2/22/78 BHJ

03
4

August 15, 1973

MEMORANDUM FOR MESSRS. WILLENS, LAPIN AND CARTER

Re: Financial Assistance to the Marianas

The Joint Communique issued by the Marianas Political Status Commission and the President's Personal Representative at the conclusion of the last negotiating session states that "the United States is prepared to agree, subject to the approval of the United States Congress, to provide financial support over an initial period of years at guaranteed fixed levels," and that "[t]he parties have agreed to explore the exact framework through which such a commitment can be implemented." 1/ This memorandum explores various legal mechanisms by which long-term financial assistance for government operations and capital improvements in the Marianas can be assured, without subjecting the Marianas to annual review by OMB or committees of the Congress. The memorandum does not consider economic assistance in the form of federal categorical grants-in-aid for which the Marianas may be eligible, 2/ nor does it discuss payments under leases

1/ Joint Communique at 7 (Economics and Finance, Para. 5).

2/ Nor is the effect of the Administrator's revenue sharing proposals analyzed in this memorandum. On the importance of federal grants-in-aid, federal payments to individuals, and federal agency expenditures in Puerto Rico, see Cappalli, Federal Financing in the Commonwealth of Puerto Rico, 39 Revista Juridica de la Universidad de Puerto Rico, 7, 22-25 (1970) (these federal outlays in 1967 totaled $386 million, compared to $584 million in Commonwealth and special funds.)

01-04550

of land to the military (on which a separate memorandum will be prepared).

THE AUTHORIZATION-APPROPRIATIONS PROCESS

Both the House and the Senate have Rules designed to divide power between the various authorizing committees on the one hand, and the appropriations committee on the other. The House, where by tradition all appropriations bills initiate, prohibits the reporting of any general appropriations bill, or the introduction of any amendment thereto, which contains funds "for any expenditure not previously authorized by law, unless in continuation of appropriations for such public works and objects as are already in progress."1/ The Senate Rule is similar, though apparently more flexible.2/ Both Houses also have Rules which prohibit general legislation

---

1/ House Rule XXI, cl. 2.

2/ Senate Rule XVI, cl. 1 provides that all general appropriations bills will be referred to the Committee on Appropriations and that "no amendments shall be received to any general appropriation bill the effect of which will be to increase an appropriation already contained in the bill, or to add a new item of appropriation, unless it be made to carry out the provisions of some existing law, or treaty stipulation, or act, or resolution previously passed by the Senate during that session; or unless the same be moved by direction of a standing or select committee of the Senate, or proposed in pursuance of an estimate submitted in accordance with law." The practical importance of the more flexible Senate rule is limited by House Rule XX, cl. 2, which prohibits the managers on the part of the House in a conference from agreeing to a provision of a Senate bill which would be in violation of House Rule XXI, cl. 2, without "specific authority" from the House "by a separate vote on every such amendment."

on appropriations bills.[1/] These Rules assure that the power of the authorizing committees (to which the vast majority of members belong) is not usurped by the appropriations committee in the course of funding various programs and activities. The power of the appropriations committee is protected in the House, but not in the Senate, by a Rule which prohibits committees "not having jurisdiction to report appropriations" from reporting a bill containing appropriations and by prohibiting amendments proposing appropriations to bills coming from these committees.[2/] These Rules are not self-executing; if no Member objects, bills which violate the Rules will be approved, as is often the case.[3/]

Because of these Rules, the ordinary procedure is for Congress first to pass an authorization bill, then later to appropriate, in one of thirteen annual appropriations bills, the amount which can be used for the activity.[4/] The authorizing

---

1/ House Rule XXI, cl. 2; Senate Rule XVI, cls. 2 and 4.

2/ House Rule XXI, cl. 4.

3/ H.R. 8917, the Department of the Interior Appropriations Act for fiscal year 1974 contains several items of appropriation without statutory authority, and of general legislation, see Sen. Rep. No. 93-362 at 32, yet it passed the Senate without objection, 119 Cong. Rec. S. 15319-15343 (daily ed. August 1, 1973). The same bill was considered by the House under a resolution waiving all points of order against it based on Rule XXI, cl. 2, see id. at pp. H.5483-86 (daily ed. June 27, 1973).

4/ Article 1, section 9, clause 7 of the Constitution provides: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ."

legislation usually sets the terms and conditions of a program or activity, and the maximum amount which may be appropriated for it (though sometimes a bill will authorize "such sums as are necessary" to be appropriated) for a given fiscal year, for each of a number of years, or even permanently.[1/]

The process of funding for TTPI provides an example of these procedures at work. The authorizing legislation provides that "[t]here are authorized to be appropriated not to exceed . . . for each of the fiscal years 1971, 1972, and 1973, $60,000,000 . . . ."[2/] For FY 1973 (which ended July 30, 1973) the full $60 million was appropriated.[3/] For FY 1974, the Department of the Interior Appropriations Bill as passed by the House did not include any funds for TTPI because no authorizing legislation existed.[4/] The Senate bill, passed a month later, did include $47.8 million for TTPI[5/]

1/ See The Budget of the United States Government, Fiscal Year 1974, at 323 (hereinafter cited as "The Budget").

