IN THE SUPREME COURT OF GUAM

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

Governor Felix P. Camacho
Petitioner

Lieutenant Governor Kaleo S. Moylan
Party in Interest

Supreme Court Case No. CRQ 04-001

OPINION

Cite as: 2004 Guam 10

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Request for Declaratory Judgment pursuant to
section 4104 of Title 7 of the Guam Code Annotated
Argued and submitted on May 19, 2004
Hagåtña, Guam

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; FRANCES M. TYDINGCO-GATEWOOD, Associate Justice; PETER C. SIGUENZA, JR., Justice *Pro Tempore*.

CARBULLIDO, C.J.:

[1] The Governor of Guam, Felix P. Camacho ("the Governor" or "Governor Camacho"), filed a Request for Declaratory Judgment pursuant to Title 7 GCA § 4104 requesting that this court interpret portions of sections 6 and 9 of the Organic Act of Guam (codified at 48 U.S.C. §§ 1422 and 1422c) relative to the Governor's powers of general supervision and control of all bureaus of the executive branch, his power to appoint and remove all heads of executive agencies and instrumentalities as well as officers and employees of the executive branch, and his power to reorganize. With regard to the organicity of Public Law 26-169, which created the Guam State Clearinghouse, we hold that its provisions granting exclusive purview over federal funding sources to the Guam State Clearinghouse, and final authority over federal fund applications to the Director of the Guam State Clearinghouse are in derogation of the Governor's powers of general supervision and control as set forth in section 1422 of the Organic Act, and are therefore inorganic and invalid. We also hold that Public Law 26-169's designation of the Lieutenant Governor as the Director of the Guam State Clearinghouse does not constitute an appointment, but rather, is a valid exercise of the Legislature's power to prescribe executive powers and duties to the Lieutenant Governor, as set forth in sections 1422 and 1423a of the Organic Act. We further hold that the inorganic provisions of Public Law 26-169 are severable and thus, we uphold the remaining provisions of Public Law 26-169. With respect to the Governor's issuance of Executive Order 2004-07, we hold that such executive order is void as an invalid exercise of the Governor's authority to issue executive orders pursuant to section 1422. Finally, we hold that the Governor properly exercised his Organic Act removal authority in terminating the unclassified employments of Executive Branch employees Bertha Duenas and Raymond Blas.

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I.

[2] 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).[1] 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.

[3] On June 16, 2003, Governor Camacho issued Governor's Circular No. 2003-0015, outlining the procedures immediately effective for all off-island travel. In relevant part, it required that the following documents be submitted with all travel requests: "a written justification for such travel" based on several factors identified in the circular; "a completed Travel Authorization Request form for the Governor's signature, a memorandum designating the person who will act in an acting capacity during the traveler's absence for the Governor's signature, and a completed Administrative Leave Application form for the Governor's signature." Governor's Addendum, tab 3 (Governor's Circular No. 2003-0015, June 16,

[1] For clarity and ease of reference, the legislation creating the Guam State Clearinghouse will be referred to as Public Law 26-169, and sections therein. It is recognized, however, that Public Law 26-169 has been codified at Title 5 GCA. § 2101 *et seq*. (2003).

2003). Attached to the circular were forms which complied with the new procedural requirements. *Id.*

[4] On January 21, 2004, Bertha Duenas ("Duenas"), Interim Manager for the Clearinghouse, issued GSC Memorandum 04-8 which instructed all department and agency heads to direct all federally funded travel requests to the Clearinghouse, and in addition, stated that Bureau of Budget Management and Research ("BBMR") clearance was no longer required for such requests. Governor's Addendum, tab 2 (Bordallo Decl., Ex. A at its second page).[2] On the same day, Duenas also issued GSC Memorandum 04-9, again to all department and agency heads, similarly informing them to direct all federally funded personnel action requests to the Clearinghouse, and that BBMR clearance was similarly no longer required with respect to such requests. Governor's Addendum, tab 2 (Bordallo Decl., Ex. A at its third page).

[5] On January 23, 2004, the Governor's Chief of Staff, Anthony Sanchez ("Sanchez"), issued Chief of Staff ("COS") Circular No. 2004-0001, which advised all department and agency heads that all requests for personnel action and travel authorizations require the Governor's or his designee's review, approval and clearance. Governor's Addendum, tab 2 (Bordallo Decl., Ex. B). COS Circular No. 2004-0001 further stated, with respect to BBMR, that "[the] powers vested in the Governor of Guam by the Organic Act of Guam, Federal rules and regulations governing Federal funds and disbursements, Executive Orders 87-2, 95-1, 98-33 and Governor's Circular 2003-0015 promulgate the that [BBMR] serve as the Governor's designated staff agency for clearance of all personnel actions and travel authorizations." *Id.*

[6] On March 25, 2004, Governor Camacho terminated the unclassified employments of Duenas and Raymond Blas ("Blas"). Duenas was the Chief of Staff in the Office of the Lieutenant Governor and the Interim Manager of the Clearinghouse. Blas was a staff assistant in the Office of the Lieutenant Governor. Governor Camacho authorized Sanchez to execute the personnel action requests to reflect the termination of Duenas and Blas. Governor's Addendum, tab 1 (Lieutenant Governor's Petition for Alternative and Peremptory Writs of Mandate, Ex. C); Governor's Addendum, tab 5 (April 15, 2004 Letter to Lourdes

[2] We note that GSC Memorandum 04-8 and GSC Memorandum 04-9 are identified as being created on January 21, 2004. Governor's Addendum, tab 2 (Bordallo Decl., Ex. A) However, these documents indicate they were stamped and received by the Office of the Governor on January 20, 2004. While the dates of these documents are not relevant to the matter before this court, we note the discrepancy of the dates on these documents, and we refer to January 21, 2004, as the date the memoranda were purportedly created.

M. Perez). Sanchez executed the personnel action requests effective that same day. Governor's Addendum, tab 1 (Lieutenant Governor's Petition for Alternative and Peremptory Writs of Mandate, Ex. C). Notwithstanding the personnel actions, Duenas and Blas continued to report to work pursuant to the direction of Lieutenant Governor Kaleo S. Moylan ("the Lieutenant Governor" or "Lieutenant Governor"). Governor's Addendum, tab 1 (Lieutenant Governor's Petition for Alternative and Peremptory Writs of Mandate, ¶ 14).

[7] On March 26, 2004, through Executive Order 2004-07, Governor Camacho transferred the Clearinghouse functions, as enumerated by Public Law 26-169: 3, to BBMR, Bureau Statistics and Plans and executive branch agencies and instrumentalities. Exec. Order No. 2004-07 (reproduced at Governor's Addendum, tab 1 (Lieutenant Governor's Petition for Alternative and Peremptory Writs of Mandate, Ex. A)). In addition, the executive order mandated that "Federal programs affecting the executive branch of the government of Guam shall require the final approval of the Governor of Guam." *Id.*

[8] On the same day, Attorney General Douglas Moylan issued a legal opinion regarding "the question of whether the Guam [S]tate Clearinghouse has exclusive jurisdiction over review and approval of federally-funded employee recruitment and travel, or whether the Governor may continue his practice of having BBMR and his office also review these documents, thus rendering the GSC process an additional step in the process, not a replacement of existing steps." Governor's Addendum, tab 6 (March 26, 2004 Attorney General Memorandum (Opinion)). The Attorney General's March 26, 2004 opinion concluded that "absence [sic] any federally-mandated requirements in specific grants, a court would most probably permit the GSC function to be lodged with the Lieutenant Governor and that the BBMR can be divested of those same powers. However, this does not mean that the Governor is to be excluded from the process." *Id.*

[9] The following day, in a letter dated March 27, 2004, Lieutenant Governor Moylan sought Governor Camacho's reconsideration of his decision to terminate Duenas and Blas, and his decision to transfer the functions of the Clearinghouse to other agencies, as mandated by Executive Order 2004-07. Governor's Addendum, tab 7 (March 27, 2004 Letter from Lieutenant Governor Moylan).

