case points out, it is one thing for the legislature to set dollar limits on the amounts available by way of conditional appropriations. It is quite a different matter for the legislature to dictate exact terms of a contract or be involved in the process of negotiation and execution of a lease contract.

In *Sablan v. Gutierrez*, 2002 Guam 13, the Guam Supreme Court was asked to determine whether legislation which required the Governor to appoint members of the Guam Election Commission from lists of candidates provided by the two main political parties on Guam violated the Governor’s appointment authority under the Organic Act.

Section 2101(a) [Title 3 GCA] directs the governor to appoint six members to the board of the GEC from recommendations made by the recognized political parties of Guam. The Governor failed to appoint any of the three persons recommended by the Republican party. The lower court held that the Governor’s failure to name the Republican nominees to the GEC board violated section 2101(a). The lower court’s decision rested on two alternative grounds. First, the board of the GEC is not a part of the executive branch, and thereby not within the Governor’s power of appointment as conferred by the Organic Act. Second, even assuming the GEC is an executive agency, the power of appointment is not exclusive to the Governor and can be limited by the legislature.

*Sablan*, 2002 Guam 13 ¶ 3. The Guam Election Commission is statutorily designated as “an autonomous instrumentality and an independent commission of the government of Guam, the Election Commission.” 3 GCA § 2101(a). Without delving into the meaning of this language, the Supreme Court simply assumed the GEC was an executive agency and proceeded to the analysis whether limitations placed on the Governor’s appointment authority were inorganic.

Although section 2101(a) does not completely divest the Governor of his discretion in appointing the members of the GEC, it does place a limitation on his power of appointment by restricting his group of candidates to persons recommended by Guam’s recognized political parties. Therefore, we must address the Governor’s argument that any limitation placed on his power of appointment violates the Organic Act. The

Governor's appointment authority is limited and set forth in 48 U.S.C. § 1422, which states that the Governor "shall appoint, and may remove, all officers and employees of the executive branch of the government of Guam, except as otherwise provided in this or any other Act of Congress, or under the laws of Guam...." 48 U.S.C. § 1422 (1950). Assuming *arguendo* that the GEC is an executive agency, the phrase "except as otherwise provided ... under the law[ ] ...." is an "unmistakable recognition of the authority of the lawmaking department to provide for the appointment of all officers whose appointment is not definitely regulated by the Constitution itself." *Driscoll v. Sakin*, 121 N.J.L. 225, 1 A.2d 881, 882 (N.J.1938).

Unlike the facts presented in *Bordallo v. Baldwin*, 624 F.2d 932 (9th Cir.1980), and *Nelson v. Ada*, 878 F.2d 277 (9th Cir.1989), no other provision within the Organic Act limits the manner in which the legislature may restrict the power of appointment with respect to the GEC. See *Bordallo*, 624 F.2d at 934-35 (finding that a statute rendering the Governor's power to appoint hospital trustees ministerial conflicted with the provision of the Organic Act that vested the Governor with authority to maintain Guam's health services); see also *Nelson*, 878 F.2d at 279-80 (finding that a statute divesting the Governor of his power to appoint school board members conflicted with the provision of the Organic Act that vested the Governor with authority to maintain Guam's public school system). Therefore, section 2101(a) is a legitimate exercise by the legislature of its express authority to determine how the members of a board it created are to be selected and appointed. See *Welch v. Key*, 365 P.2d 154, 157 (Okla.1961).

