IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

MARIANAS VISITORS BUREAU, et al..	Civil Action No. 94-516
Petitioners,	**MEMORANDUM DECISION AND JUDGMENT**
v.	
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, et al.,	
Respondents.	

This matter came before the Court on June 13. 1994, on the petition of Marianas Visitors Bureau ("MVB"), and several of its private members, for a preliminary injunction restraining Respondents, the Commonwealth Government. the newly-designated Department of Commerce. and Governor Froilan C. Tenorio from implementing Executive Order 94-2, the Executive Reorganization Plan No. 1 of 1994 ("E.O. 94-2"), as it relates to MVB. After the hearing and upon the Court's suggestion, the parties stipulated that MVB's motion be consolidated with the trial on the merits so that a final decision could be issued. Petitioners argue, first, that the procedure used in enacting E.O. 94-2 was constitutionally flawed, and second, that E.O. 94-2 extends beyond the scope of executive power authorized by the Commonwealth Constitution, thus violating the doctrine of separation of powers. Respondents

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counter that the E.O. was lawfully enacted and is a valid exercise of the Governor's discretion to reorganize the executive branch of government.

In view of the considerable public importance and complexity of the issues presented in this case. the Court granted permission to several non-parties to file briefs as Amici Curiae.[1] Amici were likewise permitted to present oral arguments to the Court at the June 13. *1994* hearing, although only counsel for Amicus House Members did so. At the close of this hearing, the matter was taken under advisement so that the Court could consider in greater detail the numerous issues raised by the parties' and Amici's thoughtful and well-researched submissions. The Court now renders its decision.

I. FACTS

A. PROCEDURAL HISTORY OF THIS ACTION

MVB filed its Petition in this Action on May 18, *1994.* The Petition originally was not accompanied by a request for a temporary restraining order. However, on May *26, 1994.* MVB applied to this Court for immediate relief. **A** hearing on the application was held on the same day.

The Court issued a temporary restraining order on May 27, *1994*, prohibiting the implementation of E.O. *94-2* as it relates to MVB. *See* Decision and Order Granting Temporary Restraining Order (Super. Ct. May 27, *1994).* The Order originally extended only until June 7, *1994.* However, the parties by stipulation extended the Order through the June

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[1] *See* Amicus Brief of Commonwealth Ports Authority (June 8, *1994)* ("CPA *Brief');* Brief Amicus Curiae of Ten Members of the Ninth Commonwealth Legislature House of Representatives (June *10, 1994) ("House Brief");* Brief of Amicus Curiae Howard P. Willens (June 8, *1994)* (*"Willens Brief"*).

13. 1993 hearing date. At oral argument on the preliminary injunction motion. this Court further extended the Order until such time as this decision was issued.

On June 13. 1994, MVB filed its First Amended Petition. naming as Petitioners three "private sector dues paying members of MVB" and a member of its Board of Directors. See Amended Petition at ¶ 2-3. The Amended Petition also named Governor Froilan C. Tenorio as an additional Respondent. *Id*. at ¶ 4. At the time this Amended Petition was filed. no Answer was yet on file from any Respondent.

On June 14, 1994, the Court notified the parties that it was considering consolidation of this motion for a preliminary injunction with the trial on the merits. pursuant to Com. R. Civ. P. 65(a)(2). *See* Order (Super. Ct. June 14, 1994). The Court sought the parties' views on whether such consolidation would be appropriate. *Id.* In response, on June 16, 1994 the parties stipulated to the consolidation, and the Court entered an order to that effect the following day. *See* Stipulation and Order (Super. Ct. June 17, 1994).

Thus, while this motion was brought for the purpose of obtaining a preliminary injunction only, the parties have agreed that the Court has sufficient legal and factual material before it to render a final decision on the merits of the suit as a whole. Accordingly, this Decision will constitute this Court's final determination of Petitioners' claims.

B. MVB BEFORE AND AFTER THE REORGANIZATION

(1) Early History.

Originally, tourism in the Commonwealth was promoted by a Board of Tourist and Travel Industry, established in *1965. See* District Law *1-34.* The entire Board was appointed by the District Administrator, subject to confirmation by the District Legislature. *Id.* This Board was supplanted in 1969 by the Marianas Tourist Commission. *See* District Law *3-43.*

Once again. the Commission's Board was appointed wholly by the District Administrator subject to legislative confirmation. Among the Commission's duties were: to study. survey and recommend acquisition of tourist sites: to coordinate the efforts of the government with private groups: to carry out beautification programs: and to accept donations and gifts on behalf of the District Administration. Id., § 4. Initial funding for the Commission came from an authorization of $1,600 from the unobligated balance of the General Fund. *Id.* at § 7. In 1971, tenure on the Commission's Board was increased from two to four years, and the terms of Board members were staggered so that only two or three of the five Board positions would come up for renewal in any four-year period. See District Law 3-90.

At oral argument. MVB asserted that this Tourist Commission was within the executive branch of the Trust Territory government, but MVB did not provide the Court with any evidence supporting this contention. The statutes governing the Tourist Commission did not expressly label it an "executive" agency. However, § 5 District Law 3-43 gave the District Administrator the responsibility of "coordinat[ing] the functions and efforts of the Commission with other departments of the Government." Under the Trust Territory Government, the District Administrator was the chief executive official of the Mariana Islands District, a position analogous to the Governor today.

(2) Establishment of MVB.

The law creating the present MVB structure was passed by the Fourth Mariana Islands District Legislature on January 21, 1976, and signed into law by the District Administrator on February 12 of that year. *See* District Law 4-145, *codified* as 4 CMC §§ 2101-2108. Thus, the establishment of MVB preceded the effective date of the Commonwealth Constitution by nearly two years. *See* Proclamation No. 4534 (January 9, 1978). According to MVB's enabling statute:

> It is hereby declared to be the policy of the Legislature that the development ot' the tourist industry should be encouraged and in order to provide for the orderly development of this industry and to realize its full potential. it is necessary to utilize government, tourist-oriented business, and community leaders in a concerted and unified manner.

4 CMC § 2101. This is the only statement of legislative intent available to the Court regarding District Law 4-145.[2/] Three major changes from the old Tourist Commission accompanied this statement of purpose.

First, the Board of Directors has been increased to nine, five of whom are appointed by the Governor and four of whom are elected by the "members of the Bureau." who in turn are private businesspeople involved in the tourism industry. *Id*. at § 2102. The day-to-day business of the Bureau is conducted by'a Managing Director, appointed by the Board. *Id*. at § 2103. Second. MVB is funded in part by 25% of the excise taxes levied on the sale of alcoholic beverages and 70% of the taxes levied on hotel occupancy. 4 CMC § 1803(b). MVB's funding also derives from dues paid by the private membership, ranging from $100 to $5000 per year. See Constitution of the Marianas Visitors Bureau, Art. IV(C). MVB's books and accounts are subject to inspection by the Legislature at any time. 4 CMC § 2107. Third. under **3** CMC § 3106, MVB's duties are expanded to include. inter alia: conduct of advertising campaigns; encouragement of private investment in tourist facilities; promotion of indigenous culture; establishment of language training programs: and recommendations to the Governor and Legislature regarding customs and immigration procedures and tourism in general. 4 CMC § 2106.

[2/] Any Committee reports or other relevant documents which may have existed in the Commonwealth Government were destroyed by Typhoon Kim in 1986. Moreover. the parties have submitted no documents, affidavits or other evidence from any of the original drafters of this bill showing its legislative intent.

In its Reply. MVB has submitted an exemplar in blank of Beach Concession leases. purportedly entered into between MVB and various concessionaires. See Declaration of Priscilla T. Dela Cruz ("Dela Cruz Decl."). According to MVB, such contracts were routinely reviewed by the Attorney General. In the exemplar, MVB contracts to "provide structural maintenance" as well as "develop, improve [and] operate" the concession facility. Id., "Lease Agreement" at § 8.01. The lease also requires the Concessionaire to indemnify MVB from all claims "except where caused by its or their negligence." Id. at § 10.01

(3) Post-Reorganization.

Section 302(b) of the Reorganization Plan embodied in E.O. 94-2 states, in part:

> (1) The Marianas Visitors Bureau is transferred to the Department of Commerce as a major component of the department equivalent to a division and shall have at its head a chief executive officer who shall have the rank of a division director. The Board of Directors of the Marianas Visitors Bureau is abolished and its functions transferred to the Director of Commerce.
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> (2) The distribution of revenues to the Marianas Visitors Bureau pursuant to 4 CMC § 1803(b) shall continue until September 30, 1994, and thereafter until appropriations are enacted for tourism promotion as part of the regular budget of the Government.