2/ 48 U.S.C.A. § 1681 note (Supp. 1973).

3/ The Budget of the United States Government, Fiscal Year 1974, Appendix 549-550 (hereinafter cited as "Budget Appendix").

4/ See remarks of Cong. Hansen of Washington, 119 Cong. Rec. H.5495 (daily ed. June 27, 1973).

5/ See S. Rep. No. 93-362 at 10. The Interior Appropriations Bill for FY 1974 is H.R. 8917, passed the Senate on August 1, 1973, 119 Cong. Rec. S.15341, (daily ed. August 1, 1973).

because authorizing legislation had been passed by the Senate in the interim.[1/]

An appropriation is not a grant of cash. It is, rather, the most common form of "budget authority" -- the power to incur obligations on behalf of the United States and to draw on the Treasury to liquidate the obligation or, in the case of this form of budget authority, to draw directly on the Treasury for expenses as they are incurred.[2/] Generally, except for appropriations for capital improvements, amounts available under an appropriation can be expended or obligated only in the fiscal year for which the appropriation is made, though sometimes the appropriation is explicitly made

---

1/ S. Rep. No. 93-362 at 10. S.1385 passed the Senate on May 22, 1973, 119 Cong. Rec. S.9474 (daily ed.). It authorized the appropriation of $60 million for fiscal 1974 for TTPI, and instructed the government comptroller for Guam to carry out similar duties with respect to TTPI. On June 19, 1973, the House passed its version of the bill, authorizing $60 million for each of the next three fiscal years, plus up to $10 million to make up for grants-in-aid which may be lost under special revenue sharing bills and eliminating the provisions relating to the government comptroller of Guam, id. at H.4953. The Senate on June 21 amended the House version of S.1385 by authorizing $64 million for fiscal 1974 only, and by reinserting the comptroller provisions, id. at S.11673. The House took no action before the August recess, according to the staff of the House Interior Committee Subcommittee on Territories.

2/ See generally The Budget at 314-324.

available for a term of years or indefinitely.[1] The result of this system is that Congress has little control over the amounts which will actually be expended in any given fiscal year (outlays), for outlays depend on obligations made under previous appropriations to be liquidated in the fiscal year as well as the current appropriation.[2] Congress' concern is the appropriation.

The traditional annual authorization-appropriations process is plainly highly undesirable as a way of providing financial assistance to the Marianas. It would require the Marianas to make its case for funds through an operating department or agency (perhaps Interior or State) to OMB -- or directly to OMB if the payment were to be a separate line item in the budget -- and then to the two Appropriations Committees each year. In addition, the Marianas would have to secure authorizing legislation periodically from substantive

---

1/ See The Budget, pp. 315-17; 31 U.S.C. §§ 712a, 718 (1970).

2/ Take, for example, funding for TTPI. In FY 1973 Congress appropriated $60 million, the full amount authorized. This appropriation, like previous ones, "remain[s] available until expended, to carry out the provisions" of law relating to TTPI, and "to provide for a program of necessary capital improvements and public works . . . ." 48 U.S.C.A. § 1681 note (Supp. 1973). In FY 1973, TTPI obligated $63.9 million (drawing on current and past appropriations) and actually laid out $70 million (again drawing on past authority). At the end of FY 1973, TTPI estimated that $10 million would be available from previous years (unobligated balance). Therefore, it requested an appropriation of $56 million, which would permit it to incur obligations of $66 million in FY 1974 as it planned. (The figures for FY 1973 and FY 1974 are not entirely comparable because the FY 1974 figure includes $1 million for the Trust Territory Economic Development Loan Fund, 48 U.S.C.A. §§ 1688-93 (Supp. 1973), for which no funds were sought or appropriated in earlier years.) Actual outlays in FY 74 were anticipated to be $61 million. Data taken from Budget Appendix at 549-550.

committees in the two Houses; and this, too, would involve congressional scrutiny of the operation of the Marianas Government, as well as uncertainty about the amount of funds to be available and possible restrictions or conditions on the use of funds. Finally, if the traditional process is employed, the Marianas would run the risk that funds appropriated to it would be impounded by the President for domestic economic or other reasons.

ALTERNATIVES TO THE AUTHORIZATION-APPROPRIATIONS PROCESS

There are two well-known ways to avoid the regular authorization-appropriations process: by enacting a permanent or long-term appropriation, with or without, or at the same times as, a separate authorization; and by creating or permitting an agency to create obligations of the United States which will later be liquidated by an appropriation.

Permanent or Long-Term Appropriations

A permanent or long-term appropriation does not bind Congress in the sense that it cannot be repealed (questions of obligations under a compact with the Marianas 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 obtain funds.

