ANNEX VI

POWER OF MARIANAS TO LIMIT TRANSFERS OF LAND TO PERSONS OF MARIANAN ANCESTRY

It is planned that the Mariana Islands will enter into a close and permanent affiliation with the United States. One of the problems arising from this proposed relationship is the potential effect of the exposition of the basically agricultural culture of the Marianas to the economy of the United States. The experience throughout the Pacific, e.g., in Hawaii, Western Samoa, and most recently in Guam, has shown that such encounter is likely to affect adversely the economic status of the indigenous population and to leave it landless, unless adequate precautions are taken. 1/ One of the possible protective measure would be the enactment of legislation by the Marianas which would preclude or limit the holding of interests in land by persons who are not of Marianan ancestry. The question has been raised whether such legislation would be permissible under the Constitution of the United States, especially if United States citizenship should be conferred upon the inhabitants of the Marianas. It is concluded that, in principle, this question is to be answered in the affirmative. 2/

Legislation limiting the holding of interests in real estate by persons who are not of Marianan descent presumably would take three principal aspects: First, it would limit the capacity of persons not of Marianan ancestry to acquire interests in land, and, second, it would limit the ability of owners of real property in the Marianas to transfer their interests in land to persons not of Marianan ancestry. These two categories, however, are relatively unimportant since only about 5% of the land in the Marianananas is held privately.

1/ In Hawaii, the Hawaiian Homes Commission Act of 1920 was enacted after the harm had become virtually irreparable. Changes in the status of American Samoa have been stalled for fear that they might destroy the Samoan culture.

2/ In the absence of a concrete draft it is, of course, impossible to determine in advance whether specific provisions of the prospective legislation would violate any constitutional prohibition.

The proposed legislation, moreover, may be contrary to federal statutory law, especially the Civil Rights laws. Hence, necessary precautions will have to be taken when federal laws are made applicable to the Marianas.

The remaining 95% are public lands, most of which presumably will be turned over to the Government of the Marianas. The bulk of the proposed legislation thus would relate to the disposition and administration of the public lands by the future Government of the Marianas. Such legislation could taken many forms. For example, it could provide that title to public lands could be conveyed only to persons of Marianan descent, but that the land could also be leased to others. The deeds could contain covenants to prevent evasion of the restrictions against the holding of interests in land by persons other than of Marianan descent. The legislation could also follow the pattern of Hawaiian legislation and provide that all or a part of the public lands could be leased only to persons of Marianan descent, and limit the acreage which any individual may hold. There are many other potential legal devices which could be utilized in the legislation designed to administer or dispose of the public lands to insure that such lands will continue to benefit persons of Marianan descent and not fall permanently into outside hands.

Legislation designed to protect landholdings of the indigenous population has several drawbacks. It may discourage or retard the economic development of the Marianas. By limiting non-Marianan investors to lease interests it may result in inefficient methods of economic development. These drawbacks are compounded by the relative ease with which these restrictions can be evaded. This is demonstrated by the current experience in Micronesia with respect to the legislation prohibiting foreign investment. Hence, in enacting such legislation it should be kept in mind that it may have an adverse effect on the economic development of the Marianas, and still not protect the indigenous population from losing its land to outside economic interests.

I.

Legislation preferring one group of inhabitants of an area over another or over nonresidents primarily comes under the headings of the equal protection clause of the Fourteenth Amendment and of the Privilege and Immunity Clauses of Article IV, Section 2 of the Constitution 3/ and of the Fourteenth Amendment. The application of those provisions, however, is limited to States and the Marianas would not be a State.

This, however, does not mean that the Marianas would be absolutely free to discriminate against persons who are not of Marianan ancestry. Presumably the Marianas will enter into a close relationship with the United States, which, if not identical, will be similar to the status now held by the Commonwealth of Puerto Rico. With respect to the latter, it was held in Mora v. Mejias, 206 F. 2d 377, 382 (C.A. 1, 1953):

3/ Should the Privileges and Immunities Clause of Article IV, section 2, be given statutory effect in the Marianas, as in Puerto Rico, Guam and the Virgin Islands (see 48 U.S.C. 737, 1421b(u), 1561), it would be necessary to make an exception authorizing the enactment of the proposed legislation.

"* * * For our present purposes it is unnecessary to determine whether it is the due process clause of the Fifth Amendment or that of the Fourteenth Amendment which is now applicable; the important point is that there cannot exist under the American flag any governmental authority untrammeled by the requirements of due process of law as guaranteed by the Constitution of the United States." 4/

The court did not explain the precise manner in which the due process requirements of the Fifth or Fourteenth Amendment would apply to commonwealths such as Puerto Rico and presumably the Marianas. Such commonwealth is not a State, nor is its government intended to be an agency of the Federal Government. The Supreme Court has not as yet spoken on this issue. Fornaris v. Ridge Tool Co., 400 U.S. 41, 43-44 (1970), however, suggests that the Court is troubled by this problem.

