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MEMORANDUM

October 5, 1973

TO: HOWARD WILLENS

FROM: MICHAEL S. HELFER

RE: EMINENT DOMAIN

You requested a background paper on federal eminent domain for use in connection with the negotiations between the United States and the Marianas on a new political status for the Islands. This memorandum covers the basic substantive and procedural aspects of the eminent domain power, and suggests a position for the negoations as well as several fall-back positions. Attached to this memorandum are the following: The Uniform Real Property Acquisition Policy Act; Section 405 of the U. S. Unincorporated Territory Proposal of 1970 (dealing with land); and Section 381 of the U. S. Commonwealth Proposal of 1970 (dealing with land).

At present, the United States' position is that it does not have the power of eminent domain in the Marianas. This position is apparently based on its view that it lacks sovereignty over the Islands. The question in the negotiations will be the extent, if any, to which the United States will have the power of eminent domain under a new political status agreement. The Marianas' concern,

of course, is that the power could be used to take from it its most valuable and scarcest resource: land. This memorandum, accordingly, focuses on the eminent domain power with respect to real property.

SUBSTANTIVE ASPECTS OF EMINENT DOMAIN

Generally: The power of eminent domain--the power of a sovereign to take private property for its own uses--is not explicitly granted to the federal government by the Constitution. It was long ago held, however, that this power is a necessary attribute of sovereignty,[1/] and that it is implied by the grant of other powers to the federal government.[2/] The existence of the power is confirmed, and its exercise limited, by the last clause of the fifth amendment, prohibiting the taking of "private property . . . for public use, without just compensation."[3/]

1/ E.g., Albert Hanson Lumber Co. v. United States, 261 U.S. 581, 587 (1923) ("The power of eminent domain is not dependent upon any specific grant; it is an attribute of sovereignty, limited and conditioned by the just compensation clause . . . ."); cf. West River Bridge Co. v. Dix, 47 U.S. 507, 531-33 (1848) (power of eminent domain belongs to a State as a sovereign); see also 1 Nichols on Eminent Domain §§ 1.13; 1.14; 3.1; 3.11 [1] (rev. third ed. 1973) (hereafter cited as Nichols).

2/ Kohl v. United States, 91 U.S. 367, 371-74 (1875) ("The powers vested in the Constitution in the general government demand for their exercise the acquisition of lands in all the States." (at 371)); United States v. Gettysburg Electric Ry. Co., 160 U.S. 668, 681 (1896) (the power to condemn land "results from the powers that are given, and it is implied because of its necessity, or because it is appropriate in exercising those powers")

3/ This clause requires payment to "an alien friend" just as it does to a citizen of the United States. Russian Volunteer Fleet v. United States, 282 U.S. 481, 489 (1931).

The power of eminent domain rests with the Congress, and statutory authorization is needed before the executive branch can acquire property by eminent domain.[4/] Under 40 U.S.C. § 257 (1970), however, any "officer of the Government . . . authorized to procure real estate . . . for . . . public uses, . . . may acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so." A somewhat similar statute grants to the secretary of any military department the authority to have condemnation suits brought to acquire interests in land for "fortifications, coast defenses, or military training camps" and certain other purposes.[5/] These statutes

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4/ Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 588 (1952); Catin v. United States, 324 U.S. 229, 241 (1945) (owner has "right to question the validity of the taking as not being for a purpose authorized by the statute"). In addition, 41 U.S.C. §14 (1970) requires specific statutory authorization before the United States purchases real property, and thus has been interpreted to include any interest in real property, 35 Op. A.G. 183 (1927).

Congress can delegate the power of eminent domain to private corporations performing public functions, Cherokee Nation v. Southern Kansas Ry. Co., 135 U.S. 641, 657-58 (1890), and it has done so, e.g., 16 U.S.C. §814 (1970) (permitting licensees of the F.P.C. to exercise eminent domain upon approval of the Commission). See also Missouri ex rel. Camden v. Union Electric Light & Power Co., 42 F. 2d. 692, 698 (C.D. Mo. 1930) (upholding constitutionality of 16 U.S.C. §814).