Though permanent or long-term appropriations are disfavored[1/] there are a number of them on the books. Most appear to be based on grounds which, while sensible, are inapplicable to the Marianas. For example, the importance of easily marketable government securities undoubtedly led to the permanent appropriation of sums necessary to pay the interest on the public debt[2/] and the difference between interest collected and interest paid by the newly created Environmental Financing Authority.[3/] The purpose of the permanent appropriation of sums necessary to pay judgments and settlements up to $100,000 was to save interest costs and to assure prompt payment.[4/] These are appropriations from the general revenues. Other permanent appropriations appear to be based on the particular source of the funds appropriated. For example, there is a permanent appropriation for expenditures from certain trust funds in accordance with

---

1/ 2 U.S.C.A. § 190(k) (Supp. 1973) requires each committee of the Senate to "endeavor to insure that . . . to the extent consistent with the nature, requirements, and objectives of programs and activities [within its jurisdiction], appropriations therefor will be made annually"; Section 139(d) of the Legislative Reorganization Act of 1946, 60 Stat. 833, directed the Appropriations Committees of both Houses to study "existing permanent appropriations with a view to limiting the number of permanent appropriations."

2/ 31 U.S.C. § 711(2) (1970); see also 31 U.S.C.A. § 760 (Supp. 1973) which makes a permanent appropriation of a certain percentage of the authorized amount of various debt instruments, to be used to pay all necessary expenses "connected with any operations" under the public debt provisions of law, unless a definite appropriation is made.

3/ 31 U.S.C.A. § 711(11a) (Supp. 1973).

4/ 31 U.S.C.A. § 724(a) (Supp. 1973); see United States v. Varner, 400 F.2d 369, 372 (5th Cir. 1968).

the trust,[1/] and for payments out of accounts set up for unclaimed funds[2/] and funds erroneously received.[3/] In these cases the fiduciary relationship of the United States with respect to the funds apparently lead to the permanent appropriation. A somewhat similar sort of permanent appropriation is the automatic transfer to Guam and to the Virgin Islands of customs duties and federal income taxes derived from those territories.[4/] While these are automatic payments from the federal Treasury to the territories, they provide only a little support for a permanent or long-term appropriation for the Marianas because the funds appropriated are raised locally, while the Marianas will wish to draw on the general revenues of the United States. For a similar reason, permanent appropriations made to carry out obligations under treaties with American Indians and based on particular funds rather than general revenues provide little support for the Marianas

---

1/ 31 U.S.C. § 725s (1970).

2/ 31 U.S.C. § 725p-1 (Supp. 1973).

3/ 31 U.S.C. § 725q-1 (1970).

4/ 48 U.S.C.A. § 1421(h) (Supp. 1973) (Guam); id. § 1642 (Virgin Islands). The 1970 Commonwealth Proposal provided that these local revenues would automatically be returned to Micronesia. Super Memorandum, Attachment 5 at 7 (§§ 363-64 of the draft bill).

position in the negotiations.[1/]

There are, however, two permanent or long-term appropriations and two proposed appropriations which seem to be based on reasons which would also justify a permanent or long-term appropriation for the Marianas.

Matching Payment to the Virgin Islands. Since 1917, articles produced in the Virgin Islands for shipment to the United States have been exempt from tax in the Islands and subject to "a tax equal to the internal revenue tax imposed in the United States upon like articles of domestic manufacture;"[2/] similarly, goods produced in the United States for shipment to the Virgin Islands are free of tax here and subject to the tax imposed in the territory.[3/] In 1954, during consideration of the Revised Organic Act for the Virgin Islands, spokesmen for the Islands requested that the net revenues collected by the United States under this scheme

---

1/ 31 U.S.C. § 711(20) (1970) provides a permanent appropriation out of general revenues to pay "each member of every family of the Cherokee Nation of Indians that remained in the State of North Carolina at the time of the Treaty of New Echota, May 23, 1836, interest at the rate of 6 per centum per annum on a sum equal to $53.33 for each individual member . . . ." The costs involved, however, charged against "the general Cherokee Fund" established under the Treaty of New Echota, 7 Stat. 478, by which Cherokees ceded all their land east of the Mississippi for $5 million and certain other benefits, see 9 Stat. 265. 25 U.S.C. § 153 (1970) provides a permanent appropriation for expenditures required under certain treaties by which Indians ceded lands to the United States for sale by the United States with the proceeds to be paid to the Indians.

2/ 26 U.S.C. § 7652(b)(1) (1970).

3/ 26 U.S.C. § 7653(a)(1) and (b) (1970).

returned to the territory, as was done for Guam and Puerto Rico.[1/] The request was granted, but the amount to be transferred to the Virgin Islands from these taxes was limited to the amount of revenues raised locally, and the approval of the President or his designee required before they could be expended or obligated.[2/] Subsequently, Congress provided that the salaries and expenses of the Government Comptroller would be paid out of these revenues before the matching grant was made.[3/]

1/ S. Rep. No. 1271 (83d Cong., 2d Sess.), reprinted in 1954 U.S. Code Cong., vol. 2 at 2588. The proceeds of the tax collected in the United States on goods produced in Puerto Rico, 26 U.S.C. § 7652(a)(3) (1970); 48 U.S.C.A. § 734 (Supp. 1973), and in Guam, 48 U.S.C.A. § 1421h (Supp. 1973) are returned in their entirety to those territories. Goods produced in the Virgin Islands and shipped to the United States are specifically exempt from internal revenue tax in the Islands, 26 U.S.C. § 7652(b)(2). Goods shipped to Puerto Rico, Guam, the Virgin Islands and American Samoa from the United States are exempt from federal internal revenue laws, 26 U.S.C. § 7653(b), and are explicitly made subject to "the internal revenue tax imposed" in the Virgin Islands and Puerto Rico upon like articles there manufactured," 26 U.S.C. §§ 7653(a)(1) and (2) (1970). The Commonwealth Proposal of 1970 provided that the proceeds of all internal revenue taxes on Micronesian goods shipped to the United States would be returned to Micronesia. Super Memorandum, Attachment 5 at 7 (§ 363 of the draft bill).