Directive No. 062, issued May 23, 1994 from Governor Tenorio to MVB Managing Director Bennet T. Seman. mandated this abolition of the MVB Board and transfer of its functions to the Department of Commerce.

On May 25, 1994. Ms. Seman received a facsimile from Governor Tenorio informing her that Directive 062 was in full force and that a new Chief Executive Officer of MVB had been appointed. See Declaration of Eric S. Smith in Support of Temporary Restraining Order (May 26, 1994).[3/]

[3/] In its Reply, MVB submitted a document labeled "Executive Order 94-3 -- Draft," purportedly "received" by an employee of MVB. See Dela Cruz Decl. This alleged "draft" proposes a new MVB Board of fifteen members, nine of which would be appointed by the (continued...)

C. ENACTMENT OF E.O. 94-2

The parties do not dispute the essential facts surrounding the enactment of E.O. 94-2. On March 17, 1994, Governor Froilan C. Tenorio transmitted his Reorganization Plan to then-Senate President Jesus R. Sablan and House Speaker Diego T. Benavente. See *House* Brief. Exh. A. The Plan was presented to the Legislature in two formats simultaneously: as an Executive Order and as a bill for an act. The Governor's transmittal letter stated: "The Executive Order is submitted to you pursuant to the Constitution. It will automatically have the force and effect of law if you do not amend or modify it within sixty (60) days." *Id.*

On March 22, 1994, the Speaker and Senate President referred E.O. 94-2 to the Joint House and Senate Committees for Judiciary and Government Operations for review, urging the Committees to place the matter "at the top of your priority list." *Id.* at Exh. G. The Joint Committees convened a meeting on April 5, 1994 to discuss the E.O. *Id.* On April *13*, 1994. the Joint Committees issued Standing Committee Report 9-1, which concluded that the Governor's Plan swept beyond the permissible reach of executive reorganization power under Article III, § 15 of the Commonwealth Constitution. The Report recommended that the Legislature reject E.O. 94-2 in accordance with the procedure for legislative disapproval set forth in that Article. *Id.*

[3/](...continued)
Governor to serve four-year terms. The other five directors would be chosen by members of key sectors of the tourism industry and would serve one-year terms. Id. MVB's Declaration, however, contains no information disclosing who prepared the document or for what purpose. The Declaration also contains a hearsay statement allegedly made by the Governor at a travel association meeting that the present Reorganization Plan was a "temporary measure" as it related to MVB. However, there is no evidence before the Court as to whether the document labeled "Executive Order 94-3 -- Draft" has at any time reflected the intentions of the Governor. Therefore, the Court can assign little, if any, evidentiary weight to these documents.

On May 2. 1994. Senators Villagomez, Atalig, King and Hocog offered Senate Joint Resolution 9-7. which resolved that:

> the Legislature hereby rejects and disapproves Executive Order 94-2 pursuant to the constitutional authority vested in the Legislature under Article II, Section 1, and Article III, Section 15 of the Commonwealth Constitution, thereby rendering Executive Order 94-2 null and void and without any legal effect [...].

Id. at Exh. B. The resolution was adopted by majority vote of both Houses the following day. *Id*. On May 5. 1994, the Senate Legislative Secretary formally transmitted Senate Joint Resolution 9-7 to Governor Tenorio.

On May 13, 1994, Governor Tenorio requested a special session of the Senate, to be held the same day. *MVB Brief* at 8. While no evidence on this point is before the Court,[4/] the parties do not dispute that this call occurred less than twenty-four hours before the session was actually held. Id. The May 13, 1994 special session was attended by five of the nine members of the Senate, as well as members of the press and public. *Government Brief* at 30. At the session, these five Senators considered and adopted Senate Resolution 9-22, which resolved "that the Senate hereby approves Executive Order 94-2" and "that the Senate supports the enactment and passage of Executive Order 94-2." *House Brief,* Exh. *C*. While the recitals of Senate Resolution 9-22 state that the Senate "has reconsidered the matter" of its earlier rejection of the E.O., the Resolution contains no formal recall of Senate Joint Resolution 9-7. The House of Representatives did not join in Senate Resolution 9-22 and did not consent to any recall of Senate Joint Resolution 9-7. Id. Senate Resolution 9-22 was transmitted to Governor Tenorio on May 13, 1994, the day of its passage. Id.

[4/] None of the parties or Amici submitted evidentiary exhibits regarding this call for a special session, nor regarding the scheduling and cancellation of at least two other special sessions prior to this.

May 16. 1994 marked the sixtieth day after Governor Tenorio's transmittal of E.O. 94-3 to the Legislature. On May 23. 1994. the Governor sent Directives to all government entities affected by the Reorganization Plan. announcing that it was being implemented "effective immediately," and giving each entity specific instructions pursuant to the Plan. *Id*.. Exh. F.

II. ISSUES

The parties and Amici present a myriad of issues for the Court's consideration in this case. many of them of first impression in the Commonwealth. For reasons that shall become apparent. the Court will restrict its consideration to the following five:

1. Whether this matter is justiciable;

2. Whether Petitioners have the capacity to maintain an action in this Court;

3. Whether Petitioners have standing to bring this action against these Respondents:

4. Whether Petitioner MVB is an entity within the executive branch of the Commonwealth government;

5. Whether Executive Order 94-2 was validly enacted under the Commonwealth Constitution.

III. DISCUSSION AND ANALYSIS

The Court notes at the outset that E.O. 94-2 has generated a great deal of controversy in the Commonwealth. In that public debate, questions over the legality of the Governor's reorganization plan have often been intertwined with questions over the plan's desirability from a policy point of view. Here, the Court is concerned solely with the legal questions presented by the parties. The political merits of the reorganization plan are strictly matters for the other

branches of the government to determine and are not a proper subject of consideration by this Court.

A. POLITICAL QUESTION

The Court's first task is to determine whether it should take jurisdiction over this controversy at all, or whether the case presents a "political question" best resolved by the other two branches of government. In the Commonwealth, this issue -- the justiciability of matters involving coordinate branches of government -- is determined on a case-by-case basis. *Mafnas v. Inos*, Civil Action 90-31, slip op. at 11 (Super. Ct. Jan. 22, 1990), *aff'd*, 1 N.M.I. 102 (1990). The facts here present two principal controversies to the Court for adjudication: the legality of E.O. 94-2's application to MVB, and the legality of the E.O.'s enactment.

Regarding whether MVB is within the Governor's reorganization power as set forth in Art. III, § 15 of the Commonwealth Constitution, this question involves extremely difficult issues of constitutional interpretation. As the Court indicated in its May 27, 1994 Decision and Order Granting Application for Temporary Restraining Order, "constitutional interpretation of this sort [...] is clearly the province of this Court." Slip op. at 2. See also House Speaker v. Governor, 506 N.W.2d 190, 200 (Mich. 1993) (scope of the Governor's powers of reorganization is justiciable). As the U.S. Supreme Court noted in Baker v. *Carr*, 82 S.Ct. 691 (1962),

> deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as the ultimate interpreter of the Constitution.

At oral argument, Respondents agreed that such constitutional issues are at stake in this matter, and that this Court is charged with the duty to resolve them.

The second principal controversy presented is the legality of the E.O.'s enactment. Petitioners argue that the Senate had no authority to reconsider unilaterally Senate Joint Resolution 9-7 without first recalling that Resolution from the Governor. This lack of authority, Petitioners claim, rendered the Senate's action "approving" the E.O. void and left the original Senate Joint Resolution 9-7, which had disapproved the E.O., still in force. Respondents answer that this matter is wholly a question of the internal rules of the Senate, committed to its discretion by Commonwealth Constitution, Art. II, § 14(b). See Government Brief at 18-24.