[10] On April 12, 2004, the Compiler of Laws issued an opinion on behalf of Attorney General Moylan ("Compiler's Opinion") in response to Lieutenant Governor Moylan's request for a legal opinion from the Attorney General "regarding the ability of the Governor to remove the State Clearinghouse from [his] purview and to fire its staff." Governor's Addendum, tab 1 (Lieutenant Governor's Petition for Alternative and Peremptory Writs of Mandate, Ex. G). The Compiler's Opinion reached the following conclusions: (1) "the placement of the Guam State Clearinghouse with the Lieutenant Governor does not violate Guam law, with possible exceptions which cannot be examined without more specifics"; (2) "the Governor may not, by Executive Order, remove the State Clearinghouse from the Office of the [Lieutenant] Governor, except for those specific functions which do violate the Organic Act"; and (3) "[because] the removal of the Clearinghouse by Executive Order violates the Organic Act, the firing of [Duenas] by the Governor is invalid," and further concluded that the grant of a separate budget to the Lieutenant Governor indicates that the firing of Blas is also invalid. Governor's Addendum, tab 1 (Lieutenant Governor's Petition for Alternative and Peremptory Writs of Mandate, Ex. G).

[11] On April 13, 2004, Lieutenant Governor Moylan issued GSC Memorandum 04-18, declaring "null and void all instruments facilitating federal grant applications and federal fund encumbrances or expenditures that **did not** or, heretofore, **do not** receive the final clearance of the Guam State Clearinghouse. All employees and/or accountable officers will be held accountable for all expenditures . . . ." Governor's Addendum, tab 2 (Bordallo Decl., Ex. A at its first page). In support of this directive, the Lieutenant Governor referenced his Organic Act authority, the mandates of Public Law 26-169, and the Compiler's Opinion. *Id.*

[12] In a letter dated April 14, 2004, Lieutenant Governor Moylan informed Lourdes M. Perez, Director of the Department of Administration ("the Director of DOA"), that the terminations of Duenas and Blas were contrary to law, and thus requested full payment to Duenas and Blas for the pay period ending April 3, 2004. Governor's Addendum, tab 1 (Lieutenant Governor's Petition for Alternative and Peremptory Writs of Mandate, Ex. I at its pp. 4-5).

[13] In a letter dated April 15, 2004 to Attorney General Moylan, Governor Camacho expressed his disagreement with the Compiler's Opinion, written on behalf of the Attorney General, citing section 1422 of the Organic Act and its grant of powers to the Governor of Guam in support of his position. Governor's Addendum, tab 1 (Lieutenant Governor's Petition for Alternative and Peremptory Writs of Mandate, Ex. H at its pp. 1-3).

[14] On April 20, 2004, Lieutenant Governor Moylan filed a Petition for Alternative and Peremptory Writs of Mandate in the Superior Court, seeking the trial court to compel the respondents, Governor Camacho and the Director of DOA, to restore the Clearinghouse within the Office of the Lieutenant Governor, void and dismiss the personnel action terminations of Duenas and Blas, and order the payment of compensation to Duenas and Blas. Governor's Addendum, tab 1 (Lieutenant Governor's Petition for Alternative and Peremptory Writs of Mandate, at pp. 13-14).

[15] On April 26, 2004, Governor Camacho filed the Request for Declaratory Judgment which initiated the matter at bar, seeking a "judgment declaring certain provisions of Public Law 26-169 relating to the Guam State Clearinghouse to be Inorganic," and to "clarify his power to terminate unclassified employees of the Executive Branch, and exercise his reorganization power pursuant to the Organic Act of Guam." Request for Declaratory Judgment, ¶ 7. We assumed original jurisdiction over Governor Camacho's Request pursuant to Title 7 GCA § 4104, and stayed the proceedings below.

[16] Pursuant to the briefing schedule issued by this court, Governor Camacho filed his opening brief on May 7, 2004 and his reply brief on May 18, 2004. The Director of DOA, as *amicus curiae*, filed her brief in support of Governor Camacho on May 7, 2004. In opposition, Lieutenant Governor Moylan, with *amici* Attorney General of Guam and *I Mina' Bente Siete Na Liheslaturan Guåhan* ("the Legislature") in his support, filed their briefs on May 14, 2004.

II.

[17] This court has original jurisdiction over requests for declaratory judgment pursuant to Title 7 GCA § 4104, which states:

> The Governor, in writing . . . may request declaratory judgments from the Supreme Court as to the interpretation of any law, federal or local, lying within the jurisdiction of the courts of Guam to decide, and upon any question affecting the powers and duties of the Governor and the operation of the Executive Branch . . . . The declaratory judgments may be issued only where it is a matter of great public interest and the normal process of law would cause undue delay. Such declaratory judgments shall not be available to private parties. . . .

7 GCA § 4104 (1998).

[18] We find that the Governor's Request for Declaratory Judgment satisfies the jurisdictional standards set forth in Title 7 GCA § 4104, as he requests an interpretation of local and federal law, and presents questions affecting his powers and duties under the Organic Act and the operation of the Executive Branch. *See also In re Request of Governor Felix P. Camacho Relative to the Interpretation and Application of Section 11 of the Organic Act of Guam*, 2003 Guam 16, ¶ 6.

III.

A. History of the Organic Act

[19] The history of Guam has been marked by plenary control by foreign political and military forces. The landing of Ferdinand Magellan in 1521 ushered in the Spanish occupation that ended when the United States gained possession of the island in 1898. *See* ARNOLD H. LEIBOWITZ, DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS, 316-18 (1989). The autocratic framework introduced by the Spanish-appointed governor continued under the United States, which installed a government controlled by the Navy. *See id.* at 318-23. Guam's vulnerability to foreign control was emphasized during World War II, when Japanese forces occupied Guam for two and a half years, until United States Armed Forces recaptured Guam on July 21, 1944 and once again brought Guam under United States control. LEIBOWITZ, at 323-24. At present, Guam remains an unincorporated territory of the United States. Title 48 U.S.C. § 1421a; *see also* STANLEY K. LAUGHLIN, JR., THE LAW OF UNITED STATES TERRITORIES AND AFFILIATED JURISDICTIONS, 403 (1995).

[20] A permanent civilian government is a goal that had long been sought by Guam's people. Self-government saw its first steps with the creation of the Guam Congress, which held its first meeting on February 3, 1917. Exec. Gen. Order No. 216, January 6, 1917, *reprinted in* Guam News Letter, Vol.

VIII, No. 7, at 6 (January 1917) (stating that the Guam Congress was created to "consider questions pertaining to the improvements of the Island and the welfare of the inhabitants, and [then] recommend to the Governor such measures as may be necessary."); *see also* PAUL CARANO & PEDRO C. SANCHEZ, A COMPLETE HISTORY OF GUAM 229-30 (1964); *see also* LAUGHLIN, at 403 (citing U.S. Navy Report on Guam, 1899-1950, Office of the Chief of Navel [sic] Operations (1951)).