2/ 26 U.S.C.A. § 7652(b)(3)(A) (1970). Neither qualification exists for Guam or Puerto Rico. See preceding footnote. The amount to be transferred to the Virgin Islands under this provision in fiscal year 1974 is estimated at $17.6 million. Budget Appendix at 551. According to the Super Memorandum at Attachment 3, page 9, the matching arrangement "has lost any operational meaning since the Virgin Islands now generates much greater revenue than that collected in the fund." The same source states that the matching arrangement would be eliminated by Section 16 of the proposed Federal Relations Act.

3/ 48 U.S.C.A. § 1599(a) (Supp. 1973). A similar provision exists for the Government Comptroller of Guam, 48 U.S.C.A. § 1422d(a) (Supp. 1973).

Arguably this statute provides little support for the Marianas position, for the funds transferred to the Virgin Islands are in some sense "local" and not from general revenues (though they were treated as general revenues before 1954), and the federal government retains ultimate control over them, a condition the Marianas do not want to accept. But despite these differences, the reasons which were given to justify the permanent appropriation of these funds would also justify a permanent or long-term appropriation to the Marianas. The Report of the Senate Interior Committee explaining the permanent appropriation noted that the Virgin Islands had previously sought appropriations yearly to support the local government, and that Congress had granted "such sums as it saw fit, more or less on a handout basis."[1/] The Report went on:[2/]

> "Such a system and procedure has not been conducive to the development of public responsibility, initiative, and thrift on the part of the people and their elected representatives. To far too great an extent, officials have been judged by what they have been able to obtain in the way of such handouts from the Federal Government, rather than what contributions toward self-sufficiency and economic as well as political autonomy they were able to make to the people.
>
> . . . .

1/ Sen. Rep. No. 1271 (83d Cong., 2d Sess.), reprinted in 1954 U.S. Code Cong., Vol. 2 at 2589.

2/ *Id.*

> To remedy this situation, the Committee has worked out a limited return or grant of the internal revenue taxes on Virgin Islands products. For every dollar of local revenue, including Federal income taxes, which the people of the islands raise, a dollar of the internal revenue taxes on Virgin Islands products would be granted to them, automatically.
>
> Under these provisions, the people of the Virgin Islands would have a far greater degree of control over their finances than under the present system. They would not have to come petitioning the Congress each year for money for specified purposes by which to support their local government, as at present."

Similar reasoning lies behind the Marianas'request for guarantees of financial assistance.

Revenue Sharing. The State and Local Fiscal Assistance Act of 1972 establishes on the books of the Treasury a Trust Fund consisting of such funds as are appropriated to it, to be used without fiscal year limitation for payments to state and local governments in accordance with a formula contained in the Act.[1/] The subsequent section actually appropriates money to the Trust Fund in specific amounts for each of five calendar years from that portion of the general fund attributable to federal individual income taxes not otherwise appropriated.[2/] The Act

---

1/ 31 U.S.C.A. § 1224(a)(1) (Supp. 1973).

2/ Id. § (b)(1).

01-04562

directs the Secretary of the Treasury to disburse the money in the Trust Fund at regular intervals. The result of this mechanism is the same as a long-term appropriation would be: a flow of funds out of the Treasury without further action by Congress.[1/]

The Revenue Sharing Act provides support for the Marianas' position in two ways. First, the distribution formula depends in part on local tax effort,[2/] showing, as does the Virgin Islands matching provision, that local revenues are a proper guidepost for determining federal assistance. Second, and more important, the reasons behind the Act's long-term appropriation -- unsuccessfully opposed in each House by their respective Appropriations Committees[3/] --

---

1/ By special provision, 31 U.S.C.A. § 1261(c)(1) (Supp. 1973), the District of Columbia is entitled to revenue sharing. No such provision exists for territories or possessions of the United States.

2/ 31 U.S.C.A. §§ 1225(b)(2) and (b)(3)(D), (E) (Supp. 1973). One might argue that the revenue sharing bill, since it appropriates only individual income taxes, is another example of a permanent or long-term appropriation which returns particular funds to the people from whom they are raised. However, in view of the fact that 42% of the budget dollar comes from individual income taxes, The Budget at 2, and that the revenue sharing formula is intended to grant money primarily to communities which need it rather than to communities which paid high individual income taxes, the argument is not persuasive.