In *King* v. *Cuomo*, 613 N.E. 950, 951-2 (N.Y. 1993), the court agreed that "the internal rules of the Assembly and the Senate [...] are entitled to respect" from the courts. However, the *King* opinion made clear that this respect for the legislature's internal procedures does not prevent a court from determining the constitutional limits of the Legislature's power to make those rules. *King* cited a series of precedents from New York and other jurisdictions for the proposition that "courts will always be available to resolve disputes concerning the scope of that authority which is granted by the constitution to the other two branches of government." Id. at 952. Here, the Court agrees that the Senate's action in "approving" the E.O. raises issues regarding the constitutional limits of the Legislature's powers. Therefore, the dispute over the legality of Senate's action is an issue the Court must decide.[5/]

[5/] The same conclusion does not hold regarding Petitioner's claim that the Senate failed to follow the Open Government Act by giving less than twenty-four hours' public notice prior to the special session of May 13, 1994. Whether Public Law 8-41, the Open Government Act, applies to the proceedings of the Senate's May 13, 1994 special session is not a question of constitutional dimensions. In the past, the Commonwealth Courts have intruded into non-constitutional issues of Senate procedure when the controversy at issue created an "impasse within the Senate" preventing the Legislative branch from functioning properly. See *Mafnas* v. *Inos*, *supra*, slip op. at 11-12. There is no showing here that the alleged failure to comply with the Open Government Act created any such impasse. Finally, the issues presented by Petitioners' Open Government Act claim are much more squarely before the Court in another (continued...)

B. MVB'S CAPACITY TO SUE

Capacity to sue constitutes the ability of a particular individual or entity to avail itself of the courts of a forum. BLACK'S LAW DICTIONARY citing Johnson v. Helicopter & Airplane *Serv. Corp.*, 404 F.Supp. 726, 729 (1975). Rule 17 of the Commonwealth Rules of Civil Procedure governs capacity to sue in all civil actions of the Commonwealth. Com. R. Civ. Proc. 17(a). More specifically, Rule 17(b) effectively categorizes entities and sets forth the capacity law applicable to each. Thus, in order to make a determination concerning MVB's capacity to sue, the Court must determine what type of entity MVB is.

Respondents claim that MVB does not have the capacity to sue or be sued because its enabling statute does not specifically confer upon it corporate status or the right to sue and be sued. While Petitioners have conceded the absence of language of incorporation from 4 CMC §§ 2101-08, they direct the Court to several aspects of the MVB enabling statute, which they argue, clothes MVB with corporate status. Alternatively, Petitioners argue that MVB constitutes a quasi-corporation with capacity to sue by virtue of its many corporate features. Finally, in the event this Court finds that MVB lacks corporate or quasi-corporate status, the Petitioner's rest MVB's capacity to sue upon its existence as an "unincorporated association".

(1) Is MVB a Corporation?

Respondent directs the Court to several Commonwealth enabling statutes which specifically endow governmental entities with corporate status and thus the capacity to sue and

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[5/](...continued)
action scheduled for consideration in the immediate future. See Sablan v. *Demapan*, Civil Action No. 94-500. The Court believes that, if this question is justiciable, that action provides a more appropriate forum for its consideration. Therefore, the Court will exercise its discretion not to adjudicate MVB's Open Government Act claim.

be sued.[6] adding that MVB's enabling statute does not award it corporate status. Thus, according to Respondent. MVB lacks corporate status because the Legislature never conferred it upon MVB.

On the other hand, the Planning and Budgeting Act of 1983 ("Budgeting Act") includes MVB within its definition of "Government corporation." 1 CMC § 7103(n). In addition. section 7401 of the Budgeting Act grants the chairmen of several public corporations (i.e. MPLC, MIHA, CPA, and NMIRF) the power "to expend, obligate, encumber. or otherwise commit public funds" for their respective operation. *See generally* 1 CMC § 7401. The legislature sandwiched MVB amongst these "public corporations" and thereby, gave the Board Chair of MVB identical powers to spend. 1 CMC § 7401(n). Petitioners also point out several aspects of MVB which are corporate in nature, including: 1) a Board of Directors; 2) the power to select certain Board members as officers; 3) the power to adopt a constitution and bylaws; 4) a membership with voting power to elect Directors; 5) a membership dues system akin to corporate shareholder systems which award majority shareholders more voting power: 6) the ability to contract in its own name. MVB *Reply*, at 5.

Although the characterizations of MVB in the Budgeting Act and MVB's other similarities to public corporations tend to place it on a par with legislatively proclaimed "public corporations," the fact remains that specific "corporate" language does not appear in its enabling statute. *See generally* 4 CMC § 2101-08. In the face of several enabling statutes containing "corporate" language, the Court is in no position to read the words "public corporation" into the MVB enabling statute. *See* ***King*** v. *Board of Elections, 2* N.M.I. 399,

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[6/] The NMI Retirement Fund is a "public corporation." 1 CMC § 8312. The Mariana Islands Housing Authority is a "public and corporate body." 2 CMC § 4411. Article XI, §4 of the CNMI Constitution establishes the Marianas Public Land Corporation. There is in the Commonwealth Government a public corporation called the Commonwealth Ports Authority. 2 CMC § 2121.

406 (1991) (court not empowered to act as "super-legislature"). Thus, the Court finds that MVB has no strict corporate capacity to sue.

(2) Is MVB a Quasi-Corporation?

Nonetheless, it is not necessary that a legislatively created entity be named a corporation by the legislature in order for it to be treated like a corporation. *Gross* v. *Kentucky Board of Managers.* 49 *S.W.* 458, 459 (1899). The *Gross* court held that a legislatively created government entity not expressly endowed with "corporate" status, but vested with corporate power to contract and to incur debt, takes on the status of a quasi-corporation, and thus has capacity to sue and be sued on those contracts. *Id.; See Bloomfield Village Drain Dist. v. Keefe.* 119 F.2d 157 (6th Cir. 1941) (Michigan drainage district, a non-corporate entity held to have power to sue and be sued because it exhibited the essential characteristics of a public corporation).

In order to determine whether the Legislature has endowed MVB with a quasi-corporate status. the Court turns to MVB's enabling statute and its creation. In 1976, the legislature enacted District Law 4-145 as part of a new policy to develop the tourist industry by combining government and "tourist-oriented business resources." 4 CMC 2101. In furtherance of that policy, the Legislature restricted the Governor to appointing only five of the nine MVB Board members, 4 CMC § 2102, as compared to his predecessor's power to appoint the entire Board. *See* District Law 3-90. The remaining four MVB Directors, having been elected by MVB members, are chosen for their expertise in the area of tourism as well as their ability to represent the membership interest when it comes to voting on important issues involving tourism.

According to the MVB Constitution, MVB members receive a certain number of votes to be cast at the directorship elections depending upon the amount of yearly dues paid. Thus,

a member's intluence on the election of private-sector Directors is directly related to the amount of membership dues he or she has paid. Such a system is similar to common stock issues in private corporations where principal shareholders have more say in the makeup of corporate leadership.

With respect to MVB's powers enumerated in 4 CMC § 2106, most notable are its powers to conduct advertising campaigns and to encourage private investment in tourist facilities. The granting of such powers requires MVB to enter into contracts with various members of the private sector, as evidenced by the exemplar leases submitted to the Court. See Dela Cruz Decl. Thus, like the quasi-corporation in Gross, MVB has been given the power to contract.

In sum, the Court has been presented with a unique entity that links government with the private sector. that possesses a corporate-like structure, and a list of powers in § 2106, which apparently could not be carried out by the entity without entering contracts in its own name. Thus, the Court finds that MVB falls under the title of a quasi corporation and as such, has the capacity to sue and be sued in this Court.

C. MVB'S STANDING TO BRING THIS LAWSUIT

(1) Individual Petitioners.

At the outset, the Court must reject Respondents' attack on the standing of the individual Petitioners, who are an MVB Director[7/] and five MVB members.[8/] In response

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[7/] David M. Sablan is suing as a member of the MVB Board of Directors.

[8/] Petitioners that are MVB members include John I. Schwartz representing Microl Corporation, Edward S. Tenorio representing J.C. Tenorio Enterprises, Norman T. Tenorio representing Marianas Rental Corporation, Frances DLG. Borja representing Carmen Safeway Enterprises, and David M. Sablan representing Century Finance.

to David M. Sablan's contention that his termination as a Director denies him the ability to represent the interests of the membership who elected him, Respondents deny that any private property was taken without due process because Executive Order 94-2 abolishes the MVB *Board positions* and does not remove Mr. Sablan from his position as a Director. Regardless of how Respondents care to characterize it, Mr. Sablan is in danger of becoming a former MVB Director whose term will have been cut short three years by the concerted acts of the Governor and the Legislature at issue in this case.

The U.S. Supreme Court framed the standing issue as follows: (1) does the [petitioner] allege that the challenged action has caused him "injury in fact, economic or otherwise; (2) is the interest sought to be protected arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. *Kennedy* v. *Sampson*, *511* F.2d. 430. 433 (D.C.C.A. 1974) *(citing Assoc. of Data Processing Serv. Org., Inc. v. Canzp,* 90 S.Ct. 827 (1970)). Thus, standing exists in those petitioners alleging a personal stake in the outcome of a controversy that will assure the "concrete adverseness" needed to illuminate difficult constitutional questions. *Baker* v. *Carr. 82* S.Ct. 691, 703 (1962).

