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August 10, 1973

MEMORANDUM FOR MESSRS. WILLENS AND LAPIN

Re: Status of Research on Financial Assistance to the Marianas

Jay asked me to prepare a short summary of my research to date. Based on Howard's memorandum to Barry of July 23 and our conversation, I have divided the research into two parts, one concerning ways to guarantee long-term financial assistance to the Marianas from the United States, and the other concerning leases of land to the United States for military bases.

Long-Term Financial Assistance

In the usual course, based on rules of the House and Senate, appropriations are made yearly on the basis of authorizations previously enacted -- as is the case for the Trust Territory of the Pacific Islands now. Aside from a very large one-time authorization and appropriation, there are two ways to avoid the usual process: one is to enact a permanent or long-term appropriation, and the other is to create an obligation of the United States which a subsequent appropriation will liquidate.

A permanent or long-term appropriation does not bind Congress in the sense that it cannot be repealed (questions of obligations under a compact aside), but it would at least

put the burden of action on those who want to stop the flow of funds to the Marianas instead of, as usual, on those who want to initiate the flow. Of the many such appropriations, at least three help bolster the Marianas' position.

Under 26 U.S.C. § 7652(b) (1970), a tax is imposed on articles brought into the United States from the Virgin Islands, and these goods are exempted from local income taxes. From the net amount collected under this tax, an amount equal to the amount of local revenues collected is transferred to the Virgin Islands government, and may be used as the local legislature determines, subject to the approval of the President or his designee. Though this permanent, automatic appropriation seems to help us, the facts that the matching provision is a limitation on the transfer -- a limitation which does not exist in similar statutes applicable to other territories or possessions --, and that goods shipped into the Virgin Islands from the United States are treated analogously, 26 U.S.C. § 7653 (1970), indicate that the prime concern of the statute was to avoid tax incentives for industries to move while preventing windfall revenues to the Virgin Islands. A stronger precedent is the Revenue Sharing Act, 31 U.S.C.A. §§ 1221, et seq. (Supp. 1973). That bill contains what is essentially

a five-year appropriation of funds to be distributed to the states and localities periodically under a formula. The main reason given for the unusual long-term appropriation was the necessity for local governments to be able to plan their budgets in advance, S. Rep. No. 92-1050, pt. 1, at 12. This reason is plainly applicable to the Marianas as well. The example which could be most helpful to the Marianas is the Senate version of the District of Columbia home rule bill, S. 1435 (93d Cong., 1st Sess.). That bill provides for "a permanent, indefinite federal appropriation (not merely an authorization) to be paid to the District each year based on computations under the formula [providing a payment equal to 40% of the District's tax revenues and other receipts for fiscal years 1975 and thereafter] without further legislative action by the Congress," S. Rep. No. 93-219 at 10. The justifications for this permanent appropriation, aside from the assistance it gives to long-term planning, were the importance of fiscal autonomy to meaningful local control of local affairs, and the proper relationship of a formula to the city's needs and resources. Both these reasons would justify a departure from the usual authorization-appropriations process for the Marianas. A final precedent that might be helpful in

your discussions with the Interior Department is the Government's proposal to Micronesia in May of 1970, under which the Micronesian government would have received matching funds from the United States equal to the net amount of its revenues, Super Memorandum, Attachment 5 at 7.

An alternative way to avoid the usual process is to grant an agency the authority to incur obligations on behalf of the United States in advance of appropriation. This is commonly known as contract authority. An appropriation is necessary in the following fiscal year to liquidate the obligation, but in general OMB and the Appropriations Committees feel themselves bound to meet these obligations. (Further research needs to be done on whether the contractual obligation is judicially enforceable against the United States.) Though I have found no precedent, it might be possible to create by statute or to grant to the executive branch power to create a contractual obligation of the United States to pay to the Marianas each year a sum of money or a percentage of local revenues, in return for the Marianas entering into the compact with the United States or continuing its friendly relationship with this country. It is possible that a contractual obligation will be more useful in conjunction with a lease of land to the United

States than as a way to secure payments to the Marianas government for general operations and capital improvements.

Leases of Land to the Military

I have not gone into this topic in detail, primarily because I need to use the Pentagon library, and it appears that I can save a lot of time over there by first talking to an attorney who works on leases but who is on vacation until August 13. My review of the U.S. Code and C.F.R. did not produce very much. Real property leases in the United States and Puerto Rico are authorized subject to certain limitations, 10 U.S.C.A. § 2662 (1973), as are leases in foreign countries for structures and real property not located on a military base but needed for a military purpose (10 U.S.C.A. § 2675 (1973)). But I found no permanent authority for leases of land for military bases outside of the United States. It appears that these leases are approved in the annual military contruction authorization and funds made available for them in the yearly military construction appropriations bill -- though whether funds are appropriated for the term of the lease or for the year's payment is not clear, cf. S. Rep. No. 92-1010 at 11-12. Article 1, Section 8, Clause 12 of the Constitution, which prohibits appropriations for raising and supporting armies

for "a longer term than two years" would indicate that the appropriations for payments under leases are made yearly, though this is not the only possible construction of that provision. If it turns out that the Constitution might prohibit such a long-term appropriation, and even if not, I will explore whether the United States can make a long-term contractual obligation in advance of the necessary appropriations.

I did take a look at the executive agreement between Spain and the United States promulgated on August 6, 1970, 21 T.I.A.S. 1677. Under that agreement the United States promised, subject to the necessary legislation and appropriation, to help modernize Spanish defense industries and to grant military assistance to Spain, in return for which Spain agreed to permit the United States to use and maintain Spanish bases free of all taxes and charges. At a minimum this indicates that the executive branch may be willing to enter into agreements in which the construction for the use of military bases is not based solely on the rental value of the land which the military will occupy.

In short, I have a lot more to learn about leases of land to the military, and I expect to get over to the Pentagon early next week.

M. Helfer