*Id.*, 2002 Guam 13 ¶¶ 13, 14. The Supreme Court then found that requiring the Governor to select his appointees to the Guam Election Commission from lists provided by each of the recognized political parties on Guam was a reasonable limitation on the Governor's appointment authority and was not in conflict with the Organic Act. "Therefore, we find that the legislature can restrict the Governor's selection and appointment of the GEC board members to persons recommended by Guam's recognized political parties without being inconsistent with the Organic Act. Although the Governor retains some discretion to either reject or accept the names submitted to him, he does not have the discretion to select individuals not recommended by the political parties." *Id.*, 2002 Guam 13 ¶ 16 (citation omitted). The Court did not address the question of what "autonomous instrumentality and an independent commission of the government of Guam," means saying only: "As a final matter, we address the lower court's holding that the GEC was not an executive branch agency. We find that in light of the foregoing, we need not address this issue. Whether or not the GEC is an agency within the executive branch, the Governor is vested with the power to appoint its board. We find it unnecessary to determine whether the Governor's power of appointment is derived from the Organic Act or from statute." *Id.*, 2002 Guam 13 ¶ 18.

The most recent case in the evolution of the separation of powers doctrine as between the legislative and executive branches on Guam, and perhaps the most factually similar case to the discussion here, is *In re Request of Governor Felix P. Camacho Relative to the Interpretation and Application of Sections 6 and 9 of the Organic Act of Guam*, 2004 Guam 10.

In *In re Request of Governor Felix P. Camacho*, the Governor challenged the organicity of the Guam State Clearinghouse. The Clearinghouse was established within the Office of the Lieutenant Governor by Public Law 26-169 to perform executive functions with respect to federal funding. The Clearinghouse is, in some ways, similar to the functions delegated to the Guam First Commission with respect to oversight of the military buildup on Guam.

The Guam State Clearinghouse (“the Clearinghouse” or “GSC”) was created by Public Law 26-169, enacted on January 5, 2003. Guam Pub.L. 26-169 (January 5, 2003). The Clearinghouse is “responsible for overseeing all Federal aid programs, grants, loans, direct Federal development, and other Federal funding sources for Guam.” P.L. 26-169: 1. Because of the dire financial circumstances faced by the government, the Legislature deemed it important “to identify, track and oversee the process of obtaining and receiving sources of Federal funding for Guam, to maintain rapport with the various Federal agencies involved in administering the funding” and further declared that “responsibility for these matters [be] vested at the highest levels of the Executive Branch of government.” *Id.* Accordingly, the Clearinghouse was established within the Office of the Lieutenant Governor of Guam, and granted “exclusive purview at the Guam-level over all Federal aid programs, grants, loans, contracts, contributions, appropriations, advances, direct Federal development and other Federal funding sources for Guam.” *Id.* § 2. Public Law 26-169 created the position of Director to head the Clearinghouse, designated the Lieutenant Governor of Guam as the Director, and granted the Director final submission and approval authority over all applications for any “Federal aid programs, grants, loans, contracts, contributions, appropriations, advances, direct Federal development, or other Federal funding.” *Id.* §§ 2, 3.

*In re Request of Governor Camacho*, 2004 Guam 10 ¶ 2 (footnote omitted).

Shortly after the creation and staffing of the Clearinghouse, conflicts arose between personnel in the Bureau of Budget and Management Research (BBMR), which reports to the Governor, and personnel in the Clearinghouse. The initial conflict was in regard to the processing of off-island travel requests and personnel actions when federal funds are involved. On January 16, 2004, the Governor’s Office issued a circular outlining procedures for off-island travel which required, *inter alia*, clearance from BBMR. On January 21, 2004, an unclassified employee in the Office of the Lieutenant Governor and Interim Manager of the Clearinghouse issued two memoranda instructing department and agency heads that requests for off-island travel involving federal funds were to be routed through the Clearinghouse, and that clearance from BBMR as instructed by the Governor’s Office was not necessary. Invoking the Governor’s powers under the Organic Act and federal rules and regulations governing the handling of federal funds and prior executive orders, the Governor’s Chief of Staff issued another circular advising all department and agency heads that requests for personnel actions and travel authorizations required the Governor’s approval and clearance. The circular also stated that BBMR was the Governor’s agency designated for clearance of all personnel actions and travel authorizations. *In re Request of Governor Camacho*, 2004 Guam 10 ¶¶ 3-5.

