August 3, 1973

MEMORANDUM FOR HOWARD WILLENS

SUBJECT: The Content and Legislative History of the Mink Amendment

The Mink Amendment is a provision added by Congress in 1968 to the Organic Acts of both Guam and the Virgin Islands. (48 U.S.C. §§ 1421b(u) and 1561, respectively.) It explicitly applies a number of constitutional provisions to each of the two territories. The language for Guam reads:

> "The following provisions of and amendments to the Constitution of the United States are hereby extended to Guam to the extent that they have not been previously extended to that territory and shall have the same force and effect there as in the United States or in any State of the United States: article I, section 9, clauses 2 and 3; article IV, section 1 and 2, clause 1; the first to ninth amendments inclusive; the thirteenth amendment; the second sentence of section 1 of the fourteenth amendment; and the fifteenth and nineteenth amendments.
>
> "All laws enacted by Congress with respect to Guam and all laws enacted by the territorial legislature of Guam which are inconsistent with the provisions of this subsection are repealed to the extent of such inconsistency."

The language for the Virgin Islands is identical, except for the reference to the Virgin Islands and the proviso:

> "That all offenses shall continue to be prosecuted in the district court by information as heretofore, except such as may be required by local law to be prosecuted by indictment by grand jury."

The Mink Amendment was apparently prompted by the concern that the people in the territories were second-class citizens of the United States by virtue of the fact that most provisions of the Constitution do not apply to the territories.

Note that the provision does not distinguish in its effect between laws passed by the U.S. Congress and by the particular territorial legislature. Whether there could or should be such a distinction was not discussed in the legislative history.

Also, many of the protections guaranteed by the constitutional provisions listed in the Mink Amendment were already insured the territories under earlier statutory language, though that language did not specifically incorporate the constitutional provisions. For example, the Virgin Islands had already enjoyed the benefits of due process and equal protection clause analogous to those contained in the Fourteenth Amendment. (48 U.S.C. § 1561.)

Legislative History

The Mink Amendment was passed as part of the Elective Governor Acts for Guam and the Virgin Islands. The principal purpose of the acts was to provide for the popular election of the Governor and Lieutenant Governor in each of the two territories. A number of other provisions in the acts granted further self-government to the two territories. On the other hand, the acts also contained provisions for a Comptroller General appointed by the Secretary of the Interior. (See Pub. L. 90-497 (Sept. 11, 1968) and Pub. L. 90-496 (Aug. 23, 1968).)

As for the applicability of constitutional provisions, the companion bills introduced in the House and Senate in 1967 for Guam[1/] proposed identical language:

> "The provisions of clause 1 of section 2 of article IV and section 1 of amendment XIV of the Constitution of the United States shall have the same force and effect within the unincorporated territory of Guam as in the United States or in any State of the United States."

1/ Since the proposed and eventually passed provisions for Guam and the Virgin Islands were identical for the two territories, except for the reference to the particular territory and the eventual clause regarding indictments in the Virgin Islands, the following discussion focuses on the Guam case.

This language was obviously not as ambitious as what eventually emerged from Congress. First, it incorporated the Article IV privileges and immunities clause. Similar language had been contained in the Elective Governor legislation from the first draft in the early 1960's because a similar provision had been contained in the 1947 legislation providing for an elected Governor in Puerto Rico. (H. Rep. 1521, 90th Cong., 2d Sess. 17 (1968).) The Puerto Rican provision was, in turn, caused by Congressional concern that the Puerto Rican legislature would tax the property of non-residents at a higher rate than residents. (S. Rep. 422, 80th Cong., 1st Sess. 3-4 (1947).) Second, the language extended to Guam the due process and equal protection clauses of the Fourteenth Amendment.

The Senate passed the Elective Governor Act in 1971 with the proposed provision unchanged. At the initiative of Patsy Mink, the House Committee on Interior and Insular Affairs amended the provision to read:

> "To the extent not inconsistent with the status of Guam as an unincorporated territory of the United States, the provisions of the Constitution of the United States of America and all its amendments shall have the same force and effect within Guam as in the United States."

As noted earlier, the wide scope of the provision was apparently prompted by concerns that the citizens of a territory were second-class citizens with few constitutional protections. (H. Rep. 1521, p. 18.) The specific use of the term "unincorporated" was intended to allay fears that a sweeping application of the Constitution might be interpreted as making Guam an "incorporated" territory with the implicit promise of statehood. (See Hearings on H.R. 7329 Before the Subcomm. on Territorial and Insular Affairs of the House Comm. on Interior and Insular Affairs, 90th Cong., 2d Sess., ser. 90, at 61 (1968); H. Rep. 1521, p. 18.)