5/ 10 U.S.C. § 2663 (1970) (also permits secretary to purchase property for these purposes if secretary considers price "to be reasonable," id. §(c)); see also 10 U.S.C. § 9773 (1970), which gives the Secretary of the Air Force power to condemn or purchase property for air bases under certain conditions. According to Grant Reynolds in the Air Force General Counsel's office, these statutes are not considered to grant substantive rights to acquire property in the absence of explicit congressional authorization. See also 41 U.S.C. § 14 (1970); 10 U.S.C. § 2676 (1970) (prohibiting the acquisition of real property by a military department unless "expressly authorized by law").

permit the use of the eminent domain power to carry out congressionally approved acquisitions even in the absence of specific statutory authority to use the power for the particular project.6/ Put the other way around, unless Congress specifically prohibits the use of the eminent domain power in approving an acquisition, it is available to the executive branch, at least so far as the taking of interests in land is concerned.

It is clear that the power of eminent domain can be used by the federal government both within States and within territories of the United States.7/ Indeed, because the governmental powers of the United States -- and thus the possible proper "public uses" of property -- are greater in a territory (where the federal government has all its ordinary powers plus the general police powers of a State) than within a State (where federal power is limited to the powers granted it in the Constitution), the federal eminent domain power theoretically has greater sweep in a territory than within a State.8/ The practical importance of this difference, however, is limited today because the commerce and general welfare clauses of the Constitution are given such broad scope.

6/ Swan Lake Hunting Club v. United States, 381 F.2d 238, 240 (5th Cir. 1967) (dealing with 40 U.S.C. § 257 (1970)).

7/ Cherokee Nation v. Southern Kansas Ry. Co., 135 U.S. 641, 656-57 (1890); Kohl v. United States, 91 U.S. 367 (1875).

8/ Berman v. Parker, 348 U.S. 26, 31 (1954)(D.C.); Cincinnati Soap Co. v. United States, 301 U.S. 308, 317 (1937) (Philippines); Puerto Rico v. Eastern Sugar Associates, 156 F.2d 316, 322 (1st Cir.), cert. denied, 329 U.S. 772 (1946) (P.R.)

The power of eminent domain can be granted to a local territorial government by the United States,[9] but apparently this does not present the federal government from exercising the eminent domain power as well.[10] But, as noted, if the United States does not have sovereignty over a jurisdiction, it cannot exercise the power of eminent domain over it, in the absence of a special agreement granting it that power.[11]

9/ Under the old Organic Act of Puerto Rico, the power of eminent domain was held to have been granted to the local government by the grant of legislative authority to it, since the power is "characteristically governmental and therefore not dependent upon any specific grant," Puerto Rico v. Eastern Sugar Associates, 156 F.2d 316, 321 (1st Cir.), cert. denied, 329 U.S. 772 (1946). Apparently it is considered unnecessary to make an explicit grant of the power by statute, for neither the present Constitution of Puerto Rico, or the Organic Acts for Guam and the Virgin Islands specifically grant the power, though all have just compensation clauses, see 48 U.S.C. § 731d, note (Supp. 1973) (Constitution of Puerto Rico, Art. II, § 9; requires compensation for property "taken or damaged" and has special limits protecting the press); id. § 1561 (Organic Act of the Virgin Islands Bill of Rights); id. § 1421b(f) (1970) (Organic Act of Guam Bill of Rights).

10/ Compare Guam v. Moylan, 407 F.2d 567 (9th Cir. 1969) (urban renewal condemnation by local government) with United States v. Friedman, 416 F.2d 945, 947 (9th Cir. 1969), cert. denied sub nom. Herrero v. United States, 397 U.S. 973 (1970) (federal condemnation for "the principal public highway of Guam").

11/ 1 Nichols § 2.134 (under international law, the U.S. can acquire territory and if the acquisition "results in a transfer of political jurisdiction the property becomes a territory of the United States and is subject to the exercise of the federal power of eminent domain" (footnote omitted); in a foreign country, the consent of the other government is necessary before property is acquired; at one point by treaty the U.S. had the power of eminent domain in Panama).