On March 25, 2004, the Governor fired the Interim Manager of the Clearinghouse and another unclassified staff assistant employed in the Lieutenant Governor’s Office. The following day, the Governor issued an executive order that transferred the functions of the Clearinghouse to BBMR and to other executive agencies. The executive order further directed that federal programs affecting the executive branch of the government of Guam required the final approval of the Governor of Guam. *In re Request of Governor Camacho*, 2004 Guam 10 ¶¶ 6, 7. As a result of these actions, the Lieutenant Governor filed a “Petition for Alternative and Peremptory Writs of Mandate” in the Superior Court, seeking to compel the Governor and the Director of DOA to return the functions of the Clearinghouse to the Office of the Lieutenant Governor and to void the personnel actions terminating the Lieutenant Governor’s staff employees. The Governor filed a request for declaratory relief in the Supreme Court, pursuant to 7 GCA § 4104, “seeking a ‘judgment declaring certain provisions of Public Law 26-169 relating to the Guam State Clearinghouse to be Inorganic,’ seeking to “clarify his power to terminate

unclassified employees of the Executive Branch, and seeking to exercise his reorganization power pursuant to the Organic Act of Guam.” *In re Request of Governor Camacho*, 2004 Guam 10 ¶¶ 8-15 (record citations omitted).

The Governor challenged the creation of the Guam Clearinghouse and its “exclusive purview” over federal programs as an inorganic intrusion upon his Organic Act authority to supervise and control the executive branch of the Government of Guam.

The first issue we address is whether Public Law 26-169 violates section 1422 of the Organic Act, which grants the Governor the power of general supervision and control of executive branch bureaus. *See* 48 U.S.C. § 1422. Governor Camacho argues, *inter alia*, that his power to supervise and control the executive branch is impeded by Public Law 26-169, because it grants the Clearinghouse “exclusive purview at the Guam-level over all Federal aid programs, grants, loans, contracts, contributions, appropriations, advances, direct Federal development and other Federal funding sources for Guam.” P.L. 26-169: 2. Governor Camacho also argues that Public Law 26-169 grants the Director of the Clearinghouse “final” submission and approval authority over all applications “for any Federal aid programs, grants, loans, contracts, contributions, advances, direct Federal development, or other Federal funding,” which further impedes his power of general supervision and control of the executive branch. *Id.* § 3.

*In re Request of Governor Camacho*, 2004 Guam 10 ¶¶ 34.

In order to determine whether the Governor’s authority as chief executive officer was compromised by the statute creating the Guam State Clearinghouse, the Court was required to decide whether the Clearinghouse was an entity that performed executive functions. The Court found that the Clearinghouse was intended to serve an executive function within the executive branch of the government.

We must first determine whether the Guam State Clearinghouse is an entity of the executive branch which is subject to the general supervision and control of the Governor of Guam pursuant to section 1422. A review of the plain language of Public Law 26-169 and its expressed legislative intent indicates that the Clearinghouse was created as a “bureau” within the executive branch of the government of Guam. Specifically, section 2 of Public Law 26-169 states: “[t]here is within the Office of *I Segundu Na Maga’lahi* [Lieutenant Governor] a bureau of the government of Guam which shall be known as the ‘Guam State Clearinghouse.’ ” P.L. 26-169: 2. Further, the Legislature explicitly stated that the matters related to overseeing federal monies should be vested “at the highest levels of the Executive Branch of government.” *Id.* § 1. This statement expresses the legislative intent that the Clearinghouse fall within the executive branch of government. *Cf. Bordallo v. Reyes*, 763 F.2d 1098, 1103 (9th Cir.1985) (concluding that the Guam Visitors Bureau (“GVB”) is “not an instrumentality of the government” because the Legislature did not expressly designate GVB as such, as it did with certain other public corporations). Finally, the Clearinghouse was created within the Office of the Lieutenant Governor. P.L. 26-169: 2. The Office of the Lieutenant Governor was established in the Organic Act under its subchapter II, entitled “The Executive Branch.” *See* 48 U.S.C. § 1422. Accordingly, we hold that the Guam State Clearinghouse, as an executive branch bureau, is subject to the general supervision and control of the Governor of Guam, as set forth in section 1422 of the Organic Act.

