


I MINA'BENTE OCHO NA LIHESLATURAN GUÅHAN
TWENTY-EIGHTTH GUAM LEGISLATURE
2005 (FIRST) Regular Session

Bill No. 132 (IC)

Introduced by:

A. B. Palacios, Sr. 

AN ACT TO ADD ARTICLE 2 TO CHAPTER 30 OF TITLE 5 OF THE
GUAM CODE ANNOTATED, RELATIVE TO CREATING THE
"INDEPENDENT COUNSEL ACT OF 2005."

BE IT ENACTED BY THE PEOPLE OF GUAM:

1 **Section 1.** Article 2 is hereby *added* to Chapter 30, Division 3 of Title 5 of the
2 Guam Code Annotated to read as follows:

3 **"Section 30201. Title.** This Article shall be identified as the '*Independent*
4 *Counsel Act of 2005.*'

5 **Section 30202. Legislative Findings and Intent.** In 1998 and 1999 the
6 position of Attorney General of Guam was created by Congress and *I Liheslaturan*
7 *Guåhan* to become an independent and autonomous office free from *I Maga'lahaen*
8 *Guåhan's* appointment and removal powers, through direct election of the Office by
9 the People of Guam. The Attorney General is directly accountable to the People of
10 Guam. The position of Attorney General exercises the exclusive and important
11 authority to prosecute local crimes on behalf of the People of Guam. The law vests
12 this authority only to an Attorney General, who in the past was appointed and
13 confirmed by *I Liheslaturan Guåhan*, or is now elected. The law currently provides no
14 procedure to protect the Attorney General's Constitutional due process rights when

1 the Attorney General has a conflict. The decision to prosecute crime holds much
2 discretion, and persons charged with the power to take one's liberty must do so
3 without conflict of interest or bias when the Attorney General is unable to act.

4 The Attorney General of Guam has requested that *I Liheslaturan Guåhan* enact
5 legislation which will ensure that the person holding the position of Attorney
6 General is neither above the law, nor subject to malicious or politically motivated
7 prosecutions against him. A danger exists that frivolous complaints and
8 prosecutions may be initiated against the Attorney General to punish the citizen
9 because of his fulfilling his duties as the Attorney General. *I Liheslaturan Guåhan*
10 finds that the Attorney General must perform duties which create conflict and
11 dissonance with public officials and others in the community, which may motivate
12 those affected to retaliate against him personally and professionally.

13 *I Liheslaturan Guåhan* finds that the law currently does not provide any
14 procedure when the Attorney General has a conflict of interest. Although Guam law
15 once had an Independent Special Prosecutor's Act of 1974, the law was defeated by
16 court decision. The Act contained important Constitutional due process protections
17 for a person under investigation and established procedural safeguards to protect
18 against politically and financially motivated prosecutions. Congress has previously
19 enacted an independent counsel act (28 U.S.C. § 591 *et seq.*) to account for situations
20 when the U.S. Attorney General is unable to act. *I Liheslaturan Guåhan* wishes that
21 Guam's law be substantially patterned and similarly interpreted to the Federal
22 model.

23 Good cause now exists for *I Liheslaturan Guåhan* to authorize and restrict the
24 use of independent counsels in situations wherein the Attorney General is unable to
25 act.

1 **Section 30203. Independent Counsel Authorized.** In situations when the
2 Attorney General of Guam is subject to investigation, the following procedures shall
3 be followed.

4 **(a) Recusal of Attorney General.** If information received under this
5 Article involves the Attorney General, the Attorney General shall recuse
6 himself or herself by designating the Chief Prosecutor and the two (2) most
7 senior attorneys (*Investigating Panel*) in the Office of the Attorney General
8 whom that information does not involve and who does not have a current or
9 recent personal or financial relationship with such person to perform the
10 duties assigned under this Chapter to the Attorney General with respect to
11 that information.

