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August 10, 1973

MEMORANDUM FOR HPW

Subject: Current Marianas Assignments; Preparation for Legal Subcommittee

A number of assignments in connection with our representation of the Marianas remain outstanding at the present time. Many of these relate to our preparation for the first meeting of the joint legal subcommittee. In your absence, I have attempted to stay on top of the following projects as to which work is currently in progress (or has been completed). This list does not include some projects listed in your June 19 memorandum to Eddie on which work has yet to be initiated.*/

1. United Nations Views on Self-Determination and Separatism.

Before you left, you received a memo from Elinor Shroeder on "Self-Determination and Self-Government in the United Nations." As a follow-up to that memorandum, I had Gus Oliver prepare a memorandum on Namibia and its relation to the Marianas. That memorandum, dated August 6, 1973, is enclosed. (#1.) I have copies of the pertinent resolutions and other materials cited therein. As you will see, the Namibia case, which involves forced separation of groups within the former trust territory of Southwest Africa, is hardly analogous to the current situation in Micronesia. Interestingly enough, this distinction was explicitly recognized by the French representative to the Trusteeship Council in the debates following our appearance there last June.

This entire topic (U.N. views) is of dubious utility to us in dealing with the U.S. at this point. Perhaps we will want to give further thought to preparing a formal memorandum for the U.S. "demonstrating" (which is hard to do) that the U.N. will not approve any future status for the Marianas which does not provide assurances of local autonomy or self-government.

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*/ I may also have missed a few miscellaneous projects given to Barry, some of which are reflected in material that I have seen in your "in" box.

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2. Article IV, Section 3, Clause 2.

Before you left, both Jim Moyer and Gil Kujovich circulated drafts of their memos on 4-3-2 and the Puerto Rico political status. As a follow-up, Jim Moyer prepared two short memos on whether U.S. citizenship or the theory of "vested" contract or property rights could provide a basis for securing local autonomy for the Marianas.

These memos, both dated August 1, are enclosed herewith. (#'s 2 and 3.) I do not concur in Moyer's degree of pessimism as to the utility of the vested rights theory, but it must be conceded now (in light of the research to date) that 4-3-2 presents more of a problem than perhaps we had thought originally. Accordingly, Gil Kujovich is continuing to do research in this area. First, he is exploring the ramifications of the so-called "out-in" approach whereby the Marianas becomes a part of the U.S. by the sovereign act of the people of the Marianas and by a limited delegation of authority to the United States Government. Second, he will review the Fernos-Murray bill in an effort to help us avoid the pitfalls of the Puerto Rico experience.

All of this 4-3-2 research is vitally relevant to the work of the legal subcommittee and the next round of negotiations. Ultimately, we will have to prepare a comprehensive memorandum for the client containing our recommendations on the application of 4-3-2 and the self-government issue. In the meantime, we must begin to structure our thinking, in light of the 4-3-2 and self-government problem, in approaching the question of the application of federal laws to the Marianas. Some very tentative thoughts along these lines are set forth in a memorandum entitled "Some thoughts on the application of federal laws and maximum self-government in the Marianas" (dated August 10, 1973). (#4.)

Basically, I conclude that, with possibly a very few basic exceptions, the applicability of federal laws in the Marianas should be dealt with by two formulae (or general rules) to be set forth in the status agreement itself. One of these formulae would provide for a delineation of the authority of Congress to enact legislation applicable to the Marianas. The other provision would deal with those areas where Congress would have the authority to

enact legislation; it would speak to (a) the initial application of federal legislation to the Marianas (if any) by reason of the mere change in status; (b) the affirmative application (or repeal) of federal legislation pursuant to the recommendations of a formal Commission on the Application of Federal Laws; and (c) the application of future federal laws to the Marianas when the Marianas are not specifically mentioned therein (i.e., a general rule for determining Congressional intent).

I think these issues ought to be discussed generally in the legal subcommittee -- along with the question of specific federal laws that we want to deal with in the status agreement.

