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From: Speaker's Office <speaker@guamlegislature.org>
Sent: Thursday, August 27, 2020 11:35 AM
To: Clerks Office
Cc: Rennae Meno
Subject: M&C Fwd: Legal Opinion RE: Cancellation of the 2020 Primary Election
Attachments: 2020.08.27_Legal Opinion_Canceling Primary Elections (LEG20-0350).pdf

Buenas and Hafa Adai Clerks,
Please disregard previous email regarding Messages and Communications 35Gl-20-2171, and replace with attached documents.
Thank you and Have a Great Day.

08-27-20	9:38 AM	08-27-20	Legal Opinion regarding Cancellation of the 2020 Primary Election.*	Office of the Attorney General of Guam	35GL-20-2171

Sinseru yan Minagåhet,

Office of the Speaker • Tina Rose Muña Barnes
Committee on Public Accountability, Human Resources & the Guam Buildup

35th Guam Legislature
I Mina'trentai Singko na Liheslaturan Guåhan

Guam Congress Building | 163 Chalan Santo Papa | Hagatna, GU 96910
T: (671) 477-2520/1
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---------- Forwarded message ---------
From: **Leevin T. Camacho** <ag@oagguam.org>
Date: Thu, Aug 27, 2020 at 9:38 AM
Subject: Legal Opinion RE: Cancellation of the 2020 Primary Election

To: Senator Amanda L. Shelton <officeofsenatorshelton@guamlegislature.org>, <guamcompiler@gmail.com>
Cc: Speaker Tina Muna Barnes <Speaker@guamlegislature.org>, OAG General Counsel <generalcounsel@oagguam.org>

Hafa Adai Office of the Legislative Secretary and Office of the Compiler of Laws:

Pursuant to 5 GCA 30107, this is to provide your offices with a copy of the subject legal opinion which was transmitted to the requesting party, Senator Kelly Marsh (Taitano) this morning.

Please reply to confirm receipt of this message.

Si Yu'os ma'ase',

Ufisinan Hinirat Abugao (Office of the Attorney General of Guam)
590 S. Marine Corps Drive, Suite 901
Tamuning, GU 96913
Tel: (671) 475-3324 Ext. 5015
Fax: (671) 477-4703
ag@oagguam.org
www.oagguam.org

clerks@guamlegislature.org

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08-27-20	9:38 AM	08-27-20	Legal Opinion regarding Cancellation of the 2020 Primary Election	Office of the Attorney General of Guam	35GL-20-21717

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Office of the Attorney General of Guam

590 S. Marine Corps Drive, Suite 901 ♦ Tamuning, GU 96913
671.475.3324 extension 5015 ♦ Fax 671.477.4703 ♦ Email ag@oagguam.org

Hon. Leevin Taitano Camacho
Attorney General of Guam

August 27, 2020

OPINION MEMORANDUM

TO: Senator Kelly Marsh (Taitano), PhD
I Mina'trentai Singko Na Liheslaturan Guåhan
The Thirty-fifth Guam Legislature

FROM: Attorney General Leevin T. Camacho

SUBJECT: Request for Legal Opinion Regarding Canceling the 2020 Primary Election **(Ref: LEG 20-0350)**

This opinion memorandum is provided in response to your August 23, 2020 request for legal guidance on the subject matter.

QUESTIONS AND SHORT ANSWERS

1. Has the 2020 Primary Election technically begun, since July 30, 2020, the Guam Election Commission began receiving 2,284 cast ballots, which are currently in its custody? **Yes, the 2020 Primary Election has begun.**
2. If the 2020 Primary Election has in fact begun, which entities possess the authority to cancel it and what processes need to be followed? **The Legislature has authority to cancel the election through the legislative process.**
3. In the event the 2020 Primary Election is canceled, would any federal law protecting voters' rights be violated as the ballots included the election of a federal office? Or would any federal law be violated for any other reason? **It depends.**
4. In the event the 2020 Primary Election is canceled, will the 2,284 ballots in the custody of the Guam Election Commission be nullified? If not, what happens to such ballots already cast? **The Legislature has the authority to decide what happens to these ballots.**

DISCUSSION

A little over a month ago, Bill No. 330-35, introduced by yourself and Senator Joe S. San Agustin, became law. Public Law 35-95 expanded in-office absentee voting to all qualified voters as a means of reducing the number of voters at polling sites on election day and minimizing direct contact with others. The intent of Public Law 35-95 was to protect the right to vote while also protecting the health and safety of Guam voters, election officials, and polling site workers.

On July 20, 2020, the day Bill No. 330 was signed into law, there were a total of 319 COVID-19 cases reported in Guam. Since that time, our number of cases has tripled, with more than 600 cases having been reported over the last ten days alone. In response to the surge in cases, on August 21, 2020, the Guam Election Commission wrote to the Governor and the Legislature requesting the Primary Election be canceled or postponed. The GEC noted that there was a "deep concern whether holding a Primary Election on August 29 can be done without undue risk to the health and safety of the citizens who vote and [its] election workers."[1] The following day, Governor Leon Guerrero sent a letter to the Legislature stating that she supported canceling the Primary Election.