12 **(b) Preliminary Investigation and Application for Appointment of**
13 **an Independent Counsel.**

14 **(1) Conduct of Preliminary Investigation.** A preliminary
15 investigation under this Article shall be of such matters as the
16 Investigating Panel considers appropriate in order to make a
17 determination on whether further investigation is warranted with
18 respect to each potential violation, or allegation of a violation, of
19 criminal law. The Investigating Panel shall make such determination
20 not later than ninety (90) days after the preliminary investigation is
21 commenced. The Chief Prosecutor shall promptly notify the Court
22 Panel handling the appointment of the independent counsel (*Court*
23 *Panel*) of the commencement of such preliminary investigation and the
24 date of such commencement. The Court Panel shall be comprised of
25 three (3) judges whom the Presiding Judge of the Superior Court of
26 Guam designates to perform the duties contained under this Article.

1 No judge on the Court Panel may preside over a prosecution initiated
2 by an independent counsel.

3 The Court Panel may refuse to select an independent counsel if
4 the individual being investigated brings a motion, and good cause is
5 found by the panel that the investigation and prosecution should not
6 go forward.

7 **(2) Extension of Time.** The Chief Prosecutor may apply to the
8 Court Panel for a single extension, for a period of not more than sixty
9 (60) days. The request shall extension shall be as of right. Further
10 extensions may be granted upon a showing of good cause.

11 **(c) Determination that Further Investigation Not Warranted.** If the
12 Investigating Panel, upon completion of a preliminary investigation under
13 this Article, determines that there are no reasonable grounds to believe that
14 further investigation is warranted, the Investigating Panel shall promptly so
15 notify the Court Panel, and the Court Panel shall have no power to appoint
16 an independent counsel with respect to the matters involved. This decision
17 shall not be reviewable. Such notification shall contain a summary of the
18 information received and a summary of the results of the preliminary
19 investigation

20 **(d) Determination that Further Investigation Warranted.** The
21 Investigating Panel shall apply to the Court Panel if:

22 (1) the Investigating Panel, upon completion of a preliminary
23 investigation under this Article, determines that there are reasonable
24 grounds to believe that further investigation is warranted, which shall
25 be conducted by an independent counsel; *or*

1 (2) the ninety (90) day investigation period, and any extensions
2 granted thereto, has elapsed and the Investigating Panel has not filed
3 a notification that no prosecution is warranted.

4 **(e) Receipt of Additional Information.** If, after submitting notice to the
5 Court Panel, the Investigating Panel receives additional information sufficient to
6 constitute grounds to investigate the matters to which such notification related, the
7 Investigating Panel shall:

8 (1) conduct such additional preliminary investigation as the
9 investigating panel considers appropriate for a period of not more than
10 ninety (90) days after the date on which such additional information is
11 received; *and*

12 (2) otherwise comply with the provisions of this Article with respect to
13 such additional preliminary investigation to the same extent as any other
14 preliminary investigation under this Article.

15 **(f) Contents of Application.** Any application for the appointment of an
16 independent counsel under this Article shall contain sufficient information to assist
17 the Court Panel and in defining that independent counsel's prosecutorial jurisdiction
18 so that the independent counsel has adequate authority to fully investigate and
19 prosecute the subject matter and all matters related to that subject matter.

20 **(g) Disclosure of Information.** Except as otherwise provided in this Article
21 or as is deemed necessary for law enforcement purposes, no officer or employee of
22 the Office of the Attorney General or any other person, including the independent
23 counsel, may, without leave of the Court Panel, disclose to any individual any
24 notification, application or any other document, materials or memorandum supplied
25 to the Court Panel under this Article. Nothing in this Article shall be construed as
26 authorizing the withholding of information from *I Liheslaturan Guåhan*.

1 **(f) Limitation on Judicial Review.** The Investigating Panel's determination
2 under this Article to apply to the Court Panel for the appointment of an independent
3 counsel shall *not* be reviewable in any court.

4 **Section 30204. Duties of the Court Panel.**

5 **(a) Selection and Jurisdiction of Independent Counsel.**

6 **(1) Authority.** Upon receipt of a referral by the Investigating Panel,
7 the Court Panel shall randomly select in the presence of the person under
8 investigation an independent counsel from a pool of at least five (5) qualified
9 attorneys. The attorneys need not be private practitioners, and may be
10 government lawyers. Independent counsel applicants shall be deemed
11 qualified if they meet the factors identified in Subsection (2) herein. In the
12 event that fewer than five (5) applicants respond to the solicitation, the Court
13 Panel shall perform another solicitation until five (5) qualified candidates are
14 secured.