In *Kennedy, supra*, the court held that Senator Edward M. Kennedy had standing to bring suit seeking a declaratory judgment that a bill had become law because the President's pocket veto was illegal and ineffective. 511 F.2d at 433. The *Kennedy* court reasoned that the Senator's interest in protecting the effectiveness of his vote supplied the adversity necessary to confer standing upon him. Id. at 434.

Likewise, Mr. Sablan's power to affect the direction of tourism in the Commonwealth has been extinguished by executive and legislative acts which he contends have violated the Commonwealth Constitution. Just as Senator Kennedy had standing to protect the vote he possessed by virtue of his elected position, Mr. Sablan has standing to contend the

constitutionality of an executive order which will erase three years of his four year term as an elected MVB Director.![9]

With respect to Petitioners' standing as MVB members. the Court finds that MVB members have standing to sue the Commonwealth by virtue of their substantial interest in the dues money they have expended. These annual dues entitle MVB members to choose four Directors to carry out the tourist-related interests of the private sector. The dues also entitle membership to attend meetings and voice their approval or disapproval of MVB policy to the Directors. An unconstitutional removal of the MVB Directors amounts to a demolition of MVB members' voting power, and in effect. a seizure of a substantial amount of their membership dues.

(2) Standing of MVB Itself.

The standing of MVB as a Petitioner in its own right raises more difficult concerns. Respondents claim that if this Court allows MVB to sue the CNMI government in its own name, the Court will have allowed MVB to sue itself. *Government Brief* at 9. Respondents hereby raise a concern that MVB may not have legal interests that are sufficiently separate from the CNMI government to create the adversity necessary for standing.

The essential element of the standing requirement is that the plaintiff show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant. *Wabol v. Muna,* 2 *CR* 231, 239 (N.M.I. Tr. Ct. 1985) *(citing Gladstone Realtors v. Village of Bellwood,* 99 S.Ct. 1601,1607 (1979)), *rev'd in part, 2 CR* 963 (D.M.N.I. 1987). Thus, in order to remain a party to this lawsuit, MVB must rest its

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[9] Mr. Sablan became an MVB Board member in 1993. *See* Declaration of David M. Sablan.

claim for relief upon its own legal rights and interests. *See Rogers* v. *Brockette*, 588 F.2d 1057. 1060 (5th Cir. 1979), *cert. den.* 444 U.S. 827.

Here, during the June 13th hearing for preliminary injunction, MVB argued that it was seeking to fend off an unconstitutional "attempt by the Governor to dissolve the entity of MVB and place it within the Executive Branch." In order to prove standing on this ground. Petitioner essentially has to prove its case on the merits. i.e., to show that it is outside the sphere of Governor's reorganization powers as granted by Art. III, § 15 of the Commonwealth Constitution.

It is not unusual for issues of standing to coincide with the right to relief on the merits when the petitioner is a state entity whose complaint stems from an allegedly unconstitutional act by the state itself. See "Note: Municipal Corporation Standing to Sue the State: *Rogers v. Brockette,*" 93 *HARV. L.* REV. 586, 591 (1980). If MVB's constitutional claim that it is outside the executive branch -- and thus outside the Governor's power to reorganize -- is successful. it necessarily will have had constitutionally protected interests and thus have had standing. Id.

The Court thus finds that in order to determine whether MVB has standing to sue. the Court must address the merits of this case. Such an arrangement seems to be in keeping with this Commonwealth Supreme Court's direction in *Mafnas* v. CNMI, 2 N.M.I. 248. 260 (1991) that rules of standing are to be liberally construed.

D. CONSTITUTIONALITY OF "REORGANIZING" MVB[10/]

Article III. section 15 of the Commonwealth Constitution provides:

> Executive branch offices. agencies and instrumentalities of the Commonwealth government shall be allocated by law among and within not more than fifteen principal departments so as to group them so far as practicable according to major purposes. Regulatory, quasi-judicial and temporary agencies need not be part of a principal department. The functions and duties of the principal departments and of other agencies of the Commonwealth shall be provided by law. The legislature may reallocate offices, agencies and instrumentalities among the principal departments and may change their functions and duties. The governor may make changes in the allocation of offices, agencies and instrumentalities and in their functions and duties that are necessary for efficient administration. If these changes affect existing law, they shall be set forth in executive orders which shall be submitted to the legislature and shall become effective sixty days after submission, unless specifically modified or disapproved by a majority of members of each house of the legislature.

This section contains three parts. The first defines the executive branch of government. The second defines the powers of the Legislature and the Governor to reorganize the executive branch. The third defines the power of the Legislature to disapprove a gubernatorial reorganization plan. With two exceptions,[11/] there are no reported cases in the Commonwealth interpreting either the extent of the executive branch as defined by section 15, the scope of the Governor's reorganization power, or the procedures by which the Legislature may exercise its power of disapproval. Nor is the *Restatement of the Law* applicable. Thus. the Court must examine closely the decisions of the U.S. Federal government and the fifty states as guides for the Court's decision. 7 CMC § 3401.

[10/] Normally, when faced with dual claims that a law was 1) invalidly enacted and 2) invalidly applied to a given plaintiff, a court should address the question of facial invalidity first. However, as shown above, MVB's standing to sue in this case is predicated upon its showing of independence from the executive branch. For this reason, the Court will reverse the normal order of analysis and address the scope of the Governor's reorganization power before addressing the validity of **E.O.** 94-2's enactment.

[11/] *Mafnas* v. *Camacho,*, 1 CR 302 (D.N.M.I. App. Div. 1982), and *Tenorio* v. *CNMI,* 2 CR 726 (D.N.M.I. App. Div. 1987), discussed *infra*.

(1) **Is MVB a Private Entity?**

The parties legal dispute centers on how far the Governor's power of reorganization extends *within* the CNMI government. Neither party contends that the Governor may "reorganize" a *private* entity. Therefore, the Court must first consider whether MVB is a state agency at all. *See Laguana v. Guam Visitors Bureau,* Civil Case No. 83-0008, slip op. at (15-16) (Guam Visitors Bureau deemed a private, non-profit organization).

The Seventh Circuit addressed the categorization of an entity in *Mendrala v. Crown Mortgage Company*, 955 F.2d 1132 (7th Cir. 1992). The *Mendrala* court addressed the issue of whether the Federal Home Loan Mortgage Corporation (FHLMC) was an "instrumentalit[y] or agenc[y] of the United States." *Id.* at 1135. The court weighed the following five factors: "1) the government's ownership interest in the entity; 2) government control over the entity's activities: 3) the entity's structure: 4) government involvement in the entity's finances; and *5)* the entity's function or mission." *Id.* at 1136. Applying this test, the *Mendrala* court concluded that FHLMC was not a federal instrumentality for the purposes of the Federal Tort Claims Act, because: the FHLMC was privately owned; the government had minimal control over it; it functioned independently from the government; and it did not receive appropriations from Congress. Id. at 1139.

The Alaska Supreme Court enunciated a similar test in *Alaska Commercial Fishing v. O/S Alaska Coast,* 715 P.2d 707, (Alaska 1986). The court "balanced an entity's autonomy against the state's retained control" and found that because the degree of control the entity at issue had over itself was greater than the control the state had over it, the entity was autonomous and not a state agency. *Id.* at 711. *Compare DeArmond v. Alaska State Development Corp.*, 376 P.2d 717 (Alaska 1962) (agency was an instrumentality of the state

because the broad discretion the over the choice of loans did not outweigh the "considerable control . . . retained in the executive branch").

After applying the tests set out above, this Court finds that MVB is in fact a state agency. Unlike the FHLMC in *Mendrala,* MVB is not a corporation. MVB is a non-profit organization contained within the Commonwealth Government and exercising quasi-corporate powers. 1 CMC § 2102-03. It is true that MVB's Constitution and Bylaws opens membership to any private or governmental entity doing business in the Commonwealth. and at the present time there are dues paying members of MVB. However, MVB is not purported to be owned by any entity. *See* MVB Constitution p. 3. Based on the foregoing, since no private entity can have ownership in MVB, and MVB is an entity contained within the government. the Commonwealth government has the greatest "ownership" interest in MVB.

