CORRECTED

~~SNF~~ 02 6

April 13, 1973

MEMORANDUM FOR MESSRS. WILLENS AND CARTER

SUBJECT: Marianas Islands; Termination of the Trusteeship, Interim Arrangements, and Other Related Tactical Questions

In another part of our memorandum to the Political Status Commission, we set forth our conclusion that the ultimate political status toward which the Marianas should strive is that of an associated free state such as the Commonwealth of Puerto Rico. The advantages of such a status are set forth elsewhere in great detail but can be summarized briefly as follows:

(1) The status of an associated free state would be arrived at through a compact or agreement between the people of the Marianas and the United States, thereby recognizing the sovereignty of the people of the Marianas and emphasizing that the relationship with the United States was entered into as a matter of free choice by the people of the Marianas;

(2) A compact of association would insulate the Marianas from undue interference by the United States government with the internal affairs of the Marianas;

(3) Because the status is arrived at and is maintained through the mutual consent of the parties and because the status of an associated free state has been recognized

by the international community as that of a "self-governing" territory, approval by the United Nations of this alternative to independence may be more likely that approval of mere territorial status; and

(4) Regardless of the mechanism for termination of the status of "associated free state," as a practical matter the ability of the Marianas to move from this status to independence would be greater than their ability to move from the status of a mere territory to that of an independent state.

Having concluded that the Marianas should look toward a compact of association, we must nevertheless deal with the fact that the United Nations and the United States have both determined that no alteration or termination of the trusteeship agreement with respect to a part of Micronesia will occur until the status of all of Micronesia can be resolved. We can expect the United States delegation to urge that the Marianas accept an interim arrangement of some kind until the political status of Micronesia has been resolved. We have, therefore, explored whether the advantageous characteristics of a compact of association could be simulated by such an interim arrangement. As we explain more fully below, any interim arrangement must necessarily fall short of providing the Marianas with the

benefits which would ultimately accrue from the status of associated free state but that certain specific arrangements could be made which would simulate some of these benefits.

Article 15 of the Trusteeship Agreement for Micronesia states that the terms of the agreement cannot be altered or amended without the consent of the United States. Articles 79 and 83 of the U.N. Charter make it clear that the consent of the United Nations (for Micronesia, the Security Council) is also required for any alteration or amendment of the terms of trusteeship agreement. The terms "alteration or amendment" clearly encompass termination or partial termination of the agreement. In 1947 the representative of the United States clearly stated his understanding that the Trusteeship Agreement was a bilateral contract which could not be changed without the mutual consent of the United States and the Security Council. U.N. Sec. Council Off. Rec. 116th meeting, Mar. 7, 1947, pp. 475-76.

The United States and the United Nations have also apparently determined that a partial termination of the trusteeship agreement with respect to a portion of Micronesia would not be acceptable. In 1971, following the plebiscite in Saipan on the issue of integration of the Marianas with

Guam, the Trusteeship Council and the United States both stated that such integration would involve a partial termination of the agreement which the U.N. would not approve in the absence of a comprehensive settlement of the question of status for Micronesia as a whole. Report of the Trusteeship Council to the Security Council on the Trust Territory of the Pacific Islands, July 27, 1971, ¶¶ 69,70.

The question to resolve, then, is how far can an interim arrangement go without constituting a partial alteration or termination of the trusteeship agreement. This question is extraordinarily complex but one thing seems clear: for the United States to negotiate a compact of association with the Marianas would constitute an alteration of the trusteeship agreement. That is because such a compact would modify the international status of the Marianas from that of a mere trust territory subject to the full administrative and jurisdictional authority of the United States to that of a "self-governing" territory in which the United States would have abdicated certain powers of administration. This conclusion is confirmed by a number of commentators and by the Southwest-Africa case in the International Court of Justice. See Marston, Termination of Trusteeship, 18 I.C.L.Q. 1, 37 (1969); International Status of Southwest Africa [1950] I.C.J.

128, 140; see also Memoranda of May 3, 1971 and June 16, 1971 of the Congressional Research Service, American Law Division to Honorable Patsy T. Mink re Separation of the Marianas Islands from the Trust Territory of the Pacific Islands.

These authorities support the proposition that the United States cannot unilaterally modify the international status of any part of the trust territory of the Pacific Islands without the consent of the Security Council. It seems clear, from the Puerto Rico experience, that the relationship established by a compact of association would alter the international status of the Marianas. Thus, the interim arrangement between the United States and the Marianas could not encompass a compact of association which would have the virtue of vesting certain rights in the Marianas and insulating them from unilateral interference by the United States government.

It may be permissible under the Trusteeship Agreement for the United States to establish, by act of Congress or Executive order, an interim administrative structure for the Marianas. It must be recognized, however, that, without a compact, neither Congress nor the Executive can bind or limit itself by legislative or executive action. Accordingly future Congresses and Administrations would be free to amend or repeal any aspect of the interim administrative structure.

Although this fact diminishes the security of the Marianas in their interim relationships with the United States, we are not suggesting that the Marianas abandon efforts to negotiate an interim arrangement pending termination of the Trusteeship Agreement for the rest of Micronesia. First, an interim arrangement is the first step in the direction of achieving a new political or international status for the Marianas. Second, there are certain practical and "ethical" limitations on the ability of Congress or the Executive Branch to "go back on its word" -- despite the absence of strict legal obligation to abide by any interim arrangement. Third, the Marianas could insist that the interim arrangement be of limited duration and tied explicitly to efforts directed toward final termination of the Trusteeship Agreement, thereby creating incentives for the United States to continue to work toward that ultimate goal. And, finally, there may be certain discrete aspects of the interim arrangement which would in fact bind the United States.

There are certain limited exceptions to the general rule that one Congress cannot bind or limit a succeeding Congress by a legislative act. For example, vested property rights, once granted cannot be divested by the United States without the consent of the owner -- or without payment of just compensation. Reichart v. Felps,

73 U.S. (6 Wall.) 160, 165-166 (1867); Choate v. Trapp, 224 U.S. 665, 674 (1912). In addition the United States is generally held to be bound by its contracts. See Union Pacific R.R. v. United States, 99 U.S. 700, 718-19 (1879). It may be possible then for the Marianas to tie certain aspects of the interim political status to the vesting of property rights or the negotiation of a contract between the United States and the people of the Marianas. For example, the lease of military land in the Marianas to the United States could provide a mechanism for assuring an adequate flow of revenue to the local administrative government. Indeed, it may be possible to negotiate the entire interim status arrangement as part of a contract or property settlement dealing with the critical issue of the disposition and occupation of government land. These issues need to be explored in greater detail and are only set forth here as possibilities to be raised in the opening round of negotiations.

JFL