3/ In the House, Congressman Mahon, Chairman of the Appropriations Committee, opposed a resolution presented by the Rules Committee waiving all points of order against the revenue sharing bill, and prohibiting amendments to it, primarily on the ground that the bill contained a five-year appropriation he opposed. The resolution was subsequently adopted 223-185, 118 Cong. Rec. H.5864-77 (daily ed. June 21, 1972). In the Senate, Senator McClellan, Chairman of the Appropriations Committee, offered an amendment to the revenue sharing bill providing for annual appropriations to be made one year in advanc of outlays as an alternative to the five-year appropriation contained in the bill. His amendment was defeated 34-49, id. at S.14308 (daily ed. Sept. 7, 1972).

are applicable to the Marianas. The Senate Report on the bill said that the long-term appropriation provisions "are essential to permit the States and localities to plan their budget programs in advance."1/ The Report also noted that annual appropriations are often delayed, and that "[t]his has seriously injured the efforts of the localities to plan for the economical and wise use of these funds."2/ A different reason was given during the floor debate: the importance of fiscal autonomy for the States and localities, without yearly review by, and perhaps direction from, Congress on the use of the funds. Review at the end of five years, it was argued, would provide sufficient congressional oversight, and assure a record on which to decide whether to continue the program.3/ Long-term planning and local autonomy are, of course, the primary reasons the Marianas want to avoid the regular authorization-appropriations process.

Federal Payment to the District of Columbia. The Senate version of the District of Columbia Home Rule Bill provides "a permanent appropriation (not merely an authorization) to be paid to the District each year based on computations under the formula without further legislative action by the Congress."4/

1/ Sen. Rep. No. 92-1050 (Part 1) at 12.

2/ Id.

3/ See the remarks of Senator Russell Long, Chairman of the Senate Finance Committee, 118 Cong. Rec. S.14292 (daily ed. Sept. 7, 1972).

4/ Sen. Rep. No. 92-219 at 10 (S.1435,93d Cong., 1st Sess).

Under the bill, a payment equal to 37-1/2% of the District's tax revenues and other receipts will be made in fiscal year 1974 (already obsolete) rising to 40% for fiscal 1975 and thereafter. 1/ The House bill provides a more traditional method for transferring federal funds to the District. 2/

The Report which accompanied the Senate Bill stressed not so much the planning benefits of the guaranteed federal payment as the proper relationship of the formula to "the District's needs and local resources" and the importance of the guaranteed payment in assuring the District "a proper measure of fiscal independence to govern its own affairs." 3/ Indeed the Report called its payment provision "the heart of the entire home rule proposal" while noting that the federal interest in the City would be "adequately protected by the continuing constitutional ability of the Congress to amend the

---

1/ § 701(b) of S.1435, 93d Cong., 1st Sess.

2/ Section 503 of H.R. 9682, 93d Cong., 1st Sess., authorizes the appropriation of such sums as may be appropriated for fiscal years 1976 through 1979 to a newly-created "District of Columbia Federal Payment Trust Fund." The appropriation is to be in the form of "a lump-sum unallocated Federal payment for each fiscal year . . . ." The form of the appropriation is designed to eliminate congressional control over locally-raised revenues and over the uses to which the federal payment is put.

3/ Sen. Rep. No. 93-219 at 11. Under the Organic Act for the District of Columbia, 20 Stat. ch. 180, § 3 at p. 104 (June 11, 1878) the Secretary of the Treasury is to forward budget estimates to the Congress from the District, and "to the extent to which Congress shall approve of said estimates, Congress shall appropriate the amount of fifty per centum thereof" from federal general revenues, the remaining portion to come from local revenues. From 1879 through 1920,

(Continued)

formula at any time it saw fit."[1/] If the Congress passes a bill containing an automatic payment, it should significantly help the Marianas' case.[2/] Even if Congress chooses another route, one has the Senate bill to rely on, as well as the argument that the federal interest in the governing of the capital city is much greater than in the local affairs of the Marianas (military questions put aside in both cases), thereby justifying guaranteed payments to the Marianas even if closer control is retained over the District.

Matching Payment to Micronesia. Perhaps the best precedent of all is the United States Commonwealth Proposal of May 1970 to Micronesia, under which the net amount of local Micronesian revenues would be matched yearly by a payment from the U. S.

(Continued)
bills making appropriations for the District followed this rule, but since 1921 the percentage of the District's "General Fund" financed by general federal revenues has varied from a high of 39.5% to a low of 8.5%. Sen. Rep. No. 93-219 at 11. Throughout this time, of course, Congress retained line item control over the District budget through yearly appropriations.

1/ Id. at 11, 12. Whether or not this would be true of a long-term appropriation to the Marianas depends on the legal interpretation of the obligations undertaken by the United States in the Compact.

2/ The Marianas argument for a permanent or long-term appropriation may also be strengthened by the bill transferring St. Elizabeths Hospital from federal control to the District of Columbia. H.R. 9437, 93d Cong., 1st Sess., authorizes appropriations for the next ten years for varying percentages of the operating costs of the Hospital. Senator Javits, in introducing the same legislation in the Senate at the Administration's request, S.2325, 93d Cong., 1st Sess., stated that the bill should be modified so that there would be "some floor, as well as the . . . ceiling, for Federal support," 119 Cong. Rec. S. 15399 (daily ed. Aug. 2, 1972). It is possible that a long-term appropriation or another sort of financial guarantee to assist the District during the transition period will be approved.