[21] A document stating that the thirty-two signatories "have petitioned the Government of the United States to send out a commission . . . to study the situation and needs of the people and to recommend to Congress a plan for the establishment of a permanent Government" apparently had the approval of Governor Seton Schroeder in 1901. Proceedings of Guam Congress, *reprinted in* Guam News Letter Vol. IX, No. 3, at 9-10 (Sept. 1917). Although it appears that no action was ever taken by the Naval or federal government with regard to this document, the Guam Congress acknowledged this 1901 document, and in 1917, requested that then-Governor Roy Smith send it to the United States. Proceedings of Guam Congress, *reprinted in* Guam News Letter Vol. IX, No. 2, 2 (Aug. 1917); Proceedings of Guam Congress, *reprinted in* Guam News Letter Vol. IX, No. 3, 9-10 (Sept. 1917). The Naval Governor's response to the Guam Congress was that "[s]ome action has been taken . . . but they are still pending." Proceedings of Guam Congress, *reprinted in* Guam News Letter Vol. IX, No. 3, 10 (Sept. 1917). In reality, the Guam Congress was limited to acting in an advisory role to the Naval governor, who retained virtually all power regarding the administration of Guam. LAUGHLIN, at 403; CARANO & SANCHEZ, at 229. Although the Guam Congress held monthly meetings, "it tended to act only on matters pleasing to the [Naval G]overnor" and its role was so limited that it was "disregarded . . . entirely" by some Naval Governors. CARANO & SANCHEZ, at 230.

[22] It would take another thirty years for the Guam Congress to be given any real power regarding lawmaking on Guam. In 1947, a proclamation issued by Acting Secretary of the Navy John L. Sullivan directed that only the Guam Congress could make changes to existing laws, implicitly providing that such amendments could no longer be effectuated unilaterally through executive order by the Naval Governor. CARANO & SANCHEZ, at 347. Although the Naval Governor retained a veto power, the Guam Congress

could override the veto by a two-thirds vote in each of the two congressional houses. *Id*. This proclamation, referred to as the Interim Organic Act, was the first substantive grant of power to non-appointed, non-naval officials. *Id*.

[23] Although a gradual process, the establishment of a civil government on Guam had been envisioned by President Harry S. Truman, who stated: "It is the announced aim of this Government to accord civil government and a full measure of civil rights to the inhabitants of its Pacific territories. The accomplishment of this objective will be furthered by the transfer of these territories to civilian administration and the enactment of organic legislation at the earliest practicable date." Letter from President Harry S. Truman to Secretary of the Interior on the Transfer of the Pacific Islands to Civilian Administration (May 18, 1949).[3] The shift away from Naval governance was furthered on Sept. 7, 1949, when President Truman issued Executive Order 10077, which transferred administration of Guam from the U.S. Navy to the Department of the Interior. Exec. Order No. 10077, 14 F.R. 5533; *see also* CARANO & SANCHEZ, at 353. President Truman immediately appointed Mr. Carlton S. Skinner, who was sworn in twenty days later as the first civilian Governor of Guam. CARANO & SANCHEZ, at 355.[4]

[24] It was not until 1950, however, that a civil government of Guam became a reality, when the passage of the Organic Act of Guam created three branches of government. *See generally* Organic Act of Guam, Pub. L. 81-630, codified at 48 U.S.C. § 1421 *et seq.* (1950);[5] *see also* S. REP. NO. 81-2109 (1950), *reprinted in* 1950 U.S.C.C.A.N. 2840;[6] CARANO & SANCHEZ, at 362. A stated purpose of the Organic Act was to "establish[] democratic local government for the island[.]" S. REP. NO. 81-2109 (1950),

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[3] This letter may be found at http://trumanlibrary.org/publicpapers/index.php?pid=1118&st=guam&st1=.

[4] The date of the transfer of Guam was later changed to August 1, 1950, by Executive Order 10137, apparently to coincide with the passage of the Organic Act of Guam. Exec. Order No. 10137, 15 F.R. 4241.

[5] For clarity and ease of reference in this legislative history section, the 1950 enactment of 48 U.S.C. § 1421 *et. seq.* will be referred to as the "Organic Act of Guam," and references are to the specific sections of Public Law 81-630 rather than to subsections of the codified statute. In this way, confusion is avoided when discussing future amendments. *See infra* note 7.

[6] The House of Representative issued a similar report which "repeat[ed] in substance in the Senate Report." H.R. REP. NO. 81-1677 (1950), *reprinted in* 1950 U.S.C.C.A.N. 2840, 1950 WL 1716.

reprinted in 1950 U.S.C.C.A.N. 2840, 2841. The Organic Act also "defined and limited" the "scope of executive authority." *Id.*

[25] Under the Organic Act, the position of the civilian Governor mirrored its predecessor under the United States Navy and was given broad powers. Thus, the Governor was responsible for the "general supervision and control of all executive agencies and instrumentalities of the government of Guam." Organic Act of Guam § 6(b). In addition, the Governor was given the power to "appoint or remove any officer whose appointment [wa]s not otherwise provided for." *Id.* § 9(b). Members of the Senate committee provided clarification regarding employees of the government of Guam:

> Provision is made for the establishment of a merit system for service in the government of Guam. At the same time, the Governor is left free to appoint, by and with consent of the Guam Legislature, heads of executive agencies who would be in policy-making positions. Such a provision is clearly necessary in the interest of efficient government.

S. REP. NO. 81-2109 (1950), *reprinted in* 1950 U.S.C.C.A.N. 2840, 2845.

[26] The "legislative power" of the twenty-one members of the Legislature "extend[ed] to all subjects of legislation of local application not inconsistent with the provisions of th[e Organic] Act and the laws of the United States applicable to Guam." Organic Act of Guam § 11. Finally, the Organic Act created the Federal District Court of Guam, and authorized the creation of local courts as would be provided by the laws of Guam. *Id.* § 22(a).

[27] The Organic Act, although a significant step forward in self-government, nevertheless continued the presidential appointment of Guam's Governor, its chief executive. Moreover, Congress did not enact the proposed provision which would have created the Office of Lieutenant Governor. S. REP. NO. 81-2109 (1950), *reprinted in* U.S.C.C.A.N. 2840, 2845. Instead, Congress created the position of Secretary of Guam who would "have all such executive powers . . . as may be prescribed by this [Organic] Act or assigned to him by the Governor." Organic Act of Guam § 7. The Secretary of Guam would be "a lesser official . . . who would perform the functions of Lieutenant Governor as well as other administrative duties." S. REP. NO. 81-2109 (1950), *reprinted in* U.S.C.C.A.N. 2840, 2845.

[28] Not until 1968 did the people of Guam exercise their voices in choosing the executive leaders of their island. Elective Governor Act, Pub. L. 90-497 (1968) (enacted) (codified at 48 U.S.C. § 1422

(1968));[7] *see also* S. REP. NO. 90-216 (1967).[8] Congress saw the passage of the Elective Governor Act and its amendments to the Organic Act as "a significant forward step in the development of full local self-government in Guam and toward the fulfillment of the political aspirations of its people." S. REP. NO. 90-216, at 5 (1967). The amendments provided for the popular election of the Governor and Lieutenant Governor, to "be chosen jointly, by the casting by each voter of a single vote applicable to both offices." Elective Governor Act § 6. These officeholders were required to be "bona fide resident of Guam" for five years prior to election. *Id.*

[29] The now-elected Governor continued to enjoy broad powers regarding the administration of Guam's executive branch. In fact, where the original Organic Act stated that the Governor "shall have general supervision and control of all executive agencies and instrumentalities of the government of Guam," Organic Act § 6(b), the 1968 amendments appeared to expand on this power, providing that 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." Elective Governor Act § 6.