As in *Mendrala,* MVB is governed by a Board of Directors. However, the Governor has far greater control over MVB's board than the Board in *Mendrala* did. The entire Board serves at the pleasure of the Governor and may be removed by the Governor with or without cause. 4 CMC § 2105. MVB must make an annual report to both the Legislature and the Governor which summarizes its yearly activities and finances. Moreover, MVB accounts and records must be available at all times for audit. *Id.* at § 2107-08. Finally, MVB was created for the governmental public purpose of "promoting the establishment of a visitor industry in the Commonwealth of the Northern Mariana Islands." *See* Constitution of the Marianas Visitors Bureau, Art. I; *see also Laguana, supra,* slip op. at 7 (Guam government's policy was to promote tourist industry through program within government structure).

In sum, when measured against the applicable the federal and state standards, the Court finds that MVB is unquestionably an instrumentality of the Commonwealth Government. It

is therefore necessary to proceed to the next issue: whether, as a government entity. MVB is subject to the Governor's reorganization power.

(2) Historical Evolution of Reorganization Power.

Executive authority to reorganize government in the general manner of § 15 was first granted to President Wilson in 1918. 40 Stat. 556.[12/] Later reorganization statutes in 1932 and 1939 gave the President broad reorganization powers, subject to the "legislative veto" of Congress. *Holland*, supra, at 5-6. These acts also contained detailed lists of enumerated agencies which were beyond the President's power of reorganization, such as the Civil Service Commission, the Federal Trade Commission, the Federal Retirement Board, and numerous others. Id. at 8, n. 48, citing 53 Stat. 561, § 3(b). The Reorganization Act of 1945, 59 Stat. 615. § 5(a), provided that no reorganization plan "shall have the effect of imposing"

> in connection with the exercise of any quasi-judicial or quasi-legislative function of any independent agency, any limitation upon the exercise of independent judgment or discretion, to the full extent authorized by law, in the carrying out of such function, than existed with respect to [...] the agency in which it was vested prior to the taking of effect of such reorganization ....

In 1947, Congress re-examined the subject of executive reorganization by creating a Commission on the Organization of the Executive Branch of Government. dubbed the "Hoover Commission." Holland, supra, at 7. Pursuant to the recommendations of this Commission, the Reorganization Act of 1949 omitted both the enumerated list of agencies exempted from the reorganization power and the provision exempting "quasi-judicial" and "quasi-regulatory" agencies from reorganization. Id., *citing* 63 Stat. 203. The Committee's Report to Congress provides the reasoning behind this recommended omission:

[12/] See Holland and Luking, "Executive Reorganization: An Examination of the State Experience and Article V. Section 11 of the Illinois Constitution," 9 *Loyola* University Law Journal 1, 4 (1977) ("Holland").

> The inclusion of [...] limitations upon the independent exercise of "quasi-legislative" or "quasi-judicial" functions would. in the Committee's judgment. be unwise. The phrases are extremely vague and of uncertain meaning. Ingenious and plausible arguments can be made to apply them to a wide range of functions which should clearly be subject to reorganization procedure. Such arguments would not be purely matters of theoretical concern or legislative debates. for the validity of the reorganization could be made the subject of protracted litigation by private agencies resisting the acts of a reorganized agency on the ground that it was illegally constituted. It might take several years of litigation to lay down interpretations of these general phrases and even then, uncertainty would remain.

S. Rep. No. 232, 81st Cong., 1st Sess. 2 (1949), *cited in Lusk v. U.S.*, 173 Ct.Cl. 291. 1965 WL 8288, *4 (Ct. CI. 1965), *cert. den.*. 383 U.S. 967.

This statutory context clarifies much of the apparent contradiction between federal precedents on agency "independence" and those on Presidential reorganization power. For example, in *Wiener v.* U.S., 78 S.Ct. 1275 (1958), the U.S. Supreme Court decided that the President could not lawfully remove a member of the War Claims Commission to replace him with "personnel of my own selection." 78 S.Ct. at 1276. Relying on *Humphrey's Executor v.* U.S., 55 S.Ct 869 (1935), the Court distinguished "officials who were part of the Executive establishment and were thus removable by virtue of the President's constitutional powers" from "members of an entity designed "to exercise its judgment without leave or hindrance of any other official or any department of the government." 78 S.Ct. at 1278.

After winning his case at the Supreme Court, Wiener filed another lawsuit in the Court of Claims, this time challenging President Eisenhower's later act of abolishing the War Claims Commission entirely by executive reorganization and establish the Foreign Claims Settlement Commission in its stead. Lusk, supra, 173 Ct.Cl. 291, 1965 WL 8288 (Ct. Cl. 1966) *cert. den.*, 86 S.Ct. 1271 (1966). Wiener claimed entitlement to the salary he would have received from the date of the Reorganization Plan until his term as Commissioner would have expired. *Id.* at *2, *citing* 68 Stat. 1279. The Court denied Wiener's claim, stating that the

Reorganization Act of 1949 empowered the President to reorganize the full scope of the executive branch. even as to agencies containing boards deemed independent of the President's power of removal. Id. at *4-6. The Court wrote. "the safeguard against unwise reorganization plans lies both in the sound exercise of the President's discretion and in the reserve power of Congress [...] to disapprove any proposed plan." *Id.* at *4.

A similar pair of decisions relate to the Atomic Energy Agency. *Compare Nanfelt v. U.S.*, 1 Cl.Ct. 223 (Ct. Cl. 1982) (Atomic Energy Commission not an executive department) *with Quivira Mining Co. v. U.S. E.P.A.*, 728 F.2d 477, 481 (10th Cir. 1984) (transfer of Atomic Energy Agency's regulatory functions to the Environmental Protection Agency was valid exercise of Presidential reorganization power).

In *Mafnas v. Camacho,* 1 CR 302 (D.N.M.I. App. Div. 1982), the Appellate Division of the N.M.I. District Court reached a conclusion similar to those reached in *Lusk, supra,* and *Quivira, supra.* Art. III, § 16 of the Commonwealth Constitution[G]/ mandated that the Legislature create a "non-partisan and independent" civil service commission. The Legislature complied, in part by creating a Personnel Office headed by a Personnel Officer appointed by the Governor with the advice and consent of the Senate. *Mafnas, supra,* 1 CR at 304. In 1980. Governor Carlos S. Camacho issued an executive order abolishing this office and replacing it with a new Personnel Office fully within the executive branch. *Id.* The Personnel Officer filed suit, claiming that the Governor's action exceeded the scope of § 15 and arguing that the functions of the Personnel Office were "regulatory and quasi-judicial" and therefore not subject to executive reorganization. *Id.* at 308.

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[13]/ Section 16 was repealed by the 1985 Constitutional Convention and re-enacted outside of Art. III as Art. XX.

The Court rejected Mafnas claim. finding that the Governor's powers of reorganization extended throughout the executive branch. and that the Personnel Office performed an executive function. "although independent to the extent that it is to be free from political manipulation." Thus. the Office was subject to reorganization by the Governor despite its "independent" status. *Id.*

The similarities of reasoning between *Lusk*, *Quivira* and *Mafnas* may stem from another source as well. The 1949 federal Reorganization Act at issue in *Lusk* influenced the reorganization provision of the Model State Constitution. 5.06 *(see Holland, supra* at 14-15) which, in turn, served as the model for the reorganization provision proposed to the Northern Marianas Constitutional Convention of 1976. *See* 2 *Journal of the Northern Mariana Islands Constitutional Convention* at 436 (1976); Wilmer Cutler & Pickering, "Briefing Paper No. 2: Executive Branch," 96 (1976).

Based on the foregoing historical overview and the local precedent of *Mafnas*, the Court is persuaded that the Governor's reorganization power under Art. III, § 15 extends to the limits of the executive branch, going beyond the fifteen principal departments and including "regulatory, quasi-judicial and temporary agencies."[14/] This view also squares most clearly with the repetition of the all-encompassing phrase "offices, agencies and instrumentalities" in the sentence describing the Governor's powers.

Furthermore, as a policy matter the Court shares the Hoover Commission's concern over the vagueness and uncertainty of the terms "quasi-judicial" and "regulatory." In this regard, the brief filed by Amicus House Members, while quite sophisticated and carefully reasoned, shows the complexity involved in creating a test which can be applied consistently

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[14/] This holding on the scope of the Governor's power does not include entities specifically established by the Commonwealth Constitution.

to determine whether the various uniquely-created agencies of the Commonwealth fall inside or outside the executive reorganization power. *See House Brief* at 25-38. If the limits of the Governor's power under § 15 were defined by such a test, the Court fears that the litigation costs of any reorganization plan would outweigh the intended administrative savings of the plan itself. Only by making the Governor's power co-extensive with the executive branch itself can reorganization be administered in a rational and consistent manner.