15 **(2) Qualifications of Independent Counsel.** The Court Panel shall
16 randomly select as independent counsel an individual who is not
17 representing any criminal defendants on Guam in either local or Federal
18 court. Applicants for independent counsel shall also have complied with the
19 Guam Procurement Law and Regulations for Requests for Proposal and be
20 members of the Guam Bar Association in good standing. The Court Panel
21 shall seek to appoint as independent counsel an individual who will serve to
22 the extent necessary to complete the investigation and any prosecution
23 without undue delay.

24 **(3) Approval by *I Liheslaturan Guåhan*.** The independent counsel
25 randomly selected by the Court Panel shall be approved by *I Liheslaturan*
26 *Guåhan* in a manner that an appointee is confirmed, which shall review the
27 independent counsel for any conflicts of interest or bias which might interfere

1 with the independent counsel's just investigation and prosecution of the case
2 on behalf of the People of Guam. In the event that a candidate is rejected, the
3 Court Panel shall randomly select the next qualified applicant from the
4 remaining names which qualified for the independent counsel applicant pool.

5 **(4) Scope of Prosecutorial Jurisdiction.** The independent counsel's
6 prosecutorial jurisdiction shall only include that which was referred to the
7 Court Panel by the Investigating Panel. Jurisdiction shall not extend to any
8 other matters, but the independent counsel may refer additional matters to
9 the Investigating Panel for their review and determination whether a referral
10 should be sent to the Court Panel pursuant to the procedures and time frames
11 as set forth in this Article.

12 **(5) Disclosure of Identity and Prosecutorial Jurisdiction.** An
13 independent counsel's identity and prosecutorial jurisdiction may not be
14 made public, *except* upon the request of the Investigating Panel upon a
15 determination that disclosure of the identity and prosecutorial jurisdiction of
16 such independent counsel would be in the best interests of justice. The
17 Attorney General is not bound to this Subsection requiring confidentiality. In
18 any event, the identity and prosecutorial jurisdiction of such independent
19 counsel shall be made public when any indictment is returned, or any
20 criminal information or complaint is filed, pursuant to the independent
21 counsel's investigation.

22 **(b) Vacancies.** If a vacancy in office arises by reason of the resignation, death
23 or removal of an independent counsel, the Court Panel shall randomly select a
24 replacement independent counsel to perform from the list of qualified independent
25 counsels which existed at the time the original independent counsel was selected.
26 The independent counsel must be approved by *I Liheslaturan Guåhan* pursuant to the
27 procedures set forth herein. Upon the replacement, the independent counsel shall

1 take such actions as that person deems just, which may include, but are not limited
2 to further investigating and reevaluating the case and dismissing the action if
3 warranted.

4 (c) **Attorneys' Fees.** Upon the request of the Attorney General, the Court
5 Panel shall, if no indictment is brought against such individual pursuant to that
6 investigation, award reimbursement for those attorneys' fees and costs, including,
7 but not limited to, expert witnesses, incurred by that individual during that
8 investigation which would not have been incurred but for the requirements of this
9 Article. In the event of a prosecution of the Attorney General and the dismissal or
10 acquittal of the criminal case, the Attorney General shall likewise be entitled to
11 reimbursement for those attorneys' fees and costs incurred, including, but not
12 limited to, costs of expert witnesses.

13 (d) **Amicus Curiae Briefs.** The Attorney General may request that the
14 Superior Court of Guam and the Supreme Court of Guam receive *amicus curiae* briefs
15 in support of the Attorney General's legal position. Said request shall be granted as
16 a matter of right.