[30] Under the 1968 amendments, references to the Governor's appointment and removal authority were removed from section 9 of the original Organic Act, although section 1 of the Elective Governor Act contained identical language. The House of Representatives report noted that the deletion of section 9 from the original Organic Act was the result of the language being "duplicative of the powers of the Governor as set forth in section 1 of the [Elective Governor] bill." H.R. REP. NO. 90-1521 (1968), *reprinted in* 1968 U.S.C.C.A.N. 3564, 3568, 1968 WL 5260. Notably, Congress rejected a proposal that would have given the President the power to remove the Governor of Guam, as this power "would amount to nothing less than a step backward toward colonialism." S. REP. NO. 90-216, at 9 (1967).

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[7] The 1968 amendments to 48 U.S.C. § 1422, which were promulgated by Public Law 90-497, will be referred in this legislative history section as the "Elective Governor Act" and references will be made to sections of the Public Law. *See supra* note 5.

[8] Because the Senate report discussing the Guam Elective Governor Act is not available online, page references are to the report itself and not to the *United Code Congressional and Administrative News (U.S.C.C.A.N.)*. The bill proposed by the Senate was passed "in lieu of the House [of Representatives] bill after substituting for its language much of the text of the House bill." H.R. REP. No. 90-1521 (1968), *reprinted in* 1968 U.S.C.C.A.N. 3564, 1968 WL 5260.

[31] Furthermore, the 1968 Elective Governor Act amendments deleted the language from the original Organic Act creating the Secretary of Guam, and instead enacted provisions creating the position and office of the Lieutenant Governor, who "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." Elective Governor Act § 6.

[32] The Organic Act of Guam remained substantially unchanged for twenty years following the 1968 Elective Governor Act amendments. In 1998, an amendment was passed which extended Guam legislative power, changing language from "all subjects of legislation of local application not inconsistent with the provisions of this [Organic] Act and the laws of the United States applicable to Guam" to "all rightful subjects of legislation not inconsistent with the provisions of this [Organic] Act and the laws of the United States applicable to Guam." Pub. L. 105-291, 105th Cong., § 4 (1998) (enacted and codified at 48 U.S.C. §§ 1421g, 1423a). Such amendment to the Legislature's powers were enacted to "provide Guam with a greater measure of self-government." H.R. REP. NO. 105-742 (1998), 1998 WL 658802 at *3.

B. Public Law 26-169 and the Guam State Clearinghouse

[33] Our determination of the organicity of Public Law 26-169 requires us to examine the Legislature's powers under the Organic Act to enact such law. Section 1423a of the Organic Act defines the legislature's powers. It states that, "[t]he legislative power of Guam shall extend to all rightful subjects of legislation not inconsistent with the provisions of this chapter and the laws of the United States applicable to Guam." 48 U.S.C. § 1423a. This court has held that an analysis of the organicity of a local statute "must begin with the general rule that legislative enactments are presumed to be constitutional." *In re Request of Governor Carl T.C. Gutierrez, Relative to the Organicity and Constitutionality of Public Law 26-35,* 2002 Guam 1, ¶ 41. While Congress in 1998 clarified the legislature's power to "provide Guam with a greater measure of self-government," it is a "well-established principle in this jurisdiction that the Guam Legislature cannot enact laws which are in derogation of the provisions of the Organic Act." H.R. REP. NO. 105-742 (1998), 1998 WL 658802 at *3; *In re Request of Governor Camacho*, 2003 Guam 16 at ¶ 15 n.5. 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.'" *In re Request of Governor Gutierrez,* 2002 Guam 1 at ¶ 36 (quoting *Territorial Prosecutor v. Superior Court*, Civ. No. 82-0215, 1983 WL 30224 at *5 (D.Guam App. Div. May 26, 1983)). The Ninth Circuit Court of Appeals similarly recognizes that Guam's self-government is "constrained by the Organic Act" and therefore, held that courts must "invalidate Guam statutes in derogation of the Organic Act." *Haeuser v. Dep't of Law,* 97 F.3d 1152, 1156 (9th Cir.1996). Accordingly, we turn to our consideration of whether the provisions of Public Law 26-169 relevant to the case at bar are in derogation of the Organic Act.

1. General Supervision and Control

[34] 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.

[35] Lieutenant Governor Moylan argues that the Governor's general supervision and control powers may be validly exercised through the Governor's veto and expenditure powers and further, that Clearinghouse forms sufficiently recognize the Governor as the final approval authority, because the Governor's signature is required. Thus, he argues that Public Law 26-169 does not violate the Governor's power of general supervision and control.

[36] The Governor's executive power of general supervision and control is set forth in section 1422 of the Organic Act, which state, in relevant part: "The executive power of Guam shall be vested in an

executive officer whose official title shall be the 'Governor of Guam.'" 48 U.S.C. § 1422. Section 1422 further states that "[t]he 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.*

[37] 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.

[38] Having found that the Clearinghouse is subject to the Governor's general supervision and control power, we turn to the issue of whether Public Law 26-169 is in derogation of such power. There is no controlling case authority in this jurisdiction which defines the phrase "general supervision and control." The term "general" means "overall" or "principal." BLACK'S LAW DICTIONARY 812 (5th ed. 1979). The term "supervision" is defined as "[t]he act of managing, directing, or overseeing persons or projects." BLACK'S LAW DICTIONARY (8th ed. 2004). Similarly, the term "control" is defined as "[t]he direct or indirect

power to direct the management and policies of a person or entity, whether through ownership of voting securities, by contract, or otherwise; the power or authority to manage, direct, or oversee." BLACK'S LAW DICTIONARY (8th ed. 2004). At least one other court has interpreted the inverse phrase "general control and supervision" as being "commonly understood to mean the direction or management of *all* aspects of an operation or business." *Utah Schs Bds. Ass'n v. Utah State Bd. of Educ.*, 17 P.3d 1125, 1129 (Utah 2001) (interpreting the Utah constitution which provided that "[t]he general control and supervision of the public education system shall be vested in the State Board of Education."). The Utah court further noted its prior interpretation of the phrase as meaning "plenary." *Id*. at 1130 (quoting *In re Woodward*, 384 P.2d 110, 112 (Utah 1963) (finding that a "statute unconstitutional that gave general control and supervision over juvenile courts to the probate commission")). We thus conclude that the Governor's power of "general supervision and control of all the departments, bureaus, agencies, and other instrumentalities of the executive branch of the government of Guam," means that the Governor is vested with the overall power to manage, direct, or oversee such entities. 48 U.S.C. § 1422.

[39] With the above definition in mind, we turn to section 2 of Public Law 26-169, which states:

> Notwithstanding any other provision of law to the contrary, the Guam State Clearinghouse shall have *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. On its face, the statutory language vesting the Clearinghouse, an executive branch bureau, with "exclusive" purview at the Guam-level over the enumerated federal funding sources, divests the Governor of his overall power to manage, direct, or oversee the Clearinghouse.

[40] Section 3 of Public Law 26-169 is equally offensive to the Governor's Organic Act powers. It states, in relevant part:

> With the exception of the Guam Community College and the University of Guam, and notwithstanding any other provision of law to the contrary, *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*.

Id. § 3. (emphasis added). The plain language of the statutory section 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. Moreover, we cannot reasonably find that these violations of the Organic Act are ameliorated through the use of Clearinghouse forms which provide a signature line for the Governor's approval of federal funding applications. Such forms do not, in our opinion, transform an otherwise inorganic statutory provision into an organic one.

[41] 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. *See* 48 U.S.C. § 1422; *In re Request of Governor Camacho,* 2003 Guam 16 at ¶ 15 n.5; *In re Request of Governor Gutierrez*, 2002 Guam 1 at ¶ 36; *Haeuser,* 97 F.3d at 1156. We therefore hold that such provisions violate the Organic Act and thus, are invalid.[9] *See In re Request of Governor Camacho,* 2003 Guam 16 at ¶ 15 n.5; *In re Request of Governor Gutierrez*, 2002 Guam 1 at ¶ 36; *Haeuser,* 97 F.3d at 1156.