(3) Nature of the Executive Branch.

The Court's next tasks are to determine the limits of the executive branch and to locate MVB either inside or outside of those limits.

(a) Under Federal Law. At the outset, the Court notes a sharp distinction between applicable federal and Commonwealth law. The federal government has adopted an extremely expansive definition of the executive branch of government in 5 U.S.C. §§ 101-105. These statutes provide a general framework for classifying federal agencies as either executive departments (§ 101), military departments (§ 102), government corporations (§ 103), or "independent establishments" (§ 104). However, § 105 defines *each* of these types of entities as "executive agencies" for the purposes of federal law. *Thus, by the terms of 5 U.S.C. § 105, even an "independent establishment" is within the executive branch of the federal government.* This federal classification scheme renders inapposite many of the federal cases cited by Petitioners having to do with an agency's independence from the executive power of removal. *See Lusk, supra,* 173 Ct.Cl. 291; *Quivira, supra,* 728 F.2d at 481.[15/] Just because an agency

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[15/] *Compare* Stein, Mitchell & Mezines, *Administrative* Law (1990) at § 4.04 (listing ten federal agencies as "independent") *with United States Government Manual* (1980-81), *cited in 2* Fed. Proc. L. Ed. § 2:273 (listing same ten agencies as "independent establishments within executive branch" under 5 U.S.C. § 105).

has some independence from day-to-day interference from the executive does not mean the agency is outside the executive branch of government altogether.

(b) Under Commonwealth Law. In contrast to federal law. the first two sentences of Article III, section 15 of the Commonwealth Constitution set forth a fairly restrictive definition of the structure of executive branch of government:

> Executive branch offices, agencies and instrumentalities of the Commonwealth government *shall be allocated bv law among and within not more than fifteen principal departments* so as to group them so far as practicable according to major purposes. *Regulatory, quasi-judicial and temporary agencies* need not be part of a principal department (emphasis added).

As Amicus CPA argues forcefully in its brief (at 8). every executive branch "office, agency. and instrumentality" (i.e., every executive branch entity of any type) *must* be placed within one of the principal fifteen departments, unless that entity is "regulatory, quasi-judicial. or temporary." *See* Model State Constitution § 5.06, Commentary (purpose of restricting power to create executive agencies is "[t]o simplify and facilitate over-all control of state administration"). While the Court is aware of no Commonwealth court having faced this issue, one would conclude from the language of § 15 that legislative creation of an entity that is neither among the principal executive departments. nor among the three enumerated exceptions. and yet is within the executive branch, would be unconstitutional.

On the other hand, Respondent correctly points out that the Covenant which established the Commonwealth's existence authorizes only three branches of government. *See Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America,* § 203(a). The *Analysis of the Covenant* states, "while the Northern Marianas Government will have to have three separate branches, the people of the Northern Marianas will be free to determine [...] the precise powers which each branch of government will have." *Analysis of the Covenant* at 23-24. This language leaves no room for

"independent" agencies which are *truly* independent in the constitutional sense of not falling within any of the three branches of government.

It is true that *Tenorio v. CNMI, 2* CR 725 (D.N.M.I. App. Div. 1986) recognized the status of the Washington Representative as outside of the three branches of government. However. as the *Tenorio* court observed, the Washington Representative's status is expressly authorized in the Covenant itself. *See* Covenant, § 901. Arguably, sections 805 and 806 of the Covenant provide similar authorization for the constitutional status of the Marianas Public Land Corporation and the Marianas Public Land Trust.[16/] The fact that the Covenant itself makes these exceptions to its "three branch" rule does not authorize this Court to make further exceptions by judicial implication alone. Indeed, the reverse is true; as a general principle of statutory construction, the existence of express exceptions to a rule gives rise to a presumption that no other exceptions were intended. *See Andrus* v. *Glover Construction. Co.,* 100 S.Ct. 1905, 1910 (1980); 2A *Sutherland Statutory Construction,* § 47.11.

(c) "Structural" Analysis. As described above, the first sentence of Art. III § 15 mandates what may be called a "structural" test for whether an entity is within the executive branch. That is, one looks the legislative history, the enabling statute and the bureaucratic embodiment of the entity to determine whether it is *structurally* contained within one of the fifteen main executive departments.

Such a structural analysis is essentially what Amici House Members and CPA urge on this Court. And after reviewing MVB's structure as defined by its history, its present enabling statute, its constitution and bylaws, and its ongoing activities, the Court agrees that, were it to adopt a structural analysis, it would locate MVB outside the executive branch.

[16/] Of course, these two agencies do not enjoy equal status. While the Constitutional provision governing MPLC mandates its dissolution after twelve years of operation *(See* Art. XI, § 4(f)), MPLT is established in perpetuity (Id. at § 6).

Although the evidence on point is far from conclusive the Court believes that MVB's predecessor, the Marianas Tourist Commission, was originally within the executive branch of the Trust Territory Government. The facts that the District Administrator appointed the entire Board. and that the Administrator had the responsibility of "coordinat[ing] the functions and efforts of the Commission with other departments of the Government," shows a high degree of executive control over the Commission's activities. See District Law 3-43, §§ 1, 5.

From what the Court can discern of the legislative intent behind District Law 4-145. when the District Legislature created MVB in 1976, it intended to place MVB outside the control of the executive, if not strictly speaking outside the executive branch of government. First, the provision which gave the District Administrator overall coordinating control over the Tourist Commission the agency is absent from the statute governing MVB. Second. there is a much greater level of private participation in MVB than existed in its predecessor. Any private or governmental entity shall be eligible for voting membership to MVB. MVB Constitution IV, A. Third, the Governor has only indirect power to affect MVB's operations through his appointment of the Board's majority; day to day operations fall within the power of either the Managing Director or the Board. Id. at 4; Bylaws at I. Fourth, MVB's funding is distinct from the Commonwealth General Fund and comes from both private and public sources. MVB is funded in part by 25% of alcoholic container tax. and 70% of the hotel taxes. 4 CMC § 1803 (b). The members also pay a membership dues which vary from $100 to $5.000. See MVB Constitution at Art. VI(C).

Finally, by the terms of Art. III, § 15, MVB has never been physically located within the executive branch since its inception. No showing has been made connecting MVB's personnel, funding, physical location or decision-making process with those of any executive

department. Further, the parties agree that MVB is neither a regulatory, quasi-judicial or temporary agency. See MVB Brief at 14.

However, following the structural analysis of MVB's location within the CNMI government leads the Court into what may be termed a perfect dilemma. MVB cannot be located within the executive branch of government, as seen above. But neither can MVB be located anywhere else. Locating MVB within the legislative or judicial branches would amount to legal fiction, since it has never had any structural affiliation with either branch. And placing this Court's seal of approval on a truly "independent" designation for a state entity would be to step outside the three-branch structure mandated by the Covenant.[17/]

Petitioners, in seeking to convince the Court that it is possible to classify MVB as an "independent" state entity, do not explain how such a creation can be reconciled with the Covenant. Moreover, neither Petitioners nor their Amici have cited a single case involving executive reorganization in which a court has held a given agency to be structurally independent from any of the three branches of government and yet within the state government. The cases cited in the briefs generally relate to the limits of executive power to remove members from agency boards, a question shown above to be distinct from the limits of executive reorganization power. Of the other cases cited, most ultimately hold that the agency in question is within one of the three branches of government. *See Mistretta* v. *U.S.*, 109 S.Ct. 647, 653 (1989) (Sentencing Commission an "independent commission within the judicial branch"); *Portland Audubon Society* v. *Endangered Species Committee*, 984 F.2d 1534, 1547 (9th Cir. 1993) (members of "executive tribunals" perform quasi-judicial functions and must

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[17/] It was no fault of the District Legislature that it did not anticipate the strict definition of "executive branch" found in Art. III, § 15, since the Commonwealth Constitution was not effective until nearly two years after the passage of District Law 4-145. Nevertheless, the organizational scheme created by the Covenant and the Constitution leaves no room for the "independent" agency the District Legislature sought to create.

be free from executive interference): *Commonwealth Edison Co. v. U.S. Nuclear Regulatory Commission*, 830 F.2d 610. 619 (7th Cir. 1987) (since Commission is not within judicial branch, it must be either in executive or in legislative branch); *Advisory Opinion to the Governor,* supra, 223 So.2d at 40 (public service corporation within the legislative and judicial branches); *House Speaker v. Governor, supra.* 506 N.W.2d at 190 (Department of Natural Resources within executive branch).