Government.[1/] Plainly all the reasons which justified this grant to the Micronesians would justify a similar grant to the Marianas.

It seems clear from this review that the reasons the Marianas give for wanting a permanent or long-term appropriation of funds from the federal government -- particularly the autonomy which assured revenues create and the need to be able to plan effectively for economic development and self-sufficiency -- have in the past justified, and continue to justify, departures from the ordinary authorization-appropriations process.[2/] The drafting of such a provision is not very difficult; the Micronesian Commonwealth proposal,

---

1/ Section 365(a) of the draft bill which the United States presented during its negotiations with Micronesia in May 1970 provided: "As soon as possible following the termination of each fiscal year, the Executive Authority of Micronesia shall certify to the Secretary of the Treasury the net amount of revenue, exclusive of United States Federal matching and grant funds, received by the Government of Micronesia during the preceding fiscal year. There shall thereafter each year be transferred and paid over to the Government of Micronesia, from funds in the United States Treasury not otherwise appropriated, a sum equal to the net amount of revenue received by the Government of Micronesia, as certified by the Executive Authority."

2/ Any long-term or permanent appropriation for the Marianas which was part of the Compact legislation could face in the House an objection that it violated House Rule XXI, cl. 4, prohibiting committees "not having jurisdiction to report appropriations" from reporting bills containing appropriations, and prohibiting amendments proposing appropriations to bills coming from such committees. Assuming that the executive branch is supporting the legislation, this problem could be solved either by a referral of certain portions of the Compact legislation to the House Appropriations Committee or by obtaining from the House Rules Committee a resolution waiving points of order against the bill, as was done for the revenue sharing legislation. Yet another alternative would be to suspend the rules and pass the Compact legislation containing the appropriation, but this would require a two-thirds vote and such a motion can be made only on the first and third Mondays of the month and during the last six days of the session, House Rule XXVII, cl. 1.

the Senate version of the D. C. Home Rule Bill, and the Revenue Sharing Bill provide guides.1/

Two arguments can be advanced against long-term appropriation for the Marianas. It can be argued that schemes which avoid the regular appropriations process should not be employed because they make it difficult for Congress and the President to make rational choices among competing priorities in future years. There are several responses. First, the amount of money involved is undoubtedly going to be relatively small as compared to the competing programs, so the flexibility Congress is losing is negligible; and to provide further protection Congress might put a dollar limit on the amount of local revenue it is willing to match (say $25 million, adjusted for inflation). Second, in view of the international obligations the United States undertook when it assumed jurisdiction over the Marianas, the United States must grant maximum independence to the Marianas; and retaining annual appropriations power in the Congress is inconsistent with local control of internal affairs.2/ The

1/ 31 U.S.C. § 627 (1970) provides that no legislation passed after 1906 shall be construed to make an appropriation "unless such Act shall in specific terms declare an appropriation to be made . . . ." In light of this provision the draft proposed by the United States in 1970 to Micronesia may not be as clear a statement as we would like.

2/ Article 6, paragraph 1 of the Trusteeship Agreement imposes an obligation on the United States to "promote the development of the inhabitants of the trust territory toward self-government or independence, as may be appropriate to the particular circumstances of the trust territories and its peoples and the freely expressed wishes of the peoples concerned . . . ." Quoted in Super Memorandum, p. 55, note 84.

second argument against schemes which avoid the usual authorization-appropriations process is that they prevent regular congressional review of the use of federal funds and the effectiveness of federal programs. The response is simple: in light of what the United States and the Marianas are trying to create, this insulation from annual review of local affairs is entirely proper and desirable.[1/] If Congress wants to keep up on what the funds are used for, it could (if the Marianas are agreeable) provide for reports from an independent Comptroller (appointed with the consent of the local government perhaps) on financial affairs for so long as the United States provides a substantial share of the local budget.[2/] Alternatively, the period of the appropriation might be limited (say for ten years) so that congressional review could take place without yearly incursions into local

---

1/ The Joint Communique issued at the last round of negotiations states at pp. 1-2 that under the Commonwealth Arrangement to be negotiated, "the future Marianas government would exercise a maximum amount of self-government consistent with relevant portions of the United States Constitution and federal law."

