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April 27, 1973

MEMORANDUM FOR LTC WILLIAM R. KENTY, OJCS, J-5

SUBJECT: Point Paper - Marianas Talks

This will constitute a "point paper" to be used with your forthcoming meetings on the Marianas - bearing in view Ambassador Williams' request at this time for the fundamental principles that concern us:

1. Fundamental Procedures

I recommend that a comparative table be prepared to indicate the provisions proposed for the coming Bill and with those provisions in the Puerto Rico Commonwealth Act - which appears to be the Act most closely analogous to what we will be doing here (and perhaps the relevant portions in the Guam and Virgin Islands legislation). In this connection -

-pay close attention to the fact that in that Act the Federal legislation (through a Joint Resolution of the Congress) has adopted and incorporated the Constitution of Puerto Rico (48 U. S. C. 731d).

-review Title 48 U. S. C. 731 et seq. for the procedures and substance adopted in establishing Puerto Rico as a commonwealth. (Title 48 is also source of Guam and Virgin Islands legislation).

-note in particular that the laws to be enacted by the commonwealth must be consistent with the United States Constitution; in some cases, such as our concern with eminent domain, we may want

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to have the provision (a) be comparable to the eminent domain authority presently made part of Federal law, and (b) subject to the understanding the laws and constitution of the Marianas will not affect it or amend it without the consent of the United States (the consensual element would of course not be expressed).

-note that there is an unique problem with respect to the plebiscite - who votes, what qualifications for the votes, what kind of "majority" to carry the voting, etc. Secondly, there is the additional concern that United Nations observers and perhaps criteria will be involved.

-note further that the Constitution of Puerto Rico is limited in its reach, and extends primarily to the division of powers and authority within the commonwealth, and to preserving in precise terms the "bill of rights." The United States federal legislation - amounting to a "compact" with Puerto Rico - contains a great deal of substance that might otherwise have been within the competence of the Puerto Rico legislature, but clearly overrides it - and note further that a "compact" of this nature is stronger in the legal sense than a treaty: it is part of federal law, and is subjected directly to the United States Constitution. (A treaty can be "broken" more readily, though in some cases may be an international "wrong").

## 2. Eminent Domain

-since the commonwealth will become part of United States territory it should be possible to have United States procedures and law govern the matter; this will clearly raise a serious issue, because of the importance with which land is viewed in the territory; however, in the sectional analysis of any such legislation we can clearly show that eminent domain will be exercised for very limited purposes - i. e., in connection with emergency or crisis, or where armed attack is threatened, and the like. Such interpretive language of course will not be part of the legislation.

-if the above procedures are not followed, then the United States is subjected by any qualification to the possibility of resistance and local resentment to the exercise of the right; clearly, as I have indicated in my memorandum, eminent domain is close to the concerns of local "sovereignty" and clearly there is an indication of serious tension where the government in Washington has the overriding power and right (the local government would separately retain its right). But this is a matter to be resolved by careful negotiation - otherwise we will be left primarily with a "right" not clearly expressed, and to be exercised in a serious situation solely because we must exercise that power and seek "justification" for the exercise elsewhere.

### 3. Defense Powers

-the Draft Compact intended for all of Micronesia contains an excellent model for defense powers. Language from this Compact can either be adopted in the proposed "compact" with the Marianas, or the language can be used in the negotiations and declaration of principles to indicate not only what United States needs will be but also the area in which they would need to be exercised - at the expense of the local government and its sovereignty.

-these defense powers include the powers which I have separately discussed in my memorandum regarding the "police power;" that power must be available for the reasons set forth in that memorandum.

### 4. Territorial Status

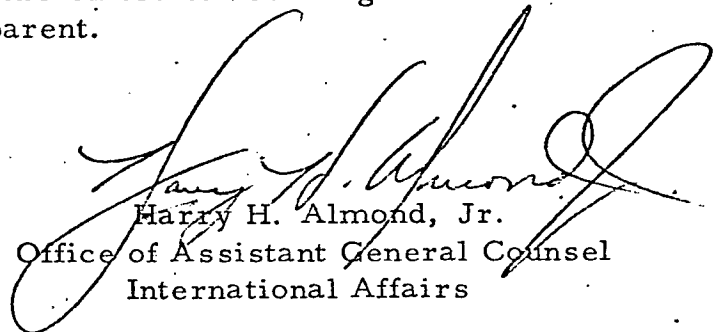
-it should be noted in assuming territorial status the territory is or probably will be treated for the most part under federal law as if it were a state, although some corrections may be necessary (as in the case of "diversity jurisdiction.") (See Title 28 U. S. C. 1332 - section chosen simply for illustration).

-it should also be noted that in being treated in this way, the territory receives the benefits as well as the "disadvantages" or "disabilities" that are imposed upon a local government, in the sense that it loses part of its decision-making (sovereign) power. But the disabilities are not great - the United States can (a) specify at the outset its major land needs currently required, (b)

further specify those needed or seemingly needed for major crises in the future, and (c) broadly indicate what emergencies or crises will necessitate a future taking, while (d) indicating that no taking will be for a period longer than the crisis requires, perhaps providing the means for the local government to have in the courts access to a judicial process to test whether the need has continued. (See my memorandum to this effect).

-the territorial status ensures the people of the fullest protection under the United States defense powers, and the greatest access to the use of her welfare powers. It does not (necessarily) mean that they are or will be entitled to becoming one of the "states" in the United States - this is a policy matter which must otherwise be resolved.

-the overriding role of the United States Congress in all of the above should be self-apparent.



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