3. Application of the United States Constitution in the Marianas.

Before he left, Barry was in the process of preparing a memorandum on the applicability of various provisions of the United States Constitution in the Marianas. He prepared a memorandum on the "Mink Amendment" of 1968 which extended certain provisions of the Constitution to Guam and the Virgin Islands. That memo, dated August 3, 1973, is enclosed herewith. (# 5.) As Barry recognized in his cover note, this is only part of a broader study which we must complete before making recommendations on the application of specific constitutional provisions to the Marianas.

Also enclosed herewith is the Kujovich memo that is mentioned in Barry's note. (# 6.) That memorandum, dated August 6, deals with the application of certain provisions of the Constitution ex proprio vigore in unincorporated territories. Based on my quick review of that memo, I would think we would want to have all of the "fundamental rights" provisions applicable in the Marianas. For tactical reasons, we would probably also want to specify such provisions in the status agreement and avoid completely any ex proprio vigore application of the U.S. Constitution. Such an application would tend to weaken our argument that the source of federal authority (including judicial authority) in the Marianas is the status agreement.

On the relevance of these studies to the legal subcommittee, I have the following thoughts: the Communique describes the legal subcommittee's function as being

primarily concerned with the application of federal laws. It also recites that the application of constitutional provisions, in addition to those specified in the Communique, is a matter for further study by the Marianas Political Status Commission. I recall that Tom Johnson told me that, other than 4-3-2, privileges and immunities, and full faith credit, the U.S. "didn't care" what other provisions were applied. Accordingly, for these reasons and because our study isn't complete, I would suggest that the applicability of the U.S. Constitution (as a general topic) not be placed on the agenda of the legal committee -- at least not for its initial meeting.

There is one closely related issue, however, that I think should be discussed; it is clearly within the mandate of the legal subcommittee under the Communique. It is the question whether the delineation of constitutional provisions that apply and those that do not is to be considered a "fundamental" provision of the status agreement and, as such, subject to the mutual consent requirement. The legal committee is supposed to work out the details on the mutual consent provision and this includes spelling out what is "fundamental" and how the consent of the Marianas (and of the U.S.) can be obtained.

4. Phase I Legal Plan.

Barry and I prepared a paragraph describing the Phase I Legal Plan (presumably for Leonard's memo) and a letter to Jim White on reconnaissance for parts of the plan. (See memo # 7, enclosed.) I think we have continued to neglect the fact that there will be "legal planning" prior to implementing political education programs, holding referenda, etc. This should be developed and costed-out before we submit any dollar figures to the U.S. for the "Phase I Legal Plan." However, I believe this remains a relatively low priority (i.e., we have more time) because the development planning is much more important and uncertain of securing financing. In other words, I don't think we need to hold up the first meeting of the economic subcommittee just because we don't have our cost estimates ready -- if Leonard has his.

5. Long-term Financial Commitments by Congress, Military Leases.

Mike Helfer is working on this assignment and I enclose a brief memo on his progress. (# 8.)

6. Public Corporations.

I have reviewed with P. J. Mode the assignment which he is willing to undertake in this area. Basically, he will determine whether a public corporation could receive the public lands in the Marianas from the United States, how that corporation can and should be structured to insulate it from U.S. control but not from control by the Marianas or the future Marianas government, and whether that corporation could enter into a lease agreement with the United States and engage in other quasi-governmental activities during the "transition" period.

P. J. will be on vacation until the last week of August but is prepared to devote a substantial portion of his time to this assignment on his return.

7. Application of Specific U.S. Laws in the Marianas.

As you know, the tax group has undertaken responsibility to study the application of the federal tax laws (excise and income), social security laws, and customs laws in the Marianas. I held a meeting with that group to review their progress (which has not been great) and to exchange ideas about how to approach their assignment.

I think it obvious that taxes and customs are perhaps the most important and controversial federal laws affecting the Marianas and deserve a high priority on our part. Because of their obvious relevance to the work of the legal subcommittee and because, as important revenue sources, they relate to the work of the economic subcommittee, I think you should consider means to expedite the work being done by the firm in this area.

As you know, prior to your departure there has been no substantive work product generated on the application of specific federal laws to the Marianas. As a gesture to your concern along these lines, I have done some very preliminary work in the area of federal labor laws. I selected this topic out of the list of "priority" laws to be studied by process of elimination -- Barry had expressed an interest in working on immigration laws and maritime laws. Attached is a very rough memorandum of preliminary thoughts on the application of several different types of federal labor laws in the Marianas. (# 9.)

