

April 24, 1973

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MEMORANDUM

SUBJECT: Mariana Islands; Restrictions on the Alien-
ability of Land to Non-Marianas Citizens

This memorandum addresses the question whether the Marianas, in a close political association with the United States, can impose restraints on the alienation of land to non-Marianas citizens. As more fully set forth below, we believe that authority to impose restraints on alienation can be exercised consistently with the United States Constitution. The constitutionality of such authority should not depend on whether or not the citizens of the Marianas are also citizens of the United States. Moreover, we believe that land alienation restrictions which are designed to preserve land for native inhabitants of a territory would be consistent with United States policy. Finally, in the concluding section of the memorandum, we discuss certain political and practical problems associated with this issue.

DISCUSSION

I. Authority to Impose Restraints on Alienation of Land Would Be Consistent with the United States Constitution.

In general, restraints on alienation of land, which discriminate on the bases of race or ancestry are "suspect classifications" which may violate various

08254

provisions of the United States Constitution. Under certain circumstances, however, land alienation schemes may be permissible under the Constitution. We believe that such restrictions could be enforced by the Marianas for two basic reasons: First, the Marianas would be a territory or commonwealth of the United States, subject to a less demanding application of constitutional prohibitions than a State or even than the federal government when acting within the 50 states. Second, restrictions on land alienation in the Marianas would be designed to preserve the cultural identity and economic vitality of a distinct group against possible exploitation by economically more powerful and numerically superior outsiders; the discrimination inherent in a scheme designed to achieve this objective could withstand constitutional scrutiny.

The Marianas would be a territory or a commonwealth of the United States, not a State. Accordingly, neither the equal protection clause (14th Amendment) nor the privileges and immunities clause (Article IV, Section 2) of the United States Constitution would apply to the Marianas unless explicitly incorporated in the enabling legislation. The Marianas and the United States would, however, be subject to the due process clause of the Constitution which prohibits unjustifiable or "invidious" discrimination. As noted above,

classifications based on race or ancestry are "inherently suspect" and subject to close judicial scrutiny. Nevertheless, because the Marianas would be a territory or commonwealth outside the 50 states, a less stringent application of the due process clause would be called for under the Insular cases. These cases, although somewhat limited by Reid v. Covert, 354 U.S. 1 (1957), permit a less rigid application of the Constitution in the territories where necessary to respond to local economic conditions and cultural traditions. Thus, a land alienation scheme which was designed to preserve the character of the indigenous population of a small territory where land has strong cultural significance should be viewed in a different context from land alienation restrictions which, for example, are designed to exclude minorities such as blacks or even aliens in the 50 states.

Even without regard to the Insular cases, however, we believe the Marianas could constitutionally enforce restrictions on land alienation, as a "justifiable" discrimination. The interests at stake for the existing inhabitants of the Marianas should be deemed sufficiently important to overcome any constitutional objection. Historical precedent exists for analogous restrictions on land alienation designed to protect

Native Hawaiians and American Indians, and these schemes have persisted after Hawaii achieved statehood in the first case and after American Indians became United States citizens in the second case.

Our conclusions as to the constitutionality of restrictions on land alienation in the Marianas is confirmed in a memorandum on this subject which was prepared by Mr. Herman Marcuse of the United States Justice Department who is also a member of the United States delegation to these negotiations. A copy of his memorandum is attached hereto. It is significant that Mr. Marcuse concludes that restrictions on land alienation would be permissible even though citizens of the Marianas would also be United States citizens. The United States commonwealth proposal, which assumed that Micronesians could also become United States citizens, also provided for restrictions on alienation of land to non-Micronesians. (See Chapter 7, Section 381(g) of draft Bill.)

II. Restrictions on Alienation of Land to Preserve the Cultural and Economic Identity of Distinct Groups Is Consistent with United States Policy.

The Marcuse memorandum refers to analogous land alienation restraints enforced or sanctioned by the United States as precedents for the granting of such authority to the Marianas. These and other analogies are described

briefly below because together they reflect a policy of the United States which is receptive to such land restrictions under certain circumstances.