17 **Section 30205. Authority and Duties of Independent Counsel.**

18 (a) **Authority.** Notwithstanding any other provision of law, an independent
19 counsel appointed under this Article shall have, with respect to all matters in such
20 independent counsel's prosecutorial jurisdiction established under this Article, full
21 power and independent authority to exercise all investigative and prosecutorial
22 functions and powers of the Attorney General. The legislative committee with
23 oversight over the Office of the Attorney General shall have authority to receive a
24 full and confidential briefing of the independent counsel's investigation or
25 prosecution of the Attorney General at any time that the Committee deems
26 appropriate.

1 **(b) Compensation.** An independent counsel selected under this Article shall
2 receive compensation at the rate the independent counsel would otherwise be paid
3 if employed as an Assistant Attorney General. The independent counsel shall be
4 paid for expenses reasonably incurred, *except* that no off-Island experts shall be
5 permitted unless expressly authorized and appropriated by *I Liheslaturan Guåhan*.
6 All compensation shall be subject to *I Liheslaturan Guåhan's* prior appropriation. No
7 work shall be performed without legislative appropriation being in place. Once an
8 appropriation is exhausted the independent counsel may not serve until *I*
9 *Liheslaturan Guåhan* provides for additional appropriation.

10 **(c) Reports.** The independent counsel shall report every three (3) months to
11 the legislative Speaker and to the legislative chairpersons of the committees with
12 purview over appropriations and over the Office of the Attorney General, all
13 amounts of monies expended by the independent counsel. A copy of the report
14 shall also be forwarded to the Investigating Panel and to the Court Panel. The
15 independent counsel is subject to *I Liheslaturan Guåhan's* cutting funding to stop the
16 independent counsel's investigation or prosecution, as well as the Court Panel
17 voting by a majority vote to terminate the independent counsel. If funding is cut,
18 the independent counsel may not serve.

19 The report by the independent counsel shall identify and explain major
20 expenses, and summarizes all other expenses, incurred by that office during the
21 reported period, and estimate future expenses of that investigation or prosecution.
22 At the end of the investigation or prosecution, the independent counsel shall
23 likewise file a full report of that period's expenses and costs. The reports shall be
24 public information. The independent counsel shall be personally financially liable
25 for any expenses incurred without a budget allocation being in place before the
26 expenditure is approved.

1 **(d) Compliance with Policies of the Office of the Attorney General.** An
2 independent counsel shall, *except* to the extent that to do so would be inconsistent
3 with the purposes of this Article, comply with the written or other established
4 policies of the Office of the Attorney General respecting enforcement of the criminal
5 laws. To determine these policies and policies, the independent counsel shall
6 consult with the Investigating Panel which shall issue a written response to a policy
7 inquiry by the independent counsel.

8 **(e) Dismissal of Matters.** The independent counsel shall have full authority
9 to dismiss matters within the independent counsel's prosecutorial jurisdiction
10 without conducting an investigation or at any subsequent time before prosecution, if
11 to do so would be in the interests of justice. If any matter is dismissed, either
12 voluntarily or by contested action of the Attorney General, the Attorney General
13 shall have the right to have expunged all records relative to the independent
14 counsel's criminal prosecution.

15 **(f) Standards of Conduct Applicable to Independent Counsel.** During the
16 period in which an independent counsel is serving under this Article said
17 independent counsel, and any person associated with a firm with which such
18 independent counsel is associated, may not represent in any matter any person
19 involved in any investigation or prosecution under this Article, and may not
20 represent any criminal defendant in any local or Federal court case during the
21 independent counsel's term. During the period in which any person appointed by
22 an independent counsel is serving, such person may not represent in any matter any
23 person involved in any investigation or prosecution under this Article.

24 **(g) Custody of Records of an Independent Counsel.** Upon termination of
25 the independent counsel service, the independent counsel shall transfer to the Office
26 of the Attorney General all records which have been created or received by the
27 independent counsel.

1 **Section 30206. Removal of Independent Counsel.**

2 **(a) Grounds for Removal.** An independent counsel appointed under this
3 Article may be removed from service by the Investigating Panel or by the Court
4 Panel for good cause, physical or mental disability (if not prohibited by law
5 protecting persons from discrimination on the basis of such a disability), or any
6 other condition that substantially impairs the performance of such independent
7 counsel's duties. The independent counsel shall also be removed for any
8 misconduct or actions showing personal bias. The court hearing the case against the
9 Attorney General may likewise remove the independent counsel for cause,
10 including for the reasons set forth in this Subsection. This removal authority shall
11 be in addition to other authority for removal of the independent counsel as
12 otherwise set forth in this Article.