The House Committee received a legal analysis of the amendment from the Department of the Interior. (H. Rep. 1521, pp. 19-22.) Written by C. Brewster Chapman, this memorandum was hurried and not persuasive. (The text of this memorandum and a related one are at Attachment A.) It did not list any negative results of the amendment, except to note that the vague language would encourage litigation.

The House passed the bill with this amendment in 1968. At that point, the Department of Justice became involved. The Deputy Attorney General (Warren Christopher) sent a letter to the appropriate Senate Subcommittee voicing misgivings about the House amendment. (114 Cong. Rec. 23047-48.) His comments are worth quoting at length:

"Analysis of the full potential import of the House amendments in question involves difficult questions, resolution of which appears uncertain. This is due in part to the circumstance that the status of unincorporated territories has never been fully judicially defined. . . .

"Since the House of Representatives did not declare the purpose of its amendment it is difficult to anticipate how the latter will be interpreted. At its narrowest, the general effect of the House amendment may well fail to confer any benefit upon the inhabitants of Guam. Many, if not most, of the provisions of the Constitution relate to the States and inhabitants of States. Hence, it could be said that the extension to Guam of any Constitutional provision relating to States would be inconsistent with the status of Guam as an unincorporated territory, since Guam is not a State. Therefore the language of the amendment would render such provisions inapplicable to Guam.

"If broadly interpreted, the amendment could be read as rendering applicable to Guam all those provisions of the Constitution which can be extended to a territory by simple legislation, short of admitting it as a State. Patently, it would be difficult to define precisely what portions of the Constitution would come within the ambit of such a broad legislative purpose.

"One specific possible effect should also be noted. Downes v. Bidwell . . . stands for the proposition that unincorporated territories need not be included in the customs territory of the United States since such territories are not part of the United States within the meaning of Article I, section 8, clause 1 of the Constitution ("all duties, imposts and excises shall be uniform throughout the United States"). However, such inclusion in the mainland customs system is not prohibited by that

> decision and would not be inconsistent with the status or concept of an incorporated territory. Hence, the House amendments could possibly have the effect of rendering the uniform imposts requirement applicable to Guam and the Virgin Islands. . . .
>
> "In sum, the effects of the House amendments are doubtful. It is not certain whether and to what extent the amendments will actually benefit the inhabitants of Guam and the Virgin Islands. On the other hand, they may cause them substantial harm. . . ."

The letter from the Justice Department recommended returning to the earlier Senate language. However, a new compromise was worked out which was acceptable to Congress and the Department of Justice. This compromise is what finally passed Congress and is now law. That language, quoted at the beginning on the memorandum, avoids the pitfalls suggested by the Department of Justice letter:

--It specifically says that the provisions will apply with the same force and effect as in the United States or in any State of the United States.

--It says which specific Constitutional provisions are made applicable.

--It does not include the customs clause and thereby avoids the problem about whether Guam must be part of the mainland customs system

Barry Carter

cc: Mr. Lapin
Mr. Kujovich

But because we would prefer that the amendment not be adopted for Guam, we also would prefer that it not be adopted for any other area.

We appreciate this further opportunity to present our views.

Sincerely yours,

HARRY R. ANDERSON,
Assistant Secretary of the Interior.

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF TERRITORIES.
Washington, D.C., April 25, 1968.

MEMORANDUM

D-68-2210.4290.

To: Assistant Solicitor, Territories.

From: Director, Office of Territories.

Subject: Constitutional rights of U.S. citizens in Guam.

At its session on April 23, the Territories Subcommittee of the House Interior Committee acted to report favorably to the full committee an elective Governor bill for Guam. Prior to doing so, it voted to strike out of H.R. 7329 the following language, which had appeared in section 8:

"The provisions of clause 1 of section 2 of article IV and section 1 of amendment XIV of the Constitution of the United States shall have the same force and effect within the unincorporated territory of Guam as in the United States or in any State of the United States."

It further agreed to substitute in lieu of that language the following provision:

"The provisions of the Constitution of the United States of America and all its amendments thereto relating to individual rights of citizenship shall have the same force and effect within the unincorporated Territory of Guam as in the United States."