As for Justice Jackson's dissenting opinion in *Federal Trade Commission v. Ruberoid Co.,* 72 S.Ct 800. 810 (1952), which described the Federal Trade Commission as part of a "fourth branch of the Government," the Court notes that the Federal Trade Commission is now classified as an "independent establishment within the executive branch" under 5 U.S.C. § 105.[18/] It may be desirable from a policy perspective to take Justice Jackson's perceptive dictum at face value and recognize the official existence of a fourth branch of government. *See* 1 Davis, *Administrative Law Treatise,* § 1.08 (suggesting explicit constitutional recognition of administrative agencies exercising "blended" powers outside of any single branch). Such a departure from precedent may be within the power of the Commonwealth Supreme Court on appeal; however, it is not within the power of this Court.

(d) Functional Analysis. Applicable precedents show the Court a way out of the classification dilemma described above, although the solution is not a doctrinally satisfactory one. In deciding whether an agency falls within the executive branch of government, many courts look to the agency's *function* rather than its structure. *See Ameron, supra,* 787 F.2d at 883 ("instead of decision by label, we must focus on function and reality"). MVB's brief

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[18/] Only *Ameron, Inc. v. U.S. Army Corps of Engineers. 787* F.2d 875, 886 (3rd Cir. 1986), which deemed the General Accounting Office ("GAO") part of a "headless fourth branch of government," expresses a *holding* fully supporting Petitioners' position. The Court notes that GAO is expressly exempted from executive reorganization by 5 U.S.C. § 902, revealing a degree of independence not enjoyed by other "independent" agencies.

urges the Court to perform such a functional analysis. arguing that most of MVB's functions are "independent" in nature and that only two are "executive." *MVB Brief* at 36-38.

This functional analysis has been adopted even in jurisdictions containing constitutional provisions similar to Art. III, § 15 which on their face call for a structural analysis. For example, *In re Advisory Opinion to the Governor,* 223 So.2d 35 (Fla. 1969), dealt with a constitutional provision which provided:

> Executive Departments -- All functions of the executive branch of state government shall be allotted among not more than twenty-five departments, exclusive of those specifically provided for or authorized in this constitution.

323 So.2d at 36. The Florida governor asked the state Supreme Court to determine whether the state Public Service Commission was an executive branch agency under this provision. The Court's analysis focused on "[t]he essential nature and effect of the governmental function to be performed, rather than the name given to the function or the officer who performs it." *Id.* at 39. Because the Commission's functions pertained to the legislative and judicial branches of government, the court deemed it constitutional for the Commission to exist outside the main departments of the executive branch. 223 So.2d at 40.

Similarly, in *Commission on Ethics v. Sullivan,* 489 So.2d *10,* 12, (Fla. 1986) the Florida court found that the state Commission on Ethics was neither a separate constitutional entity nor part of the executive branch. Looking at the essential nature and effect of the commission's powers and comparing those powers to each of the three branches of government, the court concluded that the commission was part of the legislative branch. Id. Thus, the court found that the commission's membership and reporting scheme was constitutional.

In *Chiles v. Public Service Commission Nominating Council,* 573 So.2d 829, 832 (Fla. 1991), the court reaffirmed its earlier holding that the state Public Service Commission was

not part of the executive branch, again applying a "primary function" test. The court reasoned that although the commission performed both executive and quasi-judicial functions. its *primary* functions were legislative in nature. Id.

Most significantly for the Court's purposes here, the Appellate Division of the N.M.I. District Court also applied this type of analysis in *Mafnas v. Camacho*, *supra*, 1 CR at 308. when it focused on the conclusion that the Civil Service Commission "exists primarily to *perform executive functions* although independent to the extent it is to be free from political manipulation" (emphasis added; citation omitted).

After reviewing these authorities, the Court is not at all satisfied that either *Mafnas* or the Florida cases have truly faced the mandate of both the Commonwealth and the Florida constitutions that executive agencies be *structurally* located within the main executive departments or fit within the enumerated exceptions in order to exist within the executive branch.[19/] However, as a judgment of the Appellate Division, the *Mafnas* opinion is binding on this Court until and unless it is overruled by the Commonwealth Supreme Court. *See Commonwealth v. Superior Court*, 1 N.M.I. 287, 291 (1990) (Supreme Court considers decisions of Appellate Division on an equal footing with prior Supreme Court opinions); *see also* Remarks of Chief Justice Dela Cruz on the Dedication of the New Courtroom of the U.S. District Court (Oct. 25, 1990).

Following the functional analysis mandated by binding authority, the Court finds that MVB's functions and duties, as listed in 4 CMC § 2106, are primarily executive, as opposed

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[19/] The exceptions in Art. III, § 15 for "regulatory, quasi-judicial and temporary" agencies make the functional analysis of *Mafnas* even more troubling from a doctrinal point of view. If all agencies performing "executive" functions are considered within the executive branch, and by the mandate of § 15 all regulatory and quasi-judicial functions are also within the executive branch, then effectively all agencies are in the executive branch. How this result can be squared with the first sentence of § 15 is far from clear to the Court.

to regulatory or quasi-judicial. In particular, the following of MVB's functions are executive: constructing, licensing and maintaining tourist sites; maintaining reception booths; promoting indigenous culture; conducting advertising campaigns; accepting gifts on behalf of the government; and coordinating the tourism promotion efforts of the government.

The attempts by MVB and CPA to classify these functions as "independent" (MVB *Brief* at 36-38) or "private" *(CPA Brief* at *19)* make little analytic sense given the governmental structure set forth by the Covenant. If MVB were a private entity, such functions could be considered "private." *See Laguana, supra,* slip op. at 7. But MVB is a creature of the state. and its functions must be classified among the powers exercised by the state. MVB's essentia role is to administer tourist facilities and to deliver various kinds of services to private busines and to the public at large. These are executive functions. It is true that MVB also perform some functions that are arguably legislative, such as advising the legislature on improvin tourism facilities and procedures. But these functions are not the *primary* function of *MVE See Chiles, supra,* 573 So.2d at 832.

In sum, the Court finds that MVB is part of the executive branch of the Commonweal. vernment. Hence, MVB is subject to the Governor's reorganization power under Art. II of the Commonwealth Constitution.

This brings the Court back to the question of standing to sue. Since the Court earl' found that MVB's claim to standing is premised on its constitutional argument that it is outsi the executive branch, the failure of MVB's claim on the merits also means that MVB does have standing to bring this action. *See Black River Regulatory Dist. v. Adirondack Lea Club,* 121 N.E.2d 428, 433-4 (N.Y. 1954). However, there are also several individ Petitioners in this lawsuit whose standing is not in doubt. The Court therefore will not disn this action, but will proceed to the consideration of the other Petitioners' final claim.

E. CONSTITUTIONALITY OF SENATE "APPROVAL" OF E.O. 94-2

No reported case within the Commonwealth discusses the rules governing the legislative power to disapprove a reorganization plan under Art. III, § 15. Nevertheless, the importance of the legislature's role, as the only check on a broad grant of executive power, is beyond dispute. As *Mafnas v. Carnacho, supra,* 1 CR at 307 stated, "the [reorganization] power of the Governor [...] is extensive but subject to legislative control." *See also House Speaker v. Governor, supra,* 506 N.W.2d at 204 (discussing Michigan Constitutional Convention debate on balance between executive authority to promulgate reorganization plan and legislative power to veto such plan); *Lusk v. U.S., supra,* 173 Ct.Cl. 193 at *4 (safeguard against unwise reorganizations is "reserve power in the Congress to disapprove any proposed plan"). Thus in order to determine whether constitutional limitations on legislative procedure invalidate the Senate's action here, the Court will again examine the experience of the Federal government and the fifty states for guidance.

(1) Historical Development of "Legislative Veto".

Prior to 1984, the federal reorganization statute contained a "one-house" legislative veto. *See, e.g.*, 89 Stat. 554 (1966 Reorganization Act). In other words, *either* House Congress could disapprove a reorganization plan by passing a resolution, on its own disapproving the plan within sixty days of its presentation by the President. However, in 19 the U.S. Supreme Court declared such statutorily-created "legislative vetoes" unconstitutior *INS* v. *Chadha,* 103 S.Ct. 2764 (1983). The *Chadha* ruling was based in part on constitutional requirement of bicameral action to enact laws, rather than by the unilateral act of a single House. "The division of Congress into two distinct bodies assures that legislative power would be only after opportunity for full study and debate in sepa settings." 103 S.Ct. at 2784. The *Chadha* Court also noted that to carry out the principl

the Great Compromise, creating one house representing the States and another house representing the population, both houses of Congress must operate jointly. Id. at 2783-4. Soon after the *Chadha* ruling, Congress amended the federal reorganization statute to require the *approval* of *both* Houses of Congress and the signature of the President for any reorganization plan to take effect. 5 U.S.C. § 906.