The exercise of thinking about the application of a specific set of laws was useful in developing some ideas on the general approach we should take in this area: We should minimize the number of federal laws to be explicitly dealt with in the status agreement. We should strive toward developing general principles of applicability and stay within those principles with few exceptions. The U.S. will simply not tolerate a long list of exceptions which will be subject to the mutual consent requirement. Since there are presumably some basic exceptions which are important to secure, we should concentrate on identifying them and leave the others to the Formal Commission on the Application of Federal Laws and to Congress (subject of course to the general principles set forth in the Compact).

As bases for sorting out the "important" exceptions from the trivial, I found relevant the following considerations: First, a federal law or program should not be excepted merely because a local agency could serve the same purpose. The Marianas will depend heavily on federal agencies to administer generally beneficial laws and programs in situations where the Marianas could not afford to staff or finance competing local agencies. Second, we should not except federal laws because they are merely "inappropriate" for the Marianas; this type of screening can be performed by the Formal Commission and by Congress -- with respect to statutes and programs which are otherwise within Congress' power to legislate for the Marianas, we are going to have to rely (just as states do) on Congress' good will and lack of incentive to purposely prejudice the Marianas. Third, the laws which should be selected as "fundamental" for specific inclusion in the status agreement are those relating to revenues and vital economic concerns.

It is the function of the status agreement to secure the Marianas' future as a viable, self-sufficient entity -- not to anticipate every needed accommodation between the U.S. and the future Marianas government. In this connection, I think we may need the guidance of economists and government planners to identify revenue-related laws which may be vital to the Marianas economy. We have identified some examples: immigration, maritime laws which encourage trade, and possibly minimum wage laws. There are undoubtedly others. When we assemble this list, however, we will have to cut it down to manageable proportions before inclusion of the most important specific statutes in the status agreement. The rest may have to depend on the willingness of Congress to accommodate our preferences.

8. General Principles Governing Application of Federal Laws.

As I noted above, I have set down some very tentative thoughts on the general rule (or rules) we should provide in the Compact to govern the application of federal laws in the Marianas. The enclosed memorandum on this subject (# 5) discusses this subject somewhat in the context of the tension between "4-3-2" and the principle of maximum self-government for the Marianas.

9. Preparation for the First Meeting of the Legal Subcommittee.

All of the foregoing is relevant to preparing an agenda for the first meeting of the legal subcommittee. The items listed below could serve as such an agenda, and I suggest that we use this list (or a version revised by you) in our luncheon meeting with Chapman. Basically, I feel that we are ready to have fruitful discussions with the U.S. now -- even though some of our research on specific items is not yet complete. We should impress upon Chapman that there are issues of substance (that cannot be answered by consulting the Department of Interior's files) which have been delegated to this committee by the Joint Communique These areas are:

(1) The mutual consent provision

-- identify fundamental provisions
-- discuss mechanism for securing mutual consent.

(2) General rules for application of federal laws

-- rule of divided authority
-- rule of Congressional intent
-- mechanics of Formal Commission; and problem of interim status of Marianas before Commission recommendations are adopted.

(3) Article IV, Section 3, Clause 2 and maximum self-government

-- the foregoing agenda items necessarily reflect limits on the plenary power of Congress; this should be acknowledged and discussed informally to get a feel of the U.S. position.

(4) Application of specific U.S. laws

-- discuss "terms of reference" for this inquiry
-- seek out assistance in identifying critical areas of federal legislation
-- discuss minimum wage problem, first; others when we have finished tentative research.

(5) Citizenship alternatives

-- first task here is to get U.S. to understand our position
-- defend position with Philippines and American Samoa precedent
-- begin discussions on working out details; identify problems, e.g., what of persons born after new status is achieved.

I believe we can fruitfully initiate discussion in each of these areas. In some, we have fairly detailed views and could easily prepare brief and "unofficial" discussion papers. You may wish to add some items or strike some (prime candidate for latter is "4-3-2" discussion -- at least until we have firmed up our thinking further on this score).

JFL

6) Applicability of Constitutional Provisions

7) Court [illegible]

8) Five-year Review

9) Limits on [illegible]

10) Transition