2. Appointment Powers

[42] 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,

[9] It is significant to note that the issue of whether the provisions of Public Law 26-169 are in conflict with specific federal grants or related federal requirements has not been presented to us for declaratory judgment. We therefore reserve decision on such issues.

invalidly exercised the appointment power which is reserved only for the Governor, and thus also violated the separation of powers doctrine.

[43] Lieutenant Governor Moylan, with *amici* Attorney General Moylan and the Guam Legislature, argue that Public Law 26-169, including its designation of the Lieutenant Governor as Director of the Clearinghouse, is not an appointment but rather is a legislative prescription of executive powers and duties, which is allowed by the Organic Act. They further argue that, if this court finds that an appointment has occurred, the Legislature is nevertheless authorized by the Organic Act to "otherwise provide" for the appointment of the Director of the Clearinghouse, and thus, Public Law 26-169 is a valid exercise of the Legislature's powers. Finally, the Lieutenant Governor and *amici* argue that the separation of powers doctrine is not violated by the Legislature's designation, or appointment, of the Lieutenant Governor as the Director of the Clearinghouse.

[44] The Governor's appointment powers are set forth in sections 1422 and 1422c(a) of the Organic Act. Section 1422 provides for the Governor's power to appoint officers and employees of the executive branch and states, in relevant part, "[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. Section 1422c(a) provides for the Governor's power to appoint the heads of executive agencies and instrumentalities. Under this section, "[t]he Governor shall, except as otherwise provided in this chapter or the laws of Guam, appoint, by and with the advice and consent of the legislature, all heads of executive agencies and instrumentalities." 48 U.S.C. § 1422c(a).

[45] With respect to the Legislature's authorization to prescribe executive powers and duties to the Lieutenant Governor, section 1422 of the Organic Act provides, "[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." 48 U.S.C. § 1422. Under this section, it is clear that the Legislature is granted the authority to prescribe executive powers and duties, so long as such duties are not inconsistent with other Organic Act provisions. *See also* 48 U.S.C. § 1423a ("The legislative

power of Guam shall extend to all rightful subjects of legislation not inconsistent with the provisions of this chapter and the laws of the United States applicable to Guam.").

[46] Accordingly, the threshold issue we must decide is whether the Legislature, in mandating that the Lieutenant Governor serve concomitantly as Director of the Clearinghouse, has prescribed the Lieutenant Governor with an executive power or duty, as contemplated and authorized by sections 1422 and 1423a of the Organic Act, or whether in so doing the Legislature in fact exercised the Governor's power of appointment, thus implicating the appointments clauses found at sections 1422 and 1422c(a) of the Organic Act, and raising separation of powers concerns.

[47] Turning to case law for guidance, in *Southern Pac. Co. v. Bartine*, the law in question provided, "[a] Railroad Commission is hereby created, to be composed of three commissioners. The Governor, the Lieutenant-Governor, and the Attorney-General shall constitute a railroad board for the purpose of appointing such commissioners." *Southern Pac. Co. v. Bartine*, 170 F. 725 (C.C.D. Nev. 1909) (quoting St. Nev. 1907, p. 73, ch. 44 § 1). There, the court considered whether the legislature exercised the power of appointment. Finding no exercise of the appointment power, the court held:

> If in the statute in question certain non office holding individuals were designated by name to be members of and to constitute the railroad board, undoubtedly it would be an appointment by the Legislature. But this is not the case. The duty of serving as members of the railroad board and of appointing commissioners is by the act attached and added to the duties and powers of the offices of Governor, Lieutenant Governor, and Attorney General.

Id. at 746.

[48] Similarly, in the case of *Shoemaker v. United States*, Congress enacted a statute which established a five-member commission to oversee the development of a park in the District of Columbia. *Shoemaker*, 147 U.S. 282, 301, 13 S. Ct. 361, 391 (1893). The statute provided that three of the commission members would be appointed by the President, with the advice and consent of the Senate, and the remaining two would be "the Chief of Engineers of the Army" and "the Engineer Commissioner of the District of Columbia." *Id.* at 284, 13 S. Ct. at 363. The *Shoemaker* Court held that the officers need not be appointed, and held, "it cannot be doubted, and it has frequently been the case, that Congress may increase the power and duties of an existing office without thereby rendering it necessary that the incumbent

should be again nominated and appointed." *Id.* at 300-01, 13 S. Ct. at 391. In considering the facts before it, the *Shoemaker* Court stated that the "duty which the military officers in question were called upon to perform cannot fairly be said to have been dissimilar to, or outside of the sphere of their [existing] official duties." *Id.* at 301, 13 S. Ct. at 391.

[49] In *Armstrong v. Townsend*, 8 F.Supp. 953 (D.C.S.D. Ind. 1934), the Indiana Lieutenant Governor was made a member of the "Department of Commerce and Industries." *Id.* at 954. The provisions of the act creating the department stated:

> That the department of commerce and industries shall be in charge of the board of department of commerce and industries, which board shall consist of the governor, the lieutenant-governor, and three other persons, one of whom shall be designated by the governor as the chief administrative officer thereof; and in the discretion and upon the direction of the governor such additional number of persons as he may direct from time to time, not to exceed five.

Id. (quoting Acts Ind. 1933, ch. 4, § 17 at 12). Under the above authority, the Indiana Governor named the Lieutenant Governor as chief administrative officer of the department. The *Armstrong* court pointed out that the legislature later passed another law creating the "Division of Agriculture" to exist under the "Department of Commerce and Industries," and providing that "the chief administrative officer of the 'department of commerce and industries' shall be the administrative and executive officer of the 'division of agriculture.'" *Id.* at 954 (quoting Acts Ind. 1933, ch. 257, § 1 at 1140). The Lieutenant Governor, therefore, as the chief administrative officer of the Department of Commerce and Industries, became the administrative and executive officer of the Division of Agriculture. *Id.* The *Armstrong* court held, in response to the issue of whether the legislature created an additional office for the Lieutenant Governor, that "the legislation in question . . . did not create a new office to be filled by the Lieutenant Governor, but simply enlarged his duties in the department of the government of which he is a member . . . ." *Id.* at 958. *Cf. State ex rel. Att'y Genl v. Kennon*, 7 Ohio St. 546, 572 (1857) (Swan, J., concurring). Judge Swan explained circumstances in which he believed that the appointment power would have been exercised, stating that:

> If the general assembly conferred upon the incumbent of the gubernatorial chair official public powers as an individual, so that he would continue to exercise the powers thus conferred, whether he continued to hold the office of governor or not, it would seem quite

> manifest, to my mind, that the general assembly created an office in such case, and exercised the appointing power.

Id.

[50] With the above principles in mind, we examine section 2 of Public Law 26-169, which provides: "The Guam State Clearinghouse shall be headed by a Director, who shall be *I Segundu Na Maga'lahi*." Applying the cases discussed *supra*, we hold 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. *Armstrong*, 8 F.Supp. at 958; *Southern Pac. Co.*, 170 F. at 746. The Legislature has not designated by name any individual in a non office holding position to sit as the Director of the Clearinghouse. *See Southern Pac. Co.*, 170 F. at 746 (stating that if "non office holding individuals were designated by name to be members of and to constitute the railroad board, undoubtedly it would be an appointment by the Legislature"). Rather, Public Law 26-169 "attached and added to the duties and powers" of his office as Lieutenant Governor. *Id.* at 746.