Against this backdrop is the fact that over 2,200 voters have been able to submit their ballots to the GEC, mainly as a result of your initiative in P.L. 35-95. A Primary Election would also narrow the field of candidates in several contested races for various government offices. The decision to cancel the Primary Election would not be one without consequence.

As set forth below, the Legislature holds the power of deciding how elections will be held in an environment where the threat of COVID-19 shifts day-to-day. This opinion is intended to clarify the Legislature's authority and identify possible legal consequences if the Legislature chooses to cancel the Primary Election.

[1] Letter from the Guam Election Commission to Governor Lou Leon Guerrero and Speaker Tina Muña Barnes, RE: 2020 Primary Election (Aug. 21, 2020).

(1) The 2020 Primary Election has begun.

It is arguable that the election does not occur until the day set by statute,[2] and therefore absentee and in-office voting does not constitute an election but instead is simply an alternative mechanism for gathering ballots. However, what is clear is that a slate of candidates has been selected, ballots have been printed, and over 2,200 voters have chosen their candidates and submitted their ballots to the GEC. Therefore, the 2020 Primary Election has begun. *See Guam Election Comm'n v. Responsible Choices for All Adults Coalition*, 2007 Guam 20 ¶ 74 (recognizing the GEC's argument that an election had begun because the GEC had mailed out and started to receive absentee ballots).

(2) *I Liheslatura* has the authority to cancel the Primary Election through the legislative process.

The legislative branch has broad powers over the election process subject to the limitations of the Organic Act and the Constitution. *I Liheslaturan Guahan* has exercised this power through the enactment of our Election Code. The scheduling of elections is specifically governed by Title 3 GCA, Chapter 5,[3] which applies to primary elections through 3 GCA § 15103. For instance, the law permits postponement of elections in specific circumstances, including natural phenomena or acts of God, and under a procedure involving recommendation by the GEC to *i Maga'håga*[4] with the advice and consent of *i Liheslatura*. 3 GCA § 5103.

While the law does not currently contemplate the outright cancellation of a primary election, the legislature's power includes the authority to do so—as evidenced by the fact that a primary election has previously been canceled on at least one occasion. In 1994, *i Liheslatura* passed Bill No. 855 (LS), later enacted as Public Law 22-129, mandating the GEC to cancel primary elections in the event of lack of contest, directing the GEC to certify candidates for placement on the general election ballot, and requiring the preservation of the order of names on the November ballots.

In June 2006, *i Liheslatura* again exercised its power to cancel elections by further amending this section of the Election Code through the passage of Bill No. 82 (EC), enacted as Public Law 28-128. Months after enactment, the GEC canceled the 2006

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[2] Title 3 GCA §§ 5101-02, Election Days and Dates; 3 GCA § 15201, Primary Date.

[3] Title 3 GCA, Chapter 5 is subject to the Organic Act provision prescribing that the general election of the legislature shall be held on the Tuesday next after the first Monday in November, biennially in even-numbered years. 48 U.S.C. § 1423(d).

[4] The law, as it appears on the Compiler's website says, "If for serious cause resulting from any natural phenomenon, or act of God, or of public enemy, it becomes reasonably impossible to hold any election duly scheduled on Guam as a whole, or in any municipality or municipal division, *I Maga'låhen Guåhan* or *I Liheslaturan Guåhan* with the advice and consent of *I Liheslatura* (the Legislature), upon the recommendation of the Commission, may postpone any such election therein…." 3 GCA § 5103 (emphasis in underline added). We believe the inclusion of the phrase "or *I Liheslaturan Guåhan"* to be a typographical error. Public Law 31-255:2 (Dec. 11, 2012) amended prior law as we have represented here.

Republican Primary Election pursuant to P.L. 28-128:6 (formerly enacted as 3 GCA § 16108[5]) because there were only thirteen Republican candidates seeking senatorial seats in a fifteen-member legislature. All candidates advanced to the General Election. *Benavente v. Taitano*, 2006 Guam 15, ¶ 3 (*Benavente I).*

After the election, Democratic senatorial candidates and Republican voters challenged the cancellation alleging the cancellation law was unconstitutional and inorganic because it abridged the First Amendment rights of free association of Republican Party members and independent voters and impinged on a candidate's right to seek voter support. *Benavente II*, 2006 Guam 16 ¶ 11. They also claimed they were denied equal protection under the laws because the Republican Party candidates were not required to obtain a minimum number of votes to proceed to the General Election, and because voters in the Republican Primary were not allowed to write-in candidates because of the cancellation. *Benavente II*, 2006 Guam 16 ¶ 11.

The GEC argued that cancellation of the election furthered the governmental interests of preventing party raiding, regulating the number of candidates on a ballot, and saving unnecessary costs. *Id.* ¶ 164. The Supreme Court of Guam found in favor of the GEC, holding that the statute requiring the cancellation of the Primary Election did not violate the Constitution. The court held that the burden on the petitioners, if any burden even existed, was justified by the legitimate interests of the government in canceling the election. *Id.* ¶¶ 140-42.