American Indians. The Marcuse memorandum summarizes the efforts of the United States to protect American Indians against economic exploitation and cultural extinction. These measures have included restrictions on the alienation of Indian lands. Cases upholding this legislation generally have recognized the element of discrimination involved but have upheld the laws on the ground that they are generally beneficial to a minority group. The Supreme Court has also held that the power of the Government to shield the Indians from the rest of the population of the United States did not terminate when the Indians were granted United States citizenship.

Native Hawaiians. In 1920, when Hawaii was still a Territory, Congress enacted the Hawaiian Homes Commission Act, 42 Stat. 108 (1920). The Act imposed restrictions on the alienation of certain public lands, providing that the land could be leased only to "Native Hawaiians" (Section 208), a term that is defined to mean:

"[A]ny descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." (Section 201(a)(7).)

The Act was incorporated into Hawaiian state law after statehood, pursuant to a special "Compact" between Hawaii

and the United States. According to Marcuse, the stated Congressional purpose in enacting this legislation was to check the extinction of the native Hawaiians as a distinct group by returning Hawaiian families to the land. As in the case of the American Indians, the fact that Hawaiians were citizens of the United States did not impose a constitutional or political barrier to implementation of the land alienation restriction.

Alaska Indians. In 1971, Congress passed the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 et seq. The Act provides for the conveyance of public land and monetary awards to "natives" of Alaska in settlement of aboriginal claims. It applies to citizens of the United States who are persons "of one-fourth degree or more Alaska Indian . . . , Eskimo, or Aleut blood, or combination thereof." (43 U.S.C. § 1602.)

The land and moneys are conveyed to Regional Corporations in which the "natives" own stock. Basically, the natives' interest in the stock cannot be alienated for a period of 20 years, except by devise. Even then, voting rights can be exercised by the devisee during the 20-year period only if he is also a "native." (43 U.S.C. § 1606(h)(1)&(2).)

American Samoa. American Samoa is an unincorporated and unorganized Territory of the United States. Its

residents are nationals of the United States. With a few exceptions, land can be sold only to persons having at least one-half Samoan blood. (Constitution of American Samoa, Article I, Section 3.) Most of the land is owned communally, and the restraint on land alienation reflects the cultural significance that the Samoans attach to their native lands.

These analogies are not totally dispositive of the United States' attitude toward land alienation restraints in the Marianas. They reflect a governmental response, sometimes inadequate, to particular circumstances. Yet, together, they suggest a receptive attitude toward restraints on land alienation as one means to meet the cultural and economic needs of distinct groups.

III. Political and Practical Problems Are Associated with Restraints on Land Alienation.

Despite the apparent constitutionality of a restriction on land alienation in the Marianas and despite the historical precedents described above, the Marianas may encounter opposition from the United States on this aspect of the future political status proposal. The Marcuse memorandum reflects skepticism as to whether restraints on land alienation would be economically sensible for the Marianas and whether, in any event, restrictions could be devised which could not be easily evaded.

The Commission must explore these issues carefully. Even though the precise terms of the restrictions may not be subject to formal agreement, it may be tactically advantageous to have the scheme fairly well fleshed out before concluding the negotiations -- certainly before attempting to secure Congressional approval of the future political status proposal.

During Congressional consideration of the Organic Act for Guam in 1950, a provision which would have allowed the territorial government to impose restraints on alienation of land to protect native Guamanians was deleted. The stated reasons for the deletion were that the provision was contrary to the principle of equality. As discussed earlier in this memorandum, this stated reason is not persuasive as a matter of law, and the deletion of this provision may have been due mainly to the fact that its proponents were unable to provide any details as to how the authority would be implemented.

A number of important questions as to the implementation of any land alienation restriction for the Marianas must be answered:

- (1) How much land will be involved? All the land or only certain "reserved areas"?

- (2) Who is entitled to hold the land?
Marianas residents, citizens, natives?
Who are "natives"?
- (3) Will there be provision for exceptions?
- (4) How can the Marianas prevent circumvention of the restrictions by outsiders using local inhabitants merely for the purpose of holding title to the land?
- (5) Are the restrictions to be perpetual or limited in duration?

Other questions will undoubtedly arise after the matter has been given more thought.

We recommend, therefore, that the Commission attach a high priority to formulating and evaluating a detailed proposal for implementing any authority to impose restrictions on land alienation in the Marianas.