13 **(b) Termination of Service.** Service of independent counsel shall terminate
14 when:

15 (1) the independent counsel notifies the Investigating Panel and the
16 Court Panel that the investigation of all matters within the prosecutorial
17 jurisdiction of such independent counsel or accepted by such independent
18 counsel, and any resulting prosecutions, have been completed or so
19 substantially completed that it would be appropriate for the Office of the
20 Attorney General to complete such investigations and prosecutions; *or*

21 (2) the Court Panel terminates the service on the ground that the
22 investigation of all matters within the prosecutorial jurisdiction of such
23 independent counsel or accepted by such independent counsel, and any
24 resulting prosecutions, have been completed or so substantially completed
25 that it would be appropriate for the Office of the Attorney General to
26 complete such investigations and prosecutions.

1 **Section 30207. Audits.** The Public Auditor shall conduct an audit of all the
2 independent counsel's expenditures each quarter. The report shall include any
3 discrepancies and conclude whether monies may have been excessively expended,
4 or expended in violation of the independent counsel's appropriation. If the Public
5 Auditor finds any financial misconduct on the part of the independent counsel, then
6 the Public Auditor shall report the violation to the Investigating Panel, which shall
7 have jurisdiction to investigate and prosecute the independent counsel if warranted.

8 The report shall be transmitted to the legislative speaker, with copies to the
9 legislative committees with oversight over government appropriations and to the
10 Investigating Panel. The Investigating Panel shall have authority to investigate and
11 prosecute the independent counsel if warranted. Copies shall also be transmitted to
12 the Investigating Panel and the Court Panel.

13 **Section 30208. Termination of Effect of Article.** This Article shall cease to
14 be effective four (4) years after the date of the enactment of the Act, *except* that this
15 Article shall continue in effect with respect to then pending matters before an
16 independent counsel that in the judgment of such counsel require such continuation
17 until that independent counsel determines such matters have been completed.

18 **Section 30209. Prosecutorial Authority.** *I Maga'lahren Guåhan* shall not have
19 any authority to criminally investigate nor prosecute the Attorney General nor any
20 other person.

21 **Section 30210. Direct & Immediate Appeal Right.** The person under
22 investigation or being prosecuted has an immediate right to challenge the
23 investigation or prosecution before the Superior Court of Guam, and then to have
24 the decision certified for immediate review before the Supreme Court of Guam.
25 This Article shall in no way be construed to preclude or prevent Federal review of
26 issues the Attorney General may seek to be reviewed in Federal Court, nor shall the

1 independent counsel oppose any petition brought by the Attorney General to seek
2 Federal Court jurisdiction.

3 **Section 30211. Construction.** This Article shall be restrictively interpreted
4 and construed so as to limit the powers and authority of the independent counsel to
5 ensure full and fundamental due process protection to the Attorney General.

6 **Section 30212. Other Conflicts of Interest.** In all other cases wherein the
7 Attorney General is not the subject of the information, but wherein the Attorney
8 General has a conflict of interest, or chooses to withdraw himself or herself from the
9 civil or criminal matter, the Office of the Attorney General shall isolate the Attorney
10 General from the subject matter and the person who functions as the Chief Deputy
11 Attorney General shall act as the Attorney General otherwise would in handling the
12 civil or criminal matter. If any other conflict of interest arises in the Office of the
13 Attorney General involving a member of his Office, the Attorney General may act,
14 so long as the individual with the conflict is properly isolated from the issue under
15 investigation or prosecution.

16 **Section 30213. Severability.** *If any provision of this Law or its application to*
17 *any person or circumstance is found to be invalid or contrary to law, such invalidity*
18 *shall not affect other provisions or applications of this Law which can be given effect*
19 *without the invalid provisions or application, and to this end the provisions of this*
20 *Law are severable."*