The differences between the facts in *Benavente* and the facts before us today are two-fold: (1) the reason for cancellation is not for lack of contest but instead is because of a threat to public health and safety and (2) as of today over 2,200 voters have submitted their ballots to the GEC. The consideration of these differences in deciding whether to cancel an election are policy considerations left to the prerogative of the legislative branch.

(3) In the event the 2020 Primary Election is canceled, would any federal law protecting voters' rights be violated as the ballots included the election of a federal office? Or would any federal law be violated for any other reason?

It depends. "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which . . . we must live." *Burdick v. Takushi*, 504 U.S. 428, 441 (1992) (quotation omitted). However, the right to vote in any manner and the right to associate for political purposes through the ballot are not absolute. *See Benavente*, 2006 Guam 16 ¶ 118 (quoting *Burdick*, 504 U.S. at 433)."Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; 'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest

[5] The provision of law formerly enacted as 3 G.C.A. § 16108 by P.L. 22-129 and amended by P.L. 28-128 was later repealed by P.L. 31-255, *i Liheslatur*a's near overhaul of the Election Code after the 2010 elections.

and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown,* 415 U.S. 724, 730, 94 S.Ct. 1274, 1279, 39 L.Ed.2d 714 (1974). By their regulatory nature, each provision of an election code, "whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends." *Anderson v. Celebrezze,* 460 U.S. 780, 788 (1983); *see also Yang v. Kellner*, 2020 WL 2129597, --- F. Supp. 3d --- (S.D.N.Y. 2020) (quoting *Gonsalves v. New York State Bd. of Elections*, 974 F. Supp. 2d 191, 197 (E.D.N.Y. 2013)).

As discussed above, legislatures have the authority to regulate elections. Congress has set some of the parameters of the election of Guam's Delegate to the House of Representatives but has otherwise granted the legislature authority over matters of local application pertaining to the election. *See* 48 U.S.C. § 1714 (e.g., order of names, special election to fill vacancy, resolving ties). This grant of authority arguably encompasses the same power to cancel the primary election. Without more time, we are unable to analyze all the specific federal election or voting laws that may be implicated by the cancellation of our 2020 Primary Elections based on the fact that it includes an election for a federal office.[6] However, we are able to identify the legal test for constitutional challenges that may be brought regardless of whether a federal office is included on the ballot.[7]

When an election is challenged on constitutional grounds, a court will weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the [government] as justifications for the burden imposed . . . ," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights." *Anderson*, 460 U.S. at 789.

The government of Guam's interests in canceling the election are to protect the public health and safety of the community and of election workers and to avoid the pitfalls of conducting an operation without the proper resources required to ensure a timely, fair, and safe election.[8] These are clear and compelling, legitimate government interests that would be weighed against the potential harm that may result from canceling the Primary Election. The potential harm caused by a cancellation is dependent on whether

[6] There is at least one federal law that would be implicated if the election were postponed. The Uniformed and Overseas Citizen Absentee Voting Act (UOCAVA) requires certain procedures in elections for federal offices. One such procedure involves "transmitting validly-requested absentee ballots to UOCAVA voters no later than 45 days before the election, except where an undue hardship waiver is approved by the Department of Defense for that election." Dept. of Justice, UOCAVA, *https://www.justice.gov/crt/uniformed-and-overseas-citizens-absentee-voting-act* (Last visited Aug. 26, 2020).

[7] We are aware of litigation in other jurisdictions where the relief sought either challenges or demands modifications to state and local election laws in light of the COVID-19 pandemic; however, none of the cases we have seen is on point with Guam's current circumstances.

[8] Letter from the Guam Election Commission to Governor Lou Leon Guerrero and Speaker Tina Muña Barnes, RE: 2020 Primary Election (Aug. 21, 2020).

all candidates advance to the general election and also on the role of the person bringing the challenge. For example, a voter whose ballot has been submitted would not be impacted the same as a voter whose ballot has not. Similarly, a candidate for a contested position would be impacted differently than one for an uncontested position. We do not know what the court's analysis will look like for any of these, or other scenarios. We are willing to posit, however, that cancellation of a primary election is not a *per se* violation of the Constitution.

(4) If the Legislature authorizes the cancellation of the Primary Election, the Legislature can determine how the submitted ballots must be handled.

In exercising its same authority for governing the conduct of elections, the Legislature can determine through law how the submitted ballots must be handled.

CONCLUSION

Although the 2020 Primary Election has arguably begun, the Legislature has the authority to cancel a primary election. While time does not permit an analysis of specific federal election and voting laws, we posit that canceling a primary election would not likely constitute a *per se* violation of the Constitution, regardless of whether an election for federal office is involved. As with any election law, however, constitutional challenges are possible; such challenges would involve a court's analysis of balancing the interests of the government against those of the individuals.

At the time of drafting the opinion, Guam's positive case count surpasses 1,000, we've hit the highest number of cases reported in a day and lost two more lives to this unrelenting virus. Though it is not the role of this office to weigh in on the wisdom of canceling, postponing or moving forward with the Primary Election as currently scheduled, we understand the weight and gravity of this policy decision and hope this opinion helps move the discussion forward.



LEEVIN TAITANO CAMACHO
Attorney General