*In re Request of Governor Camacho*, 2004 Guam 10 ¶ 37 (editorial brackets in original).

The Court then examined section 2 of Public Law 26-169, which conferred upon the Clearinghouse “exclusive purview” with respect to federal funds, and section 3 which provided that “no application for any Federal aid programs, grants, loans, contracts, contributions, advances, direct Federal development, or other Federal funding shall be submitted or deemed approved on behalf of the government of Guam or any agency, division, office, department or instrumentality thereof, or any public corporation, without the final approval of the Director of the Guam State Clearinghouse”. The Court found both sections 2 and 3 of Public Law 26-169 “equally offensive” to the Governor’s powers under the Organic Act. *In re Request of Governor Camacho*, 2004 Guam 10 ¶ 40.

The plain language of the statutory section [3] emphasized above, which confers upon the Director of the Clearinghouse the “final” submission and approval authority for all federal fund related applications, runs afoul of the Governor’s power of general supervision and control of the Clearinghouse. Thus, under the current statutory scheme, the Governor’s overall ability to manage, direct, or oversee the Clearinghouse is frustrated.

\* \* \*

Accordingly, we find that the statutory provisions granting “exclusive” purview over federal fund sources to the Clearinghouse, and “final” submission and approval authority over all federal fund applications to the Director of the Clearinghouse, are in derogation of section 1422 of the Organic Act, which grants the Governor the power of general supervision and control over executive branch bureaus. We therefore hold that such provisions violate the Organic Act and thus, are invalid.

*In re Request of Governor Camacho*, 2004 Guam 10 ¶¶ 40, 41 (editorial brackets added; footnote and additional citations omitted).

Having found the “‘exclusive’ preview” and “‘final’ submission and approval authority” provisions of the public law inorganic, the Court next inquired whether the Legislature’s designation of the Lieutenant Governor as Director of the Clearinghouse violated the Governor’s appointment authority under the Organic Act.

The next issue we address is whether the relevant sections of Public Law 26-169 violate the Governor’s appointment powers as provided in sections 1422 and 1422c(a) of the Organic Act. Governor Camacho, with *amicus* Lourdes M. Perez, as the Director of DOA, argue that the Governor’s power to appoint the head of the Clearinghouse and officers of the executive branch is an executive function, which must be exercised by the Governor. They further argue that the Legislature, through Public Law 26-169, invalidly exercised the appointment power which is reserved only for the Governor, and thus also violated the separation of powers doctrine.

*In re Request of Governor Camacho*, 2004 Guam 10 ¶ 42. The Supreme Court found that inasmuch as 48 U.S.C. § 1422 provides that “[t]he Lieutenant Governor shall have such executive powers and perform such powers and duties as may be assigned to him by the Governor or prescribed by this chapter or under the laws of Guam,” the Legislature merely defined the Lieutenant Governor’s duties as provided in the Organic Act, which did not implicate the Governor’s appointment authority. The Court was satisfied that

“the Legislature’s designation of the Lieutenant Governor as the Director of the Clearinghouse constitutes an ‘enlarge[ment of] his duties’ as an existing officer of the executive branch, and does not constitute an exercise of the appointment power.” *In re Request of Governor Camacho*, 2004 Guam 10 ¶ 50 (editorial brackets in original).

Having decided that part of Public Law 26-169 was inorganic and part of it was not, the Court cited the framework for analysis that it had adopted in *People v. Perez*.

In holding that the Legislature has not exercised the power of appointment, but rather, has validly prescribed executive powers and duties to the Lieutenant Governor, we are nonetheless tasked to consider whether, in assigning such duties to the Lieutenant Governor, the separation of powers doctrine has been violated. We stated in *People v. Perez*, in considering the separation of powers issue:

In determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. Only where the potential for disruption is present must we then determine whether the impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.