[51] Consequently, we hold that the Governor's appointment powers under sections 1422 and 1422c(a) of the Organic Act are not implicated by Public Law 26-169. We further hold that the provision of Public Law 26-169, designating the Lieutenant Governor as the Director of the Clearinghouse, is expressly authorized by section 1422 of the Organic Act, and is therefore a valid exercise of the Legislature's powers. *See* 48 U.S.C. §§ 1422, 1423a.

[52] 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.

[53] In *State ex rel. Link v. Olson*, the court recognized that the separation of powers doctrine imposes limitations on the legislature to enact laws regarding constitutional officers. *State ex rel. Link v. Olson*, 286 N.W.2d 262, 273 -274 (N.D. 1979) ("Every constitutional officer derives his power and authority from the constitution, the same as the Legislature does, and the Legislature, *in the absence of express constitutional authority,* is as powerless to add to a constitutional office duties foreign to that office.") 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. 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.

3. Severability

[54] The final issue we consider with respect to Public Law 26-169 is whether principles of severability may be applied to preserve its remaining provisions which are not invalid. A severability provision is found in section 10 of Public Law 26-169, and states:

> **Severability**. *If* any provision of this Law or its application to any person or circumstance is found to be invalid or contrary to law, such invalidity shall *not* affect other provisions or applications of this Law which can be given effect without the invalid provisions or application, and to this end the provisions of this Law are severable.

P.L. 26-169: 10. While the "presence of a severability clause creates a presumption that [the Legislature] did not intend for the validity of a statute to depend on the survival of its constitutionally offensive provisions[,] . . . . that presumption is not conclusive." *Western States Med. Ctr. v. Shalala*, 238 F.3d 1090, 1097 (9th Cir. 2001) (citation omitted). Under the traditional test for severability, fashioned more than seventy years ago: "Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Champlin Refining Co. v. Corp. Comm'n of Okla.*, 286 U.S. 210, 234, 52 S. Ct. 559, 565 (1932). Thus, our inquiry of whether an invalid provision may be severed from a statute involves a two-part test. (1) Whether, if the inorganic provisions of Public Law 26-169 are dropped, the remaining provisions will be fully operative as law; and (2) if so, whether the legislative intent in enacting Public Law 26-169 can be accomplished through the remaining provisions. *See id.*

[55] Applying part one of the test, we find that if the invalid terms "exclusive" and "final" are excised from sections 2 and 3 of Public Law 26-169, the remaining provisions are fully operative as law. *See* P.L. 26-169:2, 3.

[56] Next, in applying part two of the test, we must examine the legislative intent in enacting Public Law 26-169, which is found at section 1. P.L. 26-169: 1. The Legislature recognized the "need to establish a single and centralized clearinghouse within the government of Guam." *Id.* The clearinghouse would thus be "responsible for overseeing all Federal aid programs, grants, loans, direct Federal development, and other Federal funding sources for Guam." *Id.* In light 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 federal funding programs for Guam and maintain rapport with the various federal agencies. *Id.* Finally, the Legislature declared, "it is important that responsibility for these matters is vested at the highest levels of the Executive Branch of government." *Id.*

[57] We find that the legislative intent as expressed in section 1 can be accomplished despite our invalidation of the inorganic provisions found in sections 2 and 3 of the statute. First, the Clearinghouse remains within the highest levels of the Executive Branch, the Office of the Lieutenant Governor. *Id.* at § 2. Second, also ensuring that the highest levels of the Executive Branch be responsible for these matters, under section 3 the Director of the Clearinghouse retains the approval authority of all federal funding applications and under section 2, the Director is identified as the Lieutenant Governor. *Id.* §§ 2, 3. Third, under section 2, the Clearinghouse retains the purview "over all Federal aid programs, grants, loans, contracts, contributions, appropriations, advances, direct Federal development and other Federal funding sources for Guam[,]" thus accomplishing the centralization goal. *Id.* Finally, the remainder of the duties and responsibilities of the Clearinghouse, found in section 3 of Public Law 26-169, are unchanged by the removal of the invalid terms from sections 2 and 3.[10] Thus, examination of the surviving sections of Public

[10] The duties and responsibilities of the Clearinghouse are found in Section 3 of Public Law 26-169, which states:

> In addition to the duties and responsibilities of the Guam State Clearinghouse as may be prescribed by *I Segundu Na Maga'lahi* [the Lieutenant Governor], or by law, the Guam State Clearinghouse shall also have the following duties and responsibilities:
>
> > (a) Administer the initiation, coordination and review process of all activities within Guam involving Federal financial assistance.
> >
> > (b) Ensure that grant proposals for Federal assistance are in accordance with plans, policies, programs, objectives and procedures of the government of Guam.
> >
> > (c) Ensure that proposed projects for which Federal financial assistance is sought are fiscally and environmentally sound and are in compliance with all applicable Federal laws.
> >
> > (d) Ensure that the government of Guam complies with all applicable Federal laws relating to Federal financial assistance and that there exists sound tracking, management, and financial accountability for all Federal programs awarded to the government of Guam.
> >
> > (e) Perform cost analysis on all Federal aid programs, grants, loans, contracts, contributions, advances, direct Federal development, or other Federal funding for the financial impact on the government of Guam's General Fund or

Law 26-169 indicates that the legislative intent in enacting Public Law 26-169, that is, to establish a single and centralized clearinghouse at the highest levels of the executive branch which would be responsible for overseeing all federal funding programs, can still be accomplished. As a result, we hold that the inorganic provisions may be severed and thus, the remaining provisions of Public Law 26-169 are upheld. *See Champlin Refining Co.*, 286 U.S. 210 at 234, 52 S. Ct. at 559.

C. Executive Order 2004-07

[58] Governor Camacho argues that he has legitimately exercised his Organic Act reorganization powers, pursuant to 48 U.S.C. § 1422c(c), and he merely carried out such actions through Executive Order 2004-07, and therefore, such action is valid. Governor's Brief, pp. 27-30. Lieutenant Governor Moylan, however, contends that Executive Order 2004-07 is in conflict with Public Law 26-169 and is therefore invalid. Lieutenant Governor's Brief, pp. 43-45.

[59] The Organic Act expressly provides the Governor with authority to issue executive orders, stating that: "[The Governor] shall have the power to issue executive orders and regulations not in conflict with any applicable law." 48 U.S.C. § 1422. Although the Governor asserts that his issuance of Executive Order 2004-07 transferring the functions of the Clearinghouse to BBMR, the Bureau of Statistics and Plans, and other executive branch agencies was a proper exercise of his Organic Act power to reorganize, Request for Declaratory Judgment, at 8, his purported reorganization was nonetheless undertaken through issuance of an executive order. Therefore, the threshold issue before us is whether Executive Order 2004-07 was validly issued pursuant to the Governor's section 1422 authority to issue executive orders which are "not in conflict with any applicable law." 48 U.S.C. § 1422.

[60] Courts have generally recognized three kinds of executive orders. *See Shapp v. Butera*, 348 A.2d 910 (Pa. Commw. Ct. 1975); *see also* Benjamin S. Longlet, Comment, *Gubernatorial Executive Orders*

> special funds used to fund the local matching requirement as prescribed by Federal law; and the financial impact on the government of Guam for the continuation of the Federal program should the Federal funding expire and require the government of Guam to financially assume the program's operation one hundred percent (100%).