In spite of this conceptualistic problem it must be assumed as a practical matter for the purposes of this memorandum that the Marianas will be subject to some kind of due process restrictions analogous to, if not identical with, those imposed on the Federal Government and the States, even if the more specific Equal Protection and Privileges and Immunity Clauses are not applicable in terms to the Marianas, since they are not States.

II.

The due process requirement does not contain an explicit prohibition against a denial of equal protection. Nevertheless a discrimination may be so unjustifiable or so "invidious" as to constitute a denial of due process. Bolling v. Sharpe, 347 U.S. 497, 499 (1954); Schneider v. Rusk, 377 U.S. 163, 168 (1964); Shapiro v. Thompson, 394 U.S. 618, 641-642 (1969). And any classification based on race or ancestry is "inherently

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4/ Balzac v. Porto Rico, 258 U.S. 258, 312-313 (1922), decided before Puerto Rico had acquired Commonwealth status, observed:

> "* * * The guaranties of certain fundamental personal rights declared in the Constitution, as for instance that no person could be deprived of life, liberty or property without due process of law, had from the beginning full application in the Philippines and Porto Rico, * * *."

suspect and subject to close judicial scrutiny." Graham v. Richardson, 403 U.S. 365, 372 (1971).

The question thus is whether discrimination on the basis of ancestry would be justifiable in the situation here involved. The purpose of the proposed restrictions on land tenure in favor of persons of Marianan descent would be to protect the persons of Marianan ancestry from exploitation by economically more advanced outside groups, and to prevent them from becoming a landless society before they have an opportunity to attain the level of the economic development which attains in the rest of the United States. Such legislation would discriminate against nonresidents of the Marianas, and residents of the Marianas who are not of Marianan ancestry and even would interfere with the freedom of persons of Marianan ancestry to alienate their property to any willing purchaser (see Buchanan v. Warley, 245 U.S. 60 (1917)). Still it would not appear to constitute an "invidious" denial of due process.

Due process prohibits such discrimination as would prejudice minority groups. It does not command, however, an equality of treatment that would leave them defenseless to the superior political and economic power of prevailing groups. In this field too, "a page of history is worth a volume of logic." New York Trust Co. v. Eisner, 256 U.S. 345 (1921).

III.

The foremost pertinent example of statutes designed to protect minorities is presented by the Indian legislation which since the earliest days of the Republic has restricted the alienation of Indian lands. See the Indian Trade and Intercourse Act of 1790, sec. 4, 1 Stat. 138, now 25 U.S.C. 177. The rationale and constitutionality of this legislation was restated relatively recently by the Supreme Court in Board of Commissioners v. Seber, 318 U.S. 705, 715-718 (1943). The Court pointed out that these laws were required to protect the Indians from the selfishness of others, i.e., the pressures of the white man's economic civilization, and to enable them ultimately to find their place in the modern body politic. The Court also reaffirmed older holdings that the power to

shield the Indians from the rest of the economy of the United States did not terminate when the Indians were granted citizenship (at p. 718). 5/ The rationale of Seber was reaffirmed as recently as Poafpybitty v. Skelly Oil Co., 390 U.S. 365, 369 (1968). Kills Crow v. United States, 451 F. 2d 323 (C.A. 8, 1971), certiorari denied, 405 U.S. 999, dealt with a challenge to special procedural provisions applicable to the criminal prosecution of Indians. The court held that although racial classifications are "constitutionally suspect" they do not violate the equal protection and due process clauses if they are generally beneficial to the minority (at pp. 325-326).

A more recent example of legislation designed to prevent an indigenous group of people from becoming landless is the Hawaiian Home Lands Legislation of 1920, 42 Stat. 108, 48 U.S.C. 691-716. This legislation was designed to check the extinction of the Hawaiians as a distinct group by returning Hawaiian families to the land. (See S. Rept. 123, 67th Cong., 1st Sess., p. 2). It provided in effect that certain public lands in Hawaii could be leased only to persons of Hawaiian descent and limited the amount of the land that could be demised to a single person. The Hawaiian Statehood Act contains a provision in the nature of a compact between the United States and the State of Hawaii pursuant to which the Home Lands legislation became a part of the Constitution of the State of Hawaii. The Hawaiian Home Lands legislation, which started out as federal territorial legislation, now has the status of State legislation. Moreover, at the time it was originally enacted, Hawaiians had been citizens of the United States. Act of April 30, 1900, section 4, 31 Stat. 141. There does not appear to have been any challenge to the constitutionality of the Hawaiian Home Lands legislation.

On the basis of those historical precedents, it would appear safe to assume that the appropriate legislation 6/

5/ Simmons v. Eagle Seelatsee, 244 F. Supp. 808, 813 (E.D. Wash., 1965), aff'd, 384 U.S. 209, also holds that the power to enact legislation based upon Indian ancestry did not terminate when citizenship was conferred upon the Indians.

6/ See fn. 2 supra.

designed to restrict land holdings in the Marianas to persons of Marianan ancestry will equally withstand attacks based on constitutional grounds.