2/ A government comptroller has been established for both the Virgin Islands, 48 U.S.C.A. § 1599 (Supp. 1973), and for Guam, 48 U.S.C.A. § 1422(d) (Supp. 1973). The Senate version of the bill authorizing appropriations for TTPI for fiscal year 1974 and succeeding years instructed the government comptroller for Guam to exercise similar functions for the trust territory, S.1385, 93d Cong., 1st Sess., approved by the Senate, 119 Cong. Rec. S.9474 (daily ed. May 22, 1973). The House version of the bill did not contain this provision and apparently the differences will not be resolved until the August recess is concluded. The fact that the post of comptroller for Puerto Rico was eliminated when it achieved commonwealth status, Super Memorandum, Attachment 4 at 16, may lead the Marianas to oppose any such proposal.

affairs. Or Congress might be content with a permanent appropriation if it thought that an unsatisfactory relationship could be altered by statute.[1/]

Obligations of the United States

Budget authority can be granted not only by an appropriation, but also through what is commonly called "contract authority" -- the power to incur obligation on behalf of the United States in advance of appropriations. An appropriation is made later to liquidate the obligation.[2/] While it might be possible for Congress to refuse to appropriate the amount needed to liquidate the obligation incurred -- the legal consequences of which may need to be researched further[3/] -- as a practical matter OMB and the Appropriations Committees consider themselves bound to meet the obligations.

full faith credit

Though many of the same arguments used against permanent or long-term appropriations are applicable to contract authority, a number of important federal programs are run on

---

1/ Of course, this would not be possible if the Compact were viewed as a mutual undertaking which cannot be altered fundamentally without the consent of both parties, as the District Court of Puerto Rico has apparently viewed the Compact of Commonwealth for Puerto Rico.

2/ See The Budget at p. 315.

3/ I have not investigated this matter at this time because Jay Lapin suggested that research on the obligation of the United States under such a contract may already have been done and be available if we decide to explore this alternative further. I will be exploring this issue with respect to payments under leases of land to the military.

01-04970

on this basis. Both the Federal Water Pollution Control Act 1/ and the Federal-Aid Highway Act 2/ contain contract authority. These Acts authorize an administrator to make grants for certain purposes and under certain conditions; and the administrator's "approval of . . . [the] project" is "deemed a contractual obligation of the Federal Government for the payment of its proportional contribution thereto." 3/ An appropriation is made in the following fiscal year to liquidate the obligation. The money for water treatment plants comes from the general revenues, while the money for highway projects comes from the Highway Trust Fund. 4/

Military leases aside, there are two ways we could use contract authority to assure a regular flow of funds to the Marianas, though I have found no solid precedent for either one. First, the Compact could be written to declare that upon the President's signature (or approval by the people of the Marianas, or by the United Nations, or some other event), the United States would be deemed to have a contractual obligation

---

1/ 33 U.S.C.A. §§ 1251, *et seq.* (Supp. 1973).

2/ *Codified in* 23 U.S.C. and 23 U.S.C.A. (Supp. 1973).

3/ 23 U.S.C. § 106(a) (1970); *see also* 33 U.S.C.A. § 1283(a) (Supp. 1973).

4/ *Compare* P.L. 91-605, § 105 (84 Stat. 1715)(authorizing appropriations for highways "out of the Highway Trust Fund") *with* 33 U.S.C.A. § 1287 (Supp. 1973)(authorizing appropriations for water treatment works).

to match local revenues of the Marianas for a term of years. Alternatively, the Compact could be made to run only for a year, so that each year the Secretary of the Interior or the Comptroller General or even the Governor of the Marianas would have to find that certain conditions had been met (e.g., the land to be used by the military had not been interferred with; or money had not been embezzled; or the Marianas had continued friendly relations with this country), and this finding would be deemed a contractual obligation of the United States to pay a share of the local budget.

There are a number of disadvantages to any such scheme. With either a long-term or annual contract, the Marianas would have to wait for the relevant appropriations bill to be passed before it could actually draw the funds it was owed out of the Treasury. This would run the risk that transfer of the money would be delayed because of political battles unrelated to the Marianas. With either sort of contract, the Marianas would also face the possibility that one or the other or both Appropriations Committees would look into local affairs and even give directions about future expenditures in a Report. This would undermine local autonomy. And with either sort of contract, the Marianas would risk a refusal to appropriate the funds needed to liquidate the obligation, and the possible lawsuit which would follow.

Continuing appropriations

An annual contract has even more disadvantages. To the extent it relies on an official subject to the President's instruction, the Marianas would risk either an impoundment of contract authority[1/] or the refusal to make the necessary findings on political or economic grounds unrelated to the merits of the situation. Further, even the most carefully circumscribed authority could be used as a wedge to influence the internal affairs of the Marianas.

The one redeeming feature of the contract authority approach is that legislation implementing it would not face the obstacle of a House Rule which prohibits appropriations in bills or as amendments to bills coming from committees which lack jurisdiction to make appropriations. But there are other ways around that Rule, including referral to the Appropriations Committee and a resolution waiving points of order. I conclude that the contract authority approach,

---

1/ The question of the President's power to direct an agency not to incur obligations under contract authority granted it by statute has been decided against him in a series of cases involving the Highway Act, State Highway Commission of Missouri v. Volpe, 41 L.W. 2539 (8th Cir. April 2, 1973), and the Water Pollution Control Act, City of New York v. Ruckelshaus, 41 L.W. 2602 (Dist.Ct.D.C. May 8, 1973); cf. Campaign Clean Water v. Ruckelshaus, 41 L.W. 2675 (Dist.Ct.E.D.Va. June 5, 1973), but there is not yet an authoritative Supreme Court decision on this point.

or a weaker approach known as statutory entitlement[1/] cannot alone provide the kind of protections the Marianas want. On the other hand, the recognition of a contractual obligation in conjunction with a lease of land to the military, or as protection on top of a long-term appropriation could be desirable.