*People v. Perez*, 1999 Guam 2, ¶ 17 (citations omitted). Under this standard, we developed the following two-part test for determining whether a separation of powers violation has occurred, stating: “(1) whether the statutory provision prevents the accomplishment of constitutional functions and (2) if so, whether the disruptive impact is justified by any overriding constitutional need.” *Id.* (emphasis added). Thus, if the statutory provision in question does not prevent the Governor from accomplishing his constitutional functions, we need not consider part two of the test and no separation of powers concern exists.

*In re Request of Governor Camacho*, 2004 Guam 10 ¶ 52. Hence, if the first part of the separation of powers test is not satisfied, there is no need to address the second part.

The Court then looked into whether the Legislature was authorized in the Organic Act to add to the responsibilities and duties of the Lieutenant Governor. The Court cited a decision from the Supreme Court of North Dakota, *State ex rel. Link v. Olson*, 286 N.W.2d 262, 273-274 (N.D.1979), for the proposition that in the absence of express constitutional authority, a legislature “is powerless to add to a constitutional office duties foreign to that office”. The Guam Supreme Court then reasoned that because under the Organic Act the Lieutenant Governor, “shall have such executive powers and perform such duties as may be assigned to him by the Governor or prescribed by this Act *or under the laws of Guam*,” 48 U.S.C.A. § 1422 (emphasis added), the converse is logically true. There was, therefore, no Organic Act impediment to the Lieutenant Governor being named the Director of the Clearinghouse.

In *Olson*, in the absence of constitutional authority to assign duties to the lieutenant governor, the court held that the legislature’s designation of the lieutenant governor as the federal aid coordinator was unconstitutional. *Id.* In relevant contrast, the Organic Act, which functions as Guam’s constitution, expressly authorizes the Legislature to prescribe executive powers and duties to the Lieutenant Governor. *See* 48 U.S.C. §§ 1422, 1423a.

In relevant contrast, the Organic Act, which functions as Guam's constitution, expressly authorizes the Legislature to prescribe executive powers and duties to the Lieutenant Governor. *See* 48 U.S.C. §§ 1422, 1423a. Therefore, applying the first part of the *Perez* test to determine if a separation of powers violation has occurred, we find that the legislative prescription of executive powers and duties to the Lieutenant Governor does not prevent the Governor from accomplishing his constitutional functions. *See Perez*, 1999 Guam 2 at ¶ 17; *Cf. Olson*, 286 N.W.2d at 273-74. This conclusion is further underscored by our holdings *supra* that the Governor retains the power of general supervision and control over the Clearinghouse and that Public Law 26-169 does not implicate the appointment clauses found at sections 1422 and 1422c(a) of the Organic Act. Having answered in the negative the first part of the two-part test, our separation of powers analysis ends here. *See Perez*, 1999 Guam 2 at ¶ 17. Accordingly, we hold that Public Law 26-169, in designating the Lieutenant Governor as Director of the Guam State Clearinghouse, does not violate the separation of powers doctrine. *See id.* at ¶ 17; 48 U.S.C. § 1422; *Olson*, 286 N.W.2d at 273-74.

*In re Request of Governor Camacho*, 2004 Guam 10 ¶ 53.

In summary, in *In re Request of Governor Camacho*, the Court held: (1) the two provisions in the statute "granting 'exclusive' purview over federal fund sources to the Clearinghouse, and 'final' submission and approval authority over all federal fund applications to the Director of the Clearinghouse" were "offensive" to the Organic Act because they "frustrated" the Governor's "overall ability to manage, direct, or oversee the Clearinghouse," *see* 2004 Guam 10 ¶¶ 40, 41; (2) the Legislature's designation of the Lieutenant Governor as the Director of the Clearinghouse was a valid exercise of the Legislature's authority to define the duties and responsibilities of the Lieutenant Governor and was, therefore, organic, *see* 2004 Guam 10 ¶ 53; (3) the centralized identification, tracking, and oversight of federal programs could still be accomplished while the Governor retained ultimate supervision and control of the Clearinghouse, leaving the Clearinghouse operational, albeit, without final approval authority with respect to federal funds; (4) the Governor's attempt to "reorganize" the Clearinghouse by transferring its function to BBMR and other executive agencies was in direct conflict with P.L. 26-169 and therefore in violation of an organic Guam law; (5) the termination of two unclassified employees was a lawful exercise of the Governor's Organic Act removal authority.