(2) Legislative Veto Under Art. III, § 15.

Art. III, § 15 is part of the Commonwealth Constitution, not merely part of a statute. Moreover, the Covenant does not incorporate the portion of the United States Constitution on which the U.S. Supreme Court based its *Chadha* ruling. *See Chadha,* 103 S.Ct at 2782: Covenant, § 501. Thus, the "legislative veto"[20/] contained in Art. III, § 15 is no unconstitutional under *Chadha.* However, the principles of bicameral legislative action laid down in *Chadha* are directly applicable to the Commonwealth.

Like the federal government, the Commonwealth was founded on a "Great Compromise" between the islands of Saipan, Rota and Tinian, resulting in two houses of the Legislature based on quite different principles of representation. *See Analysis to the Covena.* at 25. In order to address concerns of the less-populated islands that they would have no voice in a legislature based on population only, the drafters of the Covenant established a bicameral system with a Senate whose membership would be evenly divided among the three principal islands, while the House of Representatives would be apportioned on a population basis.

[20/] Amicus House Members argue without citation that only a *statutory* provision giving the legislature the power of disapproval should be called a "legislative veto." See House Br. at 4, n. 5. However, the Court's research revealed uses of the phrase "legislative veto" in reference to powers granted by state constitutions as well. *See, e.g., State v. A.L.I. V Voluntary,* 606 P.2d 769, 774 (Alaska 1980) (referring to legislative veto provisions of state constitution); *Vansicle* v. *Shanahan, 511* P.2d 223, 241 (Kan. 1973) (same). Therefore, opinion uses the term in both contexts.

In light of this bicameral structure. it is significant that the Commonwealth Constitution contains no authorization for one house of the Legislature to act unilaterally, outside of the Senate's traditional role of confirming executive nominations. Article II, § 5(a) specifies that "[t]he legislature may not enact a law except by bill and no bill may be enacted without the approval of at least a majority of the votes cast in each house of the legislature." Article III, § 15 likewise requires action by "a majority of the members of each house of the legislature" to exercise the power to disapprove an executive reorganization. Given these clear requirements of bicameral action, the Court cannot infer any power of unicameral action that is not within the express terms of the Constitution itself.[21/] *See, e.g., A.L.I.V.E. Voluntary, supra, 606* P.2d at 775 (given constitutional concerns over "legislative veto", no such power not expressly given in state constitution can be implied).

(3) Constitutional Defects of Senate "Approval" of E.O.

During oral argument, Respondent contended that the common-law rule against unicameral recall of a jointly-enacted bill or resolution did not raise constitutional issues. However. the cases on point are clearly grounded in the constitutional bicameralism requirements discussed above. *See King* v. *Cuomo, supra,* 613 N.E.2d at 952-3 (striking down bicameral recall procedure as violating Art. IV, § 7 of New York Constitution); *In re Opinion of the Justices.* 174 A.2d 818. 819 (Del. 1961) (under state constitution. one house has power to recall joint resolution once transmitted to Governor without consent of other house); *State ex rel. Florida Portland Cement Co.* v. *Hale,* 176 So. 577, 561 (Fla. 1937) (state constitution prohibits one house from recalling bill passed by both houses and presented

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[21/] It could be argued that it only takes one house of the Legislature to "approve" reorganization, since such "approval" makes a bicameral *disapproval* impossible. But under § 15, a unicameral "approval" is an act of no legal significance. It is the same as complete silence. The legislative only act carrying legal consequence under § 15 is a bicameral disapproval of the Governor's plan.

Governor); Recalling Bills, 31 P. 474 (Colo. 1886) (constitution permitted recall by means of joint resolution of state legislature); People v. Devlin, 33 N.Y. 269, 277 (N.Y. 1865); Annotation, 96 A.L.R. 1309, 1311.

A minority view recognizes a right of unilateral recall by a single house of the legislature, upon a showing that the legislature and governor have developed a custom of permitting such recall. See State v. Sessions, 115 P. 641, 645 (Kan. 1911). In response to the Court's inquiry at oral argument, counsel for Amicus House Members indicated that unicameral recalls have been permitted in the past in the Commonwealth. However, no competent evidence of this prior practice is before the Court. Furthermore, even if such evidence were presented, the better view on this point is expressed by King v. Cuomo, 61: N.E.2d at 953: "the Legislature, even with the Executive's acquiescence, cannot place itself outside [...] the Constitution."

The clear weight of this authority demonstrates that the Commonwealth Senate lacked the power to reconsider Senate Joint Resolution 9-7 without securing the agreement of the House of Representatives to recall the Joint resolution from the Governor. The Senate's failure to do so rendered Senate Resolution 9-22 void and left Senate Joint Resolution 9-7 in full force from May 5, 1994 onwards.

As a result of the unconstitutionality of the Senate's "approval" of E.O. 94-2, the Court finds that Reorganization Plan No. 1 was disapproved by the Ninth Commonwealth Legislature on May 5, 1994 and can have no force or effect as law.

IV. SUMMARY

In summary, in this Decision the Court finds:

1. MVB's lawsuit raises constitutional questions: a) concerning the scope of the Governor's reorganization power; and b) concerning whether the two houses of the Legislature are required to act jointly in order to recall and reconsider a joint resolution. The presence of these constitutional questions requires this Court to take jurisdiction over MVB's suit and find that it is not purely a "political question."

2. MVB is not a formal corporation, because the statute that created it does not grant MVB formal corporate powers. However, MVB can be considered a "quasi-corporation' because it has many of the functional attributes of a corporation. As a quasi-corporation, MVE has the capacity to sue and be sued.

3. The individual Petitioners clearly have standing to bring this lawsuit. However the standing of MVB itself depends on the success of its claim that it is outside the executiv branch of the Commonwealth government. If MVB is inside the executive branch, it has n standing to sue the Governor; if MVB is independent. it has standing.

4. The Governor's power to reorganize the Government under Art. III, § 15 of tl ommonwealth Constitution extends to the full range of the executive branch, including bo in executive departments and "regulatory, quasi-judicial and temporary" agencies.

5. The District Legislature which created MVB appears to have intended for it outside the executive branch. Moreover, the organizational structure of MVB is outs uctures of the executive branch as defined by Art. III, § 15. MVB is also clearly :he legislative or judicial branches. However, the Covenant requires that there be o unree branches of government and does not allow for "independent" agencies that are provided for in the Covenant or the Constitution.

6. The Appellate Division of the District Court decided an issue similar to this one in 1982 by looking at an agency's *functions* rather than the agency's *structure*. That decision is binding on this Court. The functions performed by MVB are primarily executive in nature. Therefore, following binding precedent, the Court finds that MVB is located within the executive branch.

7. As an executive branch agency of the government, MVB has no standing to bring this lawsuit. However, since the individual Petitioners do have standing, the Court will not dismiss the suit.

8. Before the Senate had the power to reconsider and "approve" E.O. 94-2, it firs had to obtain the agreement of the House of Representatives to recall the earlier Join Resolution that had *disapproved* the E.O. The Senate's failure to follow this recall procedur violated Art. II, § 5(a) and Art. III, § 15 of the Commonwealth Constitution. Therefore Senate Resolution 9-22, which "approved" the E.O. was null and void, and the Legislature earlier disapproval of E.O. 94-2 stands. For this reason, the E.O. is null and void.

V. JUDGMENT[22/]

For the foregoing reasons, the Court renders Judgment as follows:

1. As to the claim of Marianas Visitors Bureau that it is outside the Governor power of reorganization under Article III, § 15. the Court finds in favor of RESPONDENT:

2. As to the claim that the Commonwealth Senate lacked the power to reconsi and approve Executive Order 94-2 after it had been disapproved in Senate Joint Resolution 9

[22/] This case involves constitutional issues of great complexity and importance. rendering this Judgment, the Court has taken considerable time to study and evaluate the iss raised. In consequence, the Court wishes to advise all parties in advance that no reconsidera of this Decision will be entertained. The Court urges the parties to bring any errors percei in this Decision to the attention of the Commonwealth Supreme Court on appeal.

the Court finds in favor of PETITIONERS. Executive Order 94-2 is thus hereby declared to be void and of no legal effect.

So ORDERED this 23 day of June, 1994.

ALEXANDRO C. CASTRO, Presiding Judge