P.L. 26-169: 3.

in Wisconsin: The Case for Judicial Enforcement, WIS. L.REV. 1323, 1325 (2000). The first type consists of ceremonial and political executive orders, usually issued as proclamations declaring a special day or commemorating a special event. *Shapp*, 348 A.2d at 913. The second type are "directives" that communicate to subordinate executive branch employees a request or suggestion of action "for execution of the [executive branch] duties . . . ." *Id.* The third type of order "serve[s] to implement or supplement the Constitution or statutes" and have the force of law. *Id.* Executive Order 2004-07 is neither ceremonial nor a mere communication to subordinates; rather, it is the third type.

[61] The issue in this case is whether Executive Order 2004-07 is valid. Such an executive order "is entitled to the same presumption of constitutionality that a statute enjoys and, thus, should be construed as constitutional unless its unconstitutionality is clearly apparent." *County Road Ass'n v. Governor*, 677 N.W.2d 340, 348 (Mich. Ct. App. 2004) (citing *Straus v. Governor*, 592 N.W.2d 53 (Mich. 1999). Therefore, unless we determine that the unconstitutionality of Executive Order 2004-07 is clearly apparent, we must find it to be valid. *See id.* Since the Governor is only authorized to issue executive orders "not in conflict with any applicable law" 48 U.S.C. § 1422, if we find that Executive Order 2004-07 is in conflict with an applicable law, its unconstitutionality would be clearly apparent and Executive Order 2004-07 would be invalid.

[62] The first step in evaluating whether Executive Order 2004-07 conflicts with any applicable law is to determine what law is, in fact, applicable. As illustrated herein, both Executive Order 2004-07 and Public Law 26-169 address the functions of the Clearinghouse. The applicability of Public Law 26-169 is clear upon comparing the functions which the Governor transferred through Executive Order 2004-07 to the duties and responsibilities of the Clearinghouse identified by section 3 of Public Law 26-169 which added subsections 2101.1 (a) through (e) to Title 5 of the Guam Code Annotated. Each subsection is compared below.

[63] Subsection 2101.1(a) states that the Clearinghouse shall "[a]dminister the initiation, coordination, and review process of all activities within Guam involving Federal financial assistance." P.L. 26-169: 3. Paragraph I.B.1. of Executive Order 2004-07 states that the Bureau of Statistics and Plans has the duty

to "[i]nitiate, coordinate, and review process of all activities within Guam involving Federal financial assistance." Exec. Order No. 2004-07, ¶ I.B.1.

[64] Subsection 2101.1(b) states that the Clearinghouse shall "[e]nsure that grant proposals for Federal assistance are in accordance with plans, policies, programs, objectives and procedures of the government of Guam." P.L. 26-169: 3. Paragraph I.B.2. of Executive Order 2004-07 states, in identical language, that the Bureau of Plans and Statistics will be responsible for these duties. Exec. Order No. 2004-07, ¶ I.B.2.

[65] Subsection 2101.1(c) states that the Clearinghouse shall "[e]nsure that proposed projects for which Federal financial assistance is sought are fiscally and environmentally sound and are in compliance with all applicable Federal laws." Again, identical language is found in paragraph I.A.1. of Executive Order 2004-07, which transferred such duties to BBMR. Exec. Order No. 2004-07, ¶ I.A.1.

[66] Subsection 2101.1(d) states that the Clearinghouse shall "[e]nsure that the government of Guam complies with all applicable Federal laws relating to Federal financial assistance and that there exists sound tracking, management, and financial accountability for all Federal programs awarded to the government of Guam." P.L. 26-169: 3. Paragraph I.C.1. of Executive Order No. 2004-07 reflects the same language, and transferred these duties to "Executive Branch agencies and instrumentalities." Exec. Order No. 2004-07, ¶ I.C.1.

[67] Finally, the Clearinghouse duty outlined in subsection 2101.1(e) is transferred to BBMR, again using identical language, in paragraph I.A.2. of the executive order. Public Law 26-169:3; Exec. Order No. 2004-07, ¶ I.A.2.

[68] Based on the striking similarities, we find that the law applicable to Executive Order 2004-07 is Public Law 26-169.

[69] The second step is to determine whether Executive Order 2004-07 conflicts with the applicable law, that being Public Law 26-169. We find that the conflict between the two is apparent. The Governor's transfer of functions to BBMR, the Bureau of Statistics and Plans, and various Executive Branch bureaus, agencies and instrumentalities through Executive Order 2004-07, directly conflicts with the Legislature's

specific prescription of the identical duties to the Clearinghouse within the Lieutenant Governor's Office. The Governor's transfer of functions is also in direct contravention of the Legislature's stated finding of the "need to establish a single and centralized clearinghouse within the government of Guam responsible for overseeing all Federal aid programs, grants . . . " P.L. 26-169: 1. In addition, transferring the duties to these agencies defies the Legislature's desire "that responsibility . . . [be] vested at the highest levels of the Executive Branch of government." *Id.*

[70] We conclude that because Executive Order 2004-07 conflicts with an applicable law, it is not a valid exercise of the Governor's Organic Act power to issue executive orders under 48 U.S.C. § 1422. Therefore, because its "unconstitutionality is clearly apparent[,]" *County Road*, 677 N.W.2d at 348, Executive Order 2004-07 must be struck down as inorganic.[11]

[71] Accordingly, because Executive Order 2004-07 fails the threshold determination of validity, it is unnecessary to address the issue of the Governor's attempt to exercise his Organic Act reorganization authority under 48 U.S.C. § 1422c(c).

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[11] We note that the parties have not argued the severability of paragraph D of Executive Order 2004-07, which states that "[f]ederal programs affecting the executive branch of the government of Guam shall require the final approval of the Governor of Guam." Exec. Order No. 2004-07. When faced with the issue of unconstitutional language in an executive order, some courts have applied the test for severance used for statutes that are partially unconstitutional. *See Reyes v. U.S. Dep't of Immigration & Naturalization*, 910 F.2d 611(9th Cir. 1990); *Commonwealth v. Anglo*, 1999 WL 33595876 (N. Mar. I. 1999). Similarly, we articulate the traditional test for severability *supra* regarding the inorganic components of Public Law 26-169. For purposes of this case, we shall assume, without deciding, that severability principles may be similarly applied to an executive order. *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191, 119 S. Ct. 1187, 1198 (Minn. 1999) ("[A]ssum[ing], *arguendo*, that the severability standard for statutes also applies to Executive Orders.").

Thus, we contemplate a similar two-part test as applied to Public Law 26-169 *supra* and ask: 1) whether the surviving provision will be fully operative standing alone, and 2) if so, whether the Governor's intent in issuing Executive Order 2004-07 would still be accomplished. *Champlin Refining Co. v. Corp. Comm'n of Okla.*, 286 U.S. 210, 234, 52 S. Ct. 559, 565 (1932). Taking Executive Order 2004-07 as a whole, it seems clear that the Governor intended to achieve the specific purpose of reorganization, and not final approval. First, Executive Order 2004-07 is entitled: "Relative to Reorganizing the Processing of Federal Programs." Second, the Governor specifically references and relies on his Organic Act authority to reorganize the executive branch under 48 U.S.C. § 1422c(c), and states as follows:

> NOW, THEREFORE, I, FELIX P. CAMACHO, *I Maga'låhen Guåhan*, Governor of Guam, by virtue of the authority vested in me by the Organic Act of Guam, as amended, and the laws of Guam, do hereby invoke my authority, as Governor, to reorganize the Executive Branch of the Government of Guam pursuant to 48 U.S.C. § 1422c(c) . . . .

Exec. Order No. 2004-07. We do believe paragraph D would be valid standing alone. However, we do not believe that paragraph D, standing alone, would have accomplished the Governor's intent to reorganize through Executive Order 2004-07, and therefore, paragraph D does not survive severability.

