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8 May 1973

MEMORANDUM FOR LTC W. R. KENTY
FAR EAST, SOUTH ASIA REGION, J-5

SUBJECT: Second Draft - Marianas Political Status Commission. - Comments

The Second Draft which is reviewed here has adopted many of my suggestions raised in connection with the First Draft, but by virtue of the changes made, it raises issues that were not raised in the earlier memorandum. The following comments and several cases for the Department of State lawyers, are keyed to the Sections and Pages of the Second Draft:

1. General Principles. (Page 2). I recommend that these principles, which I assume will be adopted solely for the purposes of negotiation, (a) use the term "shall" throughout, (b) provide for the location of the capital of the Marianas, identifying the city to have that status, and (c) provide that the relationship with the United States shall be "in the nature of a compact," and not a compact in the technical sense. (A compact between the several states or with the United States in the constitutional sense is not intended, and cannot apply). (see Mora v. Torres, 133 F. Supp. 309 (1953).

2. Comments. I assume that the negotiating team will bear in view the underlying thrust of the relationship to be entered into with the Marianas - i.e. that the proposed "compact" should cover much of what the Congress of the United States will intend to maintain under its control. (see discussion, in Railroad Retirement Board, 295 U.S. 330, 374-392, 1935).

Secondly, we will have to have the Department of Justice assure us that our defense powers will be unimpaired under these proposed provisions. There is some authority in the United States

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cases to indicate that such powers may be implied, but the sensitivity of this matter is such that it should not be left solely to implication (see concerning this, the discussion in Sterling v. Constantin, 287 U.S. 378, 397 et seq (1932).

Thirdly, there is the problem that the laws of Micronesia including the "common law" or tribal law may be inconsistent with United States law, or law enacted under the proposed Marianas Consitution, or with this "compact." This matter has not even readily been resolved in the context of the several states (of discussion in United States v. Wood, 299 U.S. 123 (1936). Therefore, review the Puerto Rican legislation which attempts to resolve this problem in part and we can discuss further. (48 U.S.C. Sec. 735).

3. Article II. Section 1 should provide for a "republican form of Government" to be adopted. Section 2 should clarify the vague language calling for a "satisfactory" bill of rights (by specifying what they shall be), and for the overriding effect of the "basic provisions of the Constitution of the United States" (by declaring that the Congress shall so decide). And Section 2 should provide that the United States Congress - not the President - shall determine whether the proposed Marianas constitution is acceptable, though the President would of course submit it to the Congress.

4. Chapter 4 (page 12 et seq). The United States right to enjoyment and use of property should refer to the "title, rights or interests" inland, not just to "title" and Section 41(a) corrected accordingly.

In Sec. 41(b) reference should be made in line 5 to "land use, acquisition and retention." In Sec. 41(c)(1) following "whatever rights", add the language "not otherwise enjoyed," to complete the legal substance of this section.

5. Section 41(d). Reference must be made to the Mariana Islands and to "the waters of those islands," or use such other language as meets with the law of the sea task force policy requirements to assure full use of territorial waters, continental shelf and territorial or controlled seabeds.

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cc: O.T. Johnson, D/State
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