CONCLUSION

It is clear that the annual authorization-appropriations process is unacceptable as a method of fulfilling an American commitment to provide continuing financial assistance to the Marianas. Of the alternatives discussed, the most desirable is a permanent or long-term appropriation of an

---

1/ In a number of situations Congress has created by statute rights in persons or legal entities to receive funds if certain conditions are met. Like contract authority, an appropriation is needed to draw funds from the Treasury to pay those entitled to it. But since the appropriation is generally made in advance of the fiscal year in which it will be expended, OMB and Congress have somewhat more control over this sort of obligation than over contract authority. Examples of statutory entitlement drawing on the general revenues are Black Lung benefits, 30 U.S.C.A. § 921(a) (Supp. 1973) ("The Secretary shall . . . make payments of benefits [in accordance with a schedule established by the Act] . . . ."); and the social services program under which states were entitled to 75% of the cost of certain state programs, e.g., 42 U.S.C. § 603(a)(3) (1970) (relating to services for needy families with children). As part of the Revenue Sharing Act, Congress limited expenditures under the social services program to $2.5 billion a year nationwide, 42 U.S.C.A. § 1320b(b)(1) (Supp. 1973); see also id. § 603 (Supp. 1973).

annual payment to the Marianas based on some easily discernable standard, like local revenues. There is no doubt of the power of the federal government to make such a grant, nor of the precedents for such action; the question is one of will. The other alternatives discussed are less desirable, though preferable to a mechanism which requires annual authorizations and appropriations and risks interference by OMB and the Congress in the internal affairs of the Marianas.

There are several other ways of assuring financial assistance to the Marianas which are not discussed in this memorandum. Payments under military leases is obviously one. Another is a huge one-time payment to the Marianas at the time a new agreement is entered into. The payment would have to be large enough so that it yielded in income and invasion of principle an amount which the Marianas considered adequate for a number of years. The budgetary impact and the political difficulties a demand for so large a sum would create would both be enormous.[1/] Yet another mechanism might be a treaty by which the United States obligated itself to make regular payments to the Marianas. My research indicates that while a

1/ A variation on this idea would be to have a single lump-sum appropriation which would be disbursed to the Marianas over a period of years. In effect, this would be a long-term appropriation, but it would have a greater budgetary impact in the first year and would therefore be difficult for OMB to accept.

treaty can serve as an authorization for an appropriation, it cannot actually appropriate funds of its own power;[1] and it seems clear that as a matter of domestic law the United States is not bound to meet its financial obligations under treaties.[2] As noted, a permanent appropriation is sometimes passed to carry out a treaty obligation, but in such cases it is the legislation, not the treaty which provides the financial assurances. I therefore saw no advantage to a treaty as compared to the alternatives discussed in this memorandum.

Overall, it seems to me that the best course for the Marianas would be to get federal financial assistance from a number of sources. An automatic annual payment, a payment under a lease to the military, eligibility for federal grant programs, perhaps a one-shot payment for necessary capital improvements[3] and private economic development[4] and a permanent

---

1/ See L. Henkin, Foreign Affairs and the Constitution, at 148-162 (1972).

2/ Id. at 163-71; see Whitney v. Robertson, 124 U.S. 190 (1888); Holmes v. Laird, 459 F.2d 1211, 1220 (D.C. Cir. 1972), cert. denied, ____ U.S. ____.

3/ The estimated cost of necessary capital improvements in the Marianas is $47.7 million, and the economic consultant has stated that "[i]t would be desirable to have the entire amount available at the beginning of the construction period" to "permit maximum flexibility in programming," to "permit the funds to be invested so that cost escalation would be offset by earnings", and to "avoid the uncertainties attached to placing dependence on annual appropriations by future Congresses." James R. Leonard Associates, Inc., Economic Aspects of the Marianas Political Status Negotiations, at 9 (April 6, 1973).

4/ At a minimum the Marianas should be entitled to a proportionate share of the existing Trust Territory Economic Development Loan Fund, (Continued) authorization of such additional sums as may be necessary to be appropriated,[1/] would all be desirable. Seeking funds from a variety of sources might aid out negotiating position; and obtaining funds from a variety of sources will make it more difficult in the future for the Marianas to be cut off entirely.

M. Helfer

(Continued)

see 48 U.S.C.A. §§ 1688-93 (Supp. 1973). The MPSC position paper regarding economic aspects of the revised political status of the Marianas Islands dated May 14, 1973, at p. 11, states that "at least $40 million (1973 dollars) will be required to capitalize a Marianas development corporation."

1/ Permanent authorizations exist for the Virgin Islands, 48 U.S.C.A. § 1546 (Supp. 1973), for Guam, 48 U.S.C. § 1421j (1970), and were proposed for Micronesia in the 1970 Commonwealth Proposal by the United States. Super Memorandum, Attachment 5 at 7 (§ 365(b) of draft bill).