D. Termination of Unclassified Executive Branch Employees

[72] Lastly, Governor Camacho requests clarification of his "power to terminate non-classified employees of the Executive Branch of the Government of Guam, such as Bertha Duenas and Raymond Blas." Request for Declaratory Judgment, p. 13 ¶ 36(d). He maintains that the terminations of Duenas and Blas, both unclassified employees, were properly executed pursuant to section 1422 of the Organic Act, which sets forth his appointment and removal powers. The Lieutenant Governor argues that the terminations were invalid. Lieutenant Governor's Brief, pp. 45-49.

[73] Section 1422 of the Organic Act provides that "[the Governor] shall appoint, and may remove, all officers and employees of the executive branch and 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. Thus, the plain language of the Organic Act establishes two limitations on the Governor's appointment and removal power.

[74] First, Congress may limit the Governor's power by "otherwise provid[ing,]" through the Organic Act or other congressional acts, for appointment or removal of Executive Branch employees. 48 U.S.C. § 1422. For example, section 1422c(a) of the Organic Act "otherwise provided" for the appointment of officers and employees of the executive branch by specifically charging the Guam Legislature with "establish[ing] a merit system . . . [under which] appointments and promotions shall be made . . . ." 48 U.S.C. § 1422c(a). *See Univ. of Guam v. Guam Civil Serv. Comm'n*, 2004 Guam 4, ¶ 8 (recognizing the Guam Legislature's compliance with section 1422c(a) through the enactment of Title 4 GCA § 4101 *et seq.*); *Brown v. Civil Serv. Comm'n*, 818 F.2d 706 (9th Cir. 1987) (holding that Congress's mandate to the Guam Legislature to establish a merit system for appointments and promotions was not limited by the Governor's authority to establish and maintain the educational system).

[75] Second, the Legislature may limit the Governor's power by "otherwise provid[ing] . . . under the laws of Guam." 48 U.S.C. § 1422. Again, as evidenced in *Brown* and in *University of Guam*, the Legislature "otherwise provided" for a limitation on the Governor's appointment and removal authority by complying with the federal mandate and promulgating in Chapter 4 of Title 4 Guam Code Annotated,

Personnel Policy and the Civil Service Commission. *See* Title 4 GCA § 4101 *et seq.* (2000); *Brown*, 818 F.2d 706; *Univ. of Guam*, 2004 Guam 4, ¶ 8. Thus, the Legislature "established a merit system of employment applicable to the entire government of Guam." *Univ. of Guam*, 2004 Guam 4 at ¶ 8. Under the merit system, "[n]o person in the *classified* service shall be removed except for such cause as will promote the efficiency of the service and for the reasons given in writing." Title 4 GCA § 4201 (emphasis added). In addition, "*[c]lassified* employees are generally entitled to appeal their personnel actions to the [Civil Service] Commission." *Univ. of Guam*, 2004 Guam 4 at ¶ 8 (emphasis added); *see also* 4 GCA §§ 4105, 4103(b).

[76] In *Sablan v. Gutierrez*, we acknowledged that the Legislature had "otherwise provided" for the Governor's power of appointment by enacting Title 3 GCA § 2101(a), which "place[d] a limitation on [the Governor's] power of appointment by restricting his group of candidates [to the Guam Election Commission] to persons recommended by Guam's recognized political parties." *Sablan v. Gutierrez*, 2002 Guam 13, ¶ 13. We expressly determined that "the phrase 'except as otherwise provided . . . under the law[] . . .'" under section 1422 of the Organic Act 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." *Id.* (quoting *Driscoll v. Sakin*, 1 A.2d 881, 882 (N.J. 1938)).

[77] In the instant case, the parties do not dispute, and the record supports, that both Duenas and Blas were unclassified appointments. Governor's Addendum, tab 1 (DOA Notification of Personnel Action, Ex. B)(identifying both Duenas and Blas as unclassified employees); *see also* Title 4 GCA § 4102 (a)(15) ("The unclassified service shall include the positions of . . . employees of the office of the Governor and Lieutenant Governor . . . authorized in the applicable appropriation law"). As unclassified employees, it is clear that neither Duenas nor Blas are afforded the protection of the merit system. *See Univ. of Guam*, 2004 Guam 4 at ¶ 8; *see also* 4 GCA§ 4101 *et seq*.

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[78] Notwithstanding the unclassified status of Duenas and Blas, Lieutenant Governor Moylan appears to argue that in enacting Title 5 GCA § 2103,[12] which makes a specific and separate budget appropriation for the Office of the Lieutenant Governor, the Legislature "otherwise provided" for the removal of both Duenas and Blas and thus, effectively excluded these employees from the Governor's Organic Act removal authority. Lieutenant Governor's Brief, p. 46.

[79] We do not agree. Nothing in the language of 5 GCA § 2103 indicates that the authority to remove Executive Branch employees working in the Office of the Lieutenant Governor has been "otherwise provided" for by the Legislature. Moreover, while we recognize that the Organic Act and local laws may place limitations on the Governor's appointment and removal authority over employees of the Executive Branch, a separate appropriation by the Legislature for the Office of the Lieutenant Governor relates to the budget of that office, and thus, does not in itself affect the Governor's Organic Act authority of appointment and removal. In fact, in creating the Lieutenant Governor's separate budget, the Legislature merely stated that "the funds allocated shall be administered solely by the Lieutenant Governor of Guam." 5 GCA § 2103.

[80] The Legislature's recognition and acknowledgment that the Office of the Lieutenant Governor may have distinct budgetary needs, and its appropriation for that Office, is not tantamount to the Legislature providing an exception to the Governor's appointment and removal authority. Nothing in the separate budget addresses or affects the Governor's Organic Act authority regarding appointment and removal; thus, we hold that the Governor's authority to appoint or remove has not been "otherwise provided" for by the

[12] Title 5 GCA § 2103 (2003) states, in its entirety:

> There is hereby authorized an annual budget for the Office of the Lieutenant Governor beginning with Fiscal Year 1977. This is to ensure the effective discharge of the responsibilities and duties of the Office of the Lieutenant Governor as an office separate from that of the Governor pursuant to Section 6 of the Organic Act of Guam and of this Chapter. Notwithstanding any provision of the law, rule, or regulation or Executive Order to the contrary, the funds allocated shall be administered solely by the Lieutenant Governor of Guam and expended upon his authorization for the purposes of the allocation.

Legislature.[13] Therefore, we conclude that in terminating the unclassified employments of Duenas and Blas, Governor Camacho properly executed his Organic Act removal authority. *See* 48 U.S.C. § 1422.

IV.

[81] Accordingly, we hold that the provisions of Public Law 26-169 which grant "exclusive" purview to the Guam State Clearinghouse and "final" authority to the Director of the Guam State Clearinghouse are in derogation of the Governor's powers of general supervision and control as set forth in section 1422 of the Organic Act, and are therefore inorganic and invalid. We also hold that the designation of the Lieutenant Governor as the Director of the Guam State Clearinghouse does not constitute an appointment, but rather, is a valid exercise of the Legislature's power to prescribe executive powers and duties to the Lieutenant Governor as set forth in sections 1422 and 1423a of the Organic Act. We further hold that the inorganic provisions of Public Law 26-169 may be severed and thus, the remaining provisions of Public Law 26-169 are upheld. Further, we hold that Executive Order 2004-07 is void as an invalid exercise of the Governor's authority to issue executive orders pursuant to section 1422 of the Organic Act. Finally, we hold that the Governor properly exercised his Organic Act removal authority in terminating the unclassified employments of Bertha Duenas and Raymond Blas.

[13] In so holding we do not, at this time, address the extent to which the Legislature may otherwise provide for the appointment and removal of executive branch employees.