The chairman of the subcommittee asked that this Department furnish an opinion stating the legal consequences of the amendment. He also asked that we consider the question whether adoption of this amendment in the case of Guam would be likely to have an adverse effect upon our other territories, or whether such action would give rise to the question whether the same provision should be made applicable to some or all of them.

By way of background, the provision first quoted above was, as you are aware, contained in the first draft of elective Governor legislation in the early 1960's because a similar provision had been contained in the 1947 legislation providing for an elected Governor in Puerto Rico. The Puerto Rican provision was, in turn, precipitated by the alleged possibility that the Puerto Rican Legislature would provide for the taxation of property of nonresidents at a higher rate than residents. To preclude this development, the Congress expressly extended to Puerto Rico the privileges and immunities clauses of the Constitutition. When we turned to elective Governor legislation several years ago, we did did not believe that any territorial legislature contemplated action of the sort described in the Puerto Rican case, but we believed it wise to follow the precedent of the Puerto Rican bill anyway. Accordingly we

included in our earliest drafts the language first quoted above. The language has continued to appear, so far as I know, in all of the many elective Governor bills which have followed.

The new language, appearing in the second quotation above, and now substituted for the earlier version, was prompted by the concern sometimes voiced that the people of Guam, although citizens of the United States, are second-class citizens. This view was recently expressed in Guam Legislative Resolution No. 256. Neither the resolution, however, nor any other document which has come to my attention, has recited any specifics in support of the view that citizen residents of Guam are deprived of particular constitutional protections. As you know, U.S. citizens of Guam do have the benefits set forth in the bill of rights of the Guam Organic Act; the protections described in the long line of cases delineating the differences between incorporated and unincorporated territories; and the rights to the use of grand and petit juries, contained in local laws which implement the Federal statute pertaining to juries in Guam, enacted in 1954 (48 U.S.C. 1424(b)). They do not, of course, have the constitutional rights to participate in national elections and to representation in the Congress, but those rights are not now in issue, so far as I know. The sponsor of the new amendment stated that the amendment was not intended as a vehicle to confer such rights upon the citizen residents of Guam.

I enclose for your information and use a copy of an opinion from the Legislative Reference Service of the Library of Congress to Mrs. Mink, dated March 25, 1968, on this general subject. I sought some time ago from the Governor of Guam further information as to specifics on the "second-class citizen" matter, and I have recently asked him to expedite his response. Should an answer be received in timely fashion, I will instantly share it with you.

We will welcome your opinion on the above-quoted amendment, in terms of any particular questions or aspects which you wish to address yourself to. Among those questions which I should particularly appreciate your considering are the following:

1. Would the adoption of the amendment create any doubt as to Guam's continued status as an unincorporated territory? (The March 25 memorandum states that it would not, and I know of no reason to differ with that conclusion.)

2. Would the adoption of the amendment confer upon the citizen residents of Guam the right to participate in national elections and to be represented by voting members in the U.S. Congress? (Mrs. Mink, the sponsor of the amendment, stated that it would not do so and is not intended to do so, inasmuch as such constitutional rights are restricted by the explicit language of the Constitution to citizen residents of the States.)

3. What "individual rights of citizenship" would be conferred upon the citizen residents of Guam, if the amendment were enacted, that they do not now have? (I have suggested that the right to bear arms, under the second amendment, may be one.)

4. Might enactment of the amendment give rise to any negative results? (It has been suggested that certain tariff and tax benefits, now conferred by statute upon Guam, might no longer be applicable.)

5. We would welcome any comments you may have concerning the effect of this amendment with respect to other territories and the trust territory.

Because the elective Governor bills are scheduled for consideration by the full Interior Committee on May 1, we should appreciate receiving your opinion as much in advance of that date as may be possible, so as to permit timely transmission of it to the chairman.

RUTH G. VAN CLEVE.

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SOLICITOR,
Washington, D.C., April 30, 1968.

D-68-2210.4290.

To: Director, Office of Territories.
From: Assistant Solicitor, Branch of Territories.
Subject: Constitutional rights of U.S. citizens in Guam.

In your April 25, 1968, memorandum you have asked several questions touching upon the legal consequences of a proposed provision in H.R. 7329 that states:

"The provisions of the Constitution of the United States of America and all its amendments thereto relating to individual rights of citizenship shall have the same force and effect within the unincorporated Territory of Guam as in the United States."