#### **F. Application of Precedent to the Law Establishing the Guam First Commission**

The statement of findings and intent of Public Law 29-128 indicate that "Guam must speak with *one voice* when it deals with representatives of the Federal Government". P.L. 29-128:1 (emphasis added). However, when the Government of Guam acts, it does so through one of the three branches of government, each of which has its own separate government function which is set forth in the Organic Act. Regarding the voice of the people of Guam, "the people 'speak' through their governor in the same sense and to the same extent as they do through their legislators." *Risser v. Thompson*, 930 F.2d 549, 553 (7th Cir. 1991).

The *Kumision* is not a task force acting in an *advisory* capacity separate from a buildup office within the Office the Governor – with whom rests the final say on behalf of the executive branch of the government. The *Kumision* is a chorus of voices chosen from within the government and outside the government with no clearly established single conductor. The *Kumision* has two classes of members, voting and ex-officio. The *Kumision* law designates a specific number to make a quorum (eight) and to

pass a motion or resolution (also eight). These quorum and voting requirements indicate that the *Kumision* is something more than an advisory committee or an information clearinghouse. Additionally, the *Kumision* is not an independent regulatory board, agency or commission, since it has no clearly defined enforcement powers or regulatory authority. The *Kumision* is *sui generis*, an independent voice that would present itself as the “unified front” of the government, being ultimately answerable to neither the Governor nor the Legislature.

The functions of the *Kumision* are clearly neither legislative nor judicial. They are, therefore, executive. *See, Springer v. Philippine Islands*, 277 U.S. 201-03 (“Putting aside for the moment the question whether the duties devolved upon these members are vested by the Organic Act in the Governor General, it is clear that they are not legislative in character, and still more clear that they are not judicial. The fact that they do not fall within the authority of either of these two constitutes logical ground for concluding that they do fall within that of the remaining one of the three among which the powers of government are divided.”). Executive functions are under the supervision and control of the Governor. “The executive power of Guam shall be vested in an executive officer whose official title shall be the ‘Governor of Guam.’” Organic Act § 1422. “The Governor shall have general supervision and control of all the departments, bureaus, agencies, and other instrumentalities of the executive branch of the government of Guam.” *Id.* Therefore, removal of an executive function from the control of the Governor, violates the Organic Act.

