August 10, 1973

MEMORANDUM FOR HPW

Subject: Some thoughts on the application of federal laws and maximum self-government in the Marianas

In the Joint Communique the United States agreed to explore with us some general provisions that might be included in the compact for governing the application of future federal laws in the Marianas. The Communique also provides that the Marianas Political Status Commission will explore means to reconcile the otherwise plenary power of Congress under Article IV, Section 3, Clause 2 of the U.S. Constitution with the concept of maximum self-government for the people of the Marianas. Taken together these provisions of the Communique constitute a mandate for the joint subcommittee on legal matters to consider general formulae governing both the authority of the United States to pass laws in the Marianas and the application of various federal laws enacted within that authority. This memorandum addresses general principles in both these areas. Because research is still continuing on the subject of whether Congress can be limited under Article IV, Section 3, Clause 2, the discussion below assumes that this power can be limited in the manner suggested. Wherever

appropriate I have drawn on the research to date on this subject, however, and have selected mechanisms which are most consistent with our best thinking as to how to go about limiting federal power in the Marianas.

I. The Scope of Federal Authority in the Marianas.

The question of the authority of the federal government to legislate in the Marianas is different from the question as to what federal laws, enacted within that authority, should or will apply. I address aspects of this latter problem in the second part of this memorandum.

The source of federal authority in the Marianas may be considered to be either the Status Agreement itself (which is the Puerto Rico argument) or Article IV, Section 3, Clause 2. Perhaps the most sensible resolution of this dilemma is to say that the authority derives from both. By approving the Status Agreement, the people of the Marianas give up certain specified power to the federal government. The federal government is authorized to exercise this power under Article IV, Section 3, Clause 2. The scope of that power, however, is no broader than that which is specifically given by the people in the Status Agreement.

On this premise the compact might provide that Congress should have legislative authority under Article IV, Section 3, Clause 2 "as if the Marianas were a territory within the meaning of that clause," except that Congress

shall make now law . . . . It seems reasonable that the place to start in deciding how to complete the foregoing sentence is the federal-state relationship. This provision would then provide that Congress could make no law in the Marianas that it could not enact in a state (except as otherwise provided in the compact or unless the Government of the Marianas consents).

The advantage of this approach is that there is a clear body of precedent which determines the appropriate scope of federal authority. The disadvantage may be that we may be going too far. Denying federal authority over "intra-state" matters may be a two-edged sword in that we may be preventing Congress from enacting beneficial programs or appropriating monies for the Marianas under circumstances where it could clearly do so for other territories but could not do so for states. I don't think this is a serious problem for two reasons. First, as a practical matter Congress usually treats territories much worse than it treats states. Second, other provisions of the Status Agreement could provide for the authority, and indeed the obligation, of the federal government to appropriate monies for the Marianas.

If such a provision were to be enacted, it would secure the Marianas against regulation of purely local or "intra-state" matters. It would provide the United States with legislative power to protect all of its

legitimate interests; i.e., could Congress claim that it needed more authority to act in the Marianas than it does in Hawaii?*/ Coupled with a complimentary grant of authority to the Government of the Marianas in the compact and in the local constitution, both of which would be free from unilateral U.S. revision, the formula for allocated authority within the Marianas would appear to be both sensible and secure. A provision could be made for the supremacy of federal law (and preexemption of Marianas' law) to the same extent as those doctrines are applicable in the states.

The only matter which need be added in order to complete the picture of the balance of powers in the Marianas is a provision in the compact that certain specified laws, otherwise within the scope of federal authority, would not apply in the Marianas or would apply in a particular way. It is here that we would deal with the very important or fundamental federal statutes such as income tax, customs, etc. -- to the extent that we determined it was in our interest to do so.

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*/ At least, if we propose such an approach, we can shift the burden to the U.S. negotiating team to specify the additional federal power that they feel is needed.

II. Application in the Marianas of Federal Laws Enacted Within the Scope of Federal Authority.

Given the authority of Congress to enact legislation applicable in the Marianas, it is neither necessary nor desirable that all such laws should in fact apply there. As noted above, the Marianas may wish to proscribe the application of certain important federal laws in the Status Agreement itself. As to the great bulk of other legislation, the Status Agreement should provide for a formal Joint Commission on the Application of Federal Laws to make recommendations to Congress on this subject. Needless to say, the Commission and Congress would be obligated to abide by the general limitations on federal authority set forth in the Status Agreement. Of course, exceptions to those limitations could be made by the Marianas consenting to the application of certain specified laws.

There would be a more immediate problem, however, that would arise perhaps before the Commission had finished its work. That is, what happens when the Marianas realize their new political status? I would think the Status Agreement ought to provide for a maintenance of the status quo with respect to the application of federal law in the Marianas -- with some exceptions. Certainly the enabling legislation whereby the Marianas are presently administered under the authority of the Secretary of the Interior would be repealed.

A different problem is presented by the question whether laws passed by Congress after the Commission on Federal Laws has completed its work would apply in the Marianas. I think that, in addition to the general rule governing federal authority discussed above, the Status Agreement ought to provide for a workable rule of statutory construction with respect to laws enacted within the scope of federal authority and arguably applicable in the Marianas. Such a provision would serve a purpose somewhat analogous to that of the "not locally inapplicable" provision of the Puerto Rico status agreement. There would be clear guidelines along the following lines:

(1) If Congress specifically applies the law to the Marianas, of course the law would apply (assuming there was authority). If Congress does not mention the Marianas by name, the act would be construed not to apply in the Marianas, regardless of its application in the other territories. The operative notion here is that the burden should be on Congress to mention the Marianas by name and thereby put the Marianas on notice that pending legislation may affect them. Given the limited lobbying capabilities of the Marianas, such notice is essential if their views are to be effectively maintained. To avoid any confusion, laws which were specifically applicable in the Marianas could be amended or repealed without mentioning the Marianas by name in the amended or repealed legislation. This would

too broad!!

be fair since the Marianas "Washington representative" ought to be able to maintain a list of statutes currently applicable in the Marianas and to follow Congressional legislation explicitly amending or repealing those statutes.

III. The Marianas Are Not to be Considered an Agency or Instrumentality of the Government.

A separate question as to the applicability of federal law arises with respect to those federal statutes which impose special obligations on agencies of the federal government and upon those who have dealings with such agencies. Through this "back door," Congress has extended its regulatory authority into matters of purely local concern in which direct federal funding is involved. I am thinking particularly of the Davis-Bacon Act, but I am sure that there are a whole spate of substantive regulatory laws applicable in this area. I would think, therefore, that the Status Agreement ought to make it clear that the Government of the Marianas is not to be considered an agency or instrumentality of the United States Government for this or any other purpose. This would be consistent with the formula discussed in Section I above whereby the Marianas Government is treated as a State for purposes of authority to enact legislation in the Marianas.

JFL