The insertion was a substitution for a provision that would have extended article IV, section 2, clause 1, and section 1 of the 14th amendment of the Constitution to Guam. Each of these contains a privileges and immunities clause, the former connoting a national citizenship intended to prevent discrimination by the several States against citizens of other States in respect of the fundamental privileges of citizenship, the latter establishing safeguards for citizens of the United States against legislation of their own States having the effect of denying equality of treatment in respect of the exercise of their privileges of national citizenship in other States.[1]

The privileges and immunities clauses of the Constitution have been the basis for determinations by the courts which have identified many individual rights of citizenship under the Constitution and its amendments. In your letter you ask: "What 'individual rights of citizenship' would be conferred upon the citizen residents of Guam, if the amendment were enacted, that they do not now have?" (Question No. 3.)

In answering the question we necessarily relate our answer to individual rights associated with national citizenship as distinguished from State citizenship since Congress is here dealing with a territory under article IV, section 3 of the Constitution. In general, although our individual rights are scattered throughout the articles, they are more specifically dealt with in the first 10 amendments to the Constitution. In reviewing and comparing the Bill of Rights of the Constitution with the bill of rights in the Guam Organic Act[2] we find the following areas worthy of discussion:

1. The second amendment provides that "a well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed." The right to bear arms is not contained in the Guam Organic Act. We have found no decision in which the courts interpret this to be a fundamental right, which by its own force would apply to Guam at this time. On the contrary,

[1] 16 Am. Jur., "Constitutional Law," secs. 465–469.
[2] Act of Aug. 1, 1950, 64 Stat. 384, as amended.

the Supreme Court in *Miller* v. *Texas*, 153 U.S. 535, 538 (1894), held that a State law prohibiting the carrying of a dangerous weapon does not abridge the privileges or immunities of citizens of the United States within the meaning of the 14th amendment.

Under the doctrine of selective incorporation, discussed in *United States ex rel Hetenyi* v. *Wilkins* (348 F. 2d, 844, 853 (C.A. 2d, N.Y., 1965), certiorari denied, 383 U.S. 913), certain guaranties of the Bill of Rights, those that are fundamental, are absorbed by the due process clause of the 14th amendment and thus made applicable to the States and territories. The effect of the proposed amendment would be to extend the "right" to bear arms to the people of Guam. This privilege is unassociated with a status of citizenship and is not a fundamental right.

2. The other rights guaranteed in amendments 1 through 8 of the Bill of Rights are included in the Guam Organic Act, as amended.

3. The ninth amendment, which provides that: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people", is pertinent. Cases are few in which the Court has found it necessary to determine what these other retained rights are. Among them, however, is the right of individuals to engage in political activity (*United Public Workers* v. *Mitchell*, 330 U.S. 75 (1947)). Without determining whether the right to privacy was fundamental, the Court in *Davis* v. *Firment* (269 F. Supp. 524, 529 (1967)), pointed out that, assuming this amendment manifested intent to protect other rights not specifically mentioned in the Bill of Rights, rights accorded protection thereby would have to be fundamental. This amendment is not now part of Guamanian law. If it became applicable, it would extend to Guamanians the fundamental and nonfundamental rights which by present court decisions are said to be encompassed by the amendment. In addition, it would extend presently undefined nonfundamental rights which, by subsequent judicial decision, may be identified.

The amendment also applies to "the people". This may be construed to mean all persons regardless of citizenship status.

4. Pertinent to your question No. 2 (whether the adoption of the amendment would confer upon the citizen residents of Guam the right to participate in national elections and to be represented by voting Members in the U.S. Congress), are amendments 15 and 24, which outline the rights of citizens of the United States to vote. As indicated by the Court in *Harman* v. *Forssenius* (380 U.S. 528, 537 (1965)), the right to vote is fundamental because preservative of all rights. Guamanians now have this fundamental right to vote locally. However, a constitutional amendment as well as further legislation by the Congress undoubtedly would be necessary before their right to vote could be exercised in national elections in the territory. This is so because clause 3 of section 2 of article I of the Constitution, which provides for representation in the House of Representatives to be apportioned among the several States, makes no provision for representation from a territory. Also, section 1 of article II empowers the State to appoint electors, who, pursuant to the 12th amendment vote for the President and the Vice President. As an example, in order that the District of Columbia could appoint electors, amendment 23 was adopted. We are of the opinion that the proposed amendment as written would in no way override constitutional provisions relating specifically to State

representation in the Congress. Nevertheless, this proposed amendment, by the force of its language might necessarily be construed to mean that it is the sense of Congress that such voting rights be extended to Guam as one of the "individual rights of citizenship" under the Constitution. This, of course, would necessitate another amendment to the Constitution.