#### **G. Legislators Cannot Appoint Themselves as Voting Members of an Executive Commission**

It cannot be said that the four members of Legislature appointed to the *Kumision* truly represent the “voice” of the Legislature. An abundant number of cases hold that the “voice” of a Legislature, of Congress, or other deliberative or policy making body, can only be “heard,” in a constitutional sense, in one of two ways – by statutory enactment or by resolution. “The Legislature does not speak through individuals – even its members – in committee hearings, in bill analyses and reports, pre- and post-enactment commentary; it speaks through its enactments.” *Engtergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433 (Tex. 2009). “The legislature speaks on matters of public policy through legislative enactments and through the promulgation of regulations by state agencies as authorized by statute.” *Nichols v. Salem Subway Restaurant*, 98 Conn.App. 837, 846, 912 A.2d 1037, 1043 (2006); *accord Wiltzius v. Zoning Board of Appeals*, 106 Conn.App. 1, 29, 940 A.2d 892, 911 (2008). “Legislators speak through their statutes, not their committee reports.” *Dow Chemical Co. v. United States*, 250 F.Supp.2d 748, 827-28 (E.D. Mich. 2003) (citing *City of Chicago v. Env'tl. Def. Fund*, 511 U.S. 328, 337 (1994) (“But it is the statute, and not the Committee Report, which is the authoritative expression of the law....”). “Under the Constitution, Congress speaks through duly enacted bills and resolutions....” *United States v. Bohai Trading Co., Inc.*, 45 F.3d 577, 581 (1st Cir. 1995). “Congress must act as a consensual body before a legislative policy can be discerned. Before that happens, the legislative branch, in contrast to the executive branch, resembles more a cacophony than a chorus of voices, each legislator having his or her own reason for speaking.” *Barclays Bank International Ltd. V. Franchise Tax Board*, 232 Cal.App.3d 1187, 275 Cal.Rptr. 626 (1990), *rev'd on unrelated grounds*, 2 Cal.4th 708, 829 P.2d 279, 8 Cal.Rptr.2d 31 (1992). “Why should we, then, rely upon a single word in a committee report that did not result in legislation?” Simply put, we shouldn't. The actual words of the statute – the end product of the rough-and-tumble of the political process – are the definitive statement of congressional intent.” *Env'tl. Def. Fund v. City of Chicago*, 948 F.2d 345, 351 (7th Cir. 1991). “One might say that when Congress passes bills or resolutions, those documents ‘speak’ the will of Congress, but here the subject speaking is legislative history. Views on the meaning of a legislative measure, except as embodied in a bill or resolution, are necessarily those of the individual speaker, not of the institution as a whole.” *Gregg v. Barrett*, 771 F.2d 539, 548 (D.C. Cir. 1985).

Likewise, boards and commissions speak through their adopted resolutions. “Public bodies speak through their adopted resolutions, not statements of individual board members.” *Brown v. Fairfax County Board of Zoning*, 2001 WL 543520 \*6 (Va.Cir.Ct. 2001) (citing *Board of Zoning Appeals v. Caselin Systems*, 256 Va. 206, 501 S.E.2d 397 (1998)). “As a court speaks only through its journal, a public board, commission, or other deliberative body speaks through its minutes or its written record of resolutions, directives and action.” *Swafford v. Norwood Board of Educ.*, 14 Ohio App.3d 346, 348, 471 N.E.2d 509, 511 (1984). “The board of supervisors speak only through their actions and resolutions.” *Toan v. McGinn*, 271 Mich. 28, 33, 260 N.W. 108, 110 (1935). “A city or town council speaks through its ordinances or resolutions passed and promulgated as permitted or required by the law creating it.” *Tharp v. Blake*, 171 S.W. 549, 551 (Tex.App. 1914). “In other words, an incorporated town speaks, acts and becomes bound for the performance of obligations, but its ordinances or resolutions adopted by the legislative branch of the incorporation.” *Town of New Athens v. C.W. Thomas*, 82 Ill. 259, 1876 WL 10191 \*2 (1876).

The four members of the Legislature appointed to serve on the Guam First Commission do not represent the voice of the Legislature, nor could they, because the Guam First Commission does not serve a legislative function. Its sole purpose is to further an executive function. *See again Springer v. Philippine Islands*, 277 U.S. 189 (1928); and *Myers v. United States*, 272 U. S. 52 (1926). Hence, the legislative appointments to the *Kumision* infringe upon the executive powers of the Governor and therefore, as to such appointments, the law establishing the *Kumision* is inorganic.

### III. CONCLUSION

The Organic Act provides for three branches of government with separate and distinct powers – executive, legislative and judicial. There is no provision in the Organic Act that would allow the Legislature or the Judiciary to exercise executive power in order to allow the Government of Guam to speak with one “voice” when dealing with the federal government. As discussed above, Public Law 29-128, codified at 1 GCA § 2401 *et seq.*, violates the separation of powers doctrine mandated by the Organic Act. The law which creates the *Kumision Guåhan Fine'nana* (Guam First Commission) is, therefore, inorganic.

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