You also ask: "Would the adoption of the amendment create any doubt as to Guam's continued status as an unincorporated territory?" (Question No. 1.) Legislative intent has been the controlling factor whenever the Court determines that a territory was incorporated or unincorporated. In *Balzac* v. *Porto Rico* (258 U.S. 298 (1921)), the Court analyzed the original Organic Act of Puerto Rico, as well as all subsequent legislation extending Federal revenue, navigation, banking, bankruptcy, employers' liability, safety appliance, extradition, and census laws to Puerto Rico before concluding that "On the whole * * * we find no features in the Organic Act of Porto Rico of 1917, [or by implication from subsequent legislation] from which we can infer the purpose of Congress to incorporate Puerto Rico into the United States with the consequences which would follow," at page 313. However, as indicated by Mr. Dudley O. McGovney in a California Law Review article in 1934, the Supreme Court invented the mysterious doctrine of "unincorporated" territory and the governmental power of Congress over it as subject "to some only of the limitations of the Constitution, that is, subject to those and only those which the Supreme Court deems 'applicable' ".[3] In view of the expressed wording of the amendment identifying Guam as unincorporated, in addition to the same identification in section 3 of the Guam Organic Act, as amended, we are of the opinion that the Court would adhere to precedent and accept the status rather than overturn the "mysterious doctrine" surrounding unincorporated territories. Expressed in another way, the Court would not find that Congress intended the entire Constitution to be applicable to Guam, based upon this amendment.

In your fourth question you ask: "Might enactment of the amendment give rise to any negative results?" It has been suggested that the uniformity clause found in clause 1, section 8, of article I may create tax problems for Guam. Since we have concluded that the amendment would not result in a change of status from unincorporated, we are guided by the decision of the Court in *Downes* v. *Bidwell*, (182 U.S. 244 (1901)). There the Court found that the term "United States", used in the clause, refers only to the States of the Union, the District of Columbia, and incorporated territories and that the Congress is not bound by the rule of uniformity in framing tax measures for unincorporated territories. Thus, it was held that Puerto Rico and the Philippines are not part of the "United States", as used in the clause (*Neuss Hesslein & Co.* v. *Edwards*, 24 F. 2d 989 (1928)).

Within the limited time available to us we probably have not identified every individual right of citizenship which expressly or by implication may be included in the Constitution and its amendments. We believe, however, that the less precise language of the proposed amendment will inevitably lead to litigation to determine precisely

[3] Dudley O. McGovney, "Our Noncitizen Nationals, Who Are They?" 22 Cal. L. Rev. 593, 598.

what "individual rights of citizenship" are included in the Constitution and its amendments. It is our opinion that more precise words should be employed—words of art which have previously been used in other acts of Congress and which have been judicially defined.

C. BREWSTER CHAPMAN, Jr.,
Assistant Solicitor, Branch of Territories.

COMMITTEE RECOMMENDATION

The Committee on Interior and Insular Affairs recommends enactment of H.R. 7329, as amended.

CHANGES IN EXISTING LAW

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

ACT OF AUGUST 1, 1950 (64 STAT. 384; 48 U.S.C. (1421), AS AMENDED

This Act may be cited as the "Organic Act of Guam".

SEC. 2. The territory ceded to the United States in accordance with the provisions of the Treaty of Peace between the United States and Spain, signed at Paris, December 10, 1898, and proclaimed April 11, 1899, and known as the island of Guam in the Marianas Islands, shall continue to be known as Guam.

SEC. 3. Guam is hereby declared to be an unincorporated territory of the United States and the capital and seat of government thereof shall be located at the city of Agana, Guam. The government of Guam shall have the powers set forth in this Act, shall have power to sue by such name, and, with the consent of the legislature evidenced by enacted law, may be sued upon every contract entered into with respect to, or any tort committed incident to, the exercise by the government of Guam of any of its lawful powers. The government of Guam shall consist of three branches, executive, legislative and judicial, and its relations with the Federal Government [shall be under the general administrative supervision of the head of such civilian department or agency of the Government of the United States as the President may direct.] *in all matters not the program responsibility of another Federal department or agency, shall be under the general administrative supervision of the Secretary of the Interior.*

* * * * * * *

BILL OF RIGHTS

SEC. 5. (a) No law shall be enacted in Guam respecting an establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of their grievances.

(b) No soldier shall, in time of peace, be quartered in any house without the consent of the owner nor in time of war, but in a manner to be prescribed by law.