Private Property: Though fee title in land is often the property which the government seeks to take by eminent domain, the power extends to other property as well. The Supreme Court has said that the just compensation provision of the Constitution, and thus presumably the eminent domain power, "is addressed to every sort of interest the citizen may possess,"12/ and that property in this context means "the group of rights inhering in the citizen's relation to the physical thing." The federal government can take, besides a fee, lesser interests and intangible interests in real property; improvements on real property; and tangible and intangible personal property.13/ And the federal government can take property owned either by private persons or by a State or local government.14/

Questions as to what is property for Fifth Amendment purposes, though ultimately a matter of federal law, is usually settled by reference to local property law.15/ Naturally, just compensation is due only to persons with a property right in the property taken. Thus generally a tenant at will on property which is condemned cannot get any compensation, nor can a "mere" occupant or licensee, for such interests are revokable at will, and are said not to

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12/ United States v. General Motors Corp., 323 U.S. 373, 378 (1945).

13/ 1 Nichols § 2.1[1], [2]; 2 Nichols §§ 5.1-5.91 (rev. third ed. 1970).

14/ Oklahoma ex rel. Phillips v. Guy F. Akinson Co., 313 U.S. 508, 534 (1941). There is a hint in dicta in West, Inc. v. United States, 374 F.2d 218, 224 (5th Cir. 1967) that there is an area of "state protected sovereignty" which federal eminent domain cannot reach, though the area is quite narrow.

15/ United States ex rel. Tennessee Valley Authority v. Powelson, 319 U.S. 266, 279 (1943).

amount to property rights.16/ An interesting example of this principle arose in Fleming v. United States,17/ where a citizen and permanent resident of Saipan sued the United States for just compensation after the Navy Department had taken from him 25,000 pounds of trochus shells. The shells were undersized and the collection of undersized shells was unlawful under the Trust Territory Code. The court held that the plaintiff had no legal title or property right in the shells and was due no compensation.18/

One doctrine of property rights which depends entirely on federal law and which may be of interest to the Marianas concerns submerged lands. The federal government's powers over navigation give it a "'dominant servitude' . . . which extends to the entire stream and the stream bed below the ordinary high-water mark."19/ This means that the United States need not pay compensation to a State which owns the land beneath a wharf built on navigable waters by the Navy;20/ and that the value of land as a port does not have

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16/ 2 Nichols §§ 5.23[5]; 5.23[7]; 5.751 (rev. third ed. 1970); see, e.g., Actcn v. United States, 401 F.2d 896, 900 (9th Cir. 1968), cert. denied, 393 U.S. 1121 (1969) (United States cancelled a revokable permit; held, permit created no property rights and no compensation was due); cf. United States ex rel. Tennessee Valley Authority v. Powelson, 319 U.S. 266, 280 (1943) (right of eminent domain in private hands is not property for which federal government must provide compensation upon a taking).

17/ 352 F.2d 533 (Ct. Cl. 1965).

18/ The court thereby avoided the constitutional and jurisdictional questions the case presented, 352 F.2d at 537 n.7.

19/ United States v. Rands, 389 U.S. 121, 123 (1967).

20/ United States v. 422,978 Sq. Feet of Land in San Francisco, 445 F.2d 1180, 1186 (9th Cir. 1971) (alternate holding).

to be reflected in determining just compensation.[21] With respect to land under the oceans within the territorial limitations of the United States -- an issue perhaps more important to the Marianas--the law seems to be that this land belongs to the federal government.[22] Thus no compensation would be due for use of that land or the waters above it, unless an exceptional rule were created by statute for the Marianas.[23]

Taking: The concept of a taking of property is a crucial part of the law of just compensation, for only if there is a taking is compensation due.[24] The question typically arises when by law or regulation under the police power the State or federal government interferes with the

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21/ United States v. Rands, 389 U.S. 121 (1967). See also United States v. Fuller, 409 U.S. 488, 493 (1973) (no compensation need be paid "for that element of value based on the use of [the land taken] in combination with" government land which the owner had a revokable permit to use).

22/ 2 Nichols § 5.798.

23/ Statutes already exist permitting transfer of the federal interest in submerged lands to Guam, the Virgin Islands or American Samoa, 48 U.S.C.A. §§ 1701-04 (Supp. 1973) and to the States, 43 U.S.C. §§ 1301-43 (1970), subject to certain conditions and reservations of authority by the federal government. The United States is prepared to bring the Marianas under these laws. Statement of James M. Wilson, Jr., Deputy Representative for Micronesian Status Negotiations at 7 (May 10, 1973). Further research on the applicable law and possible alternatives will be needed.

24/ On takings generally see Nichols §§ 6.1-6.4. There is a doctrine of destruction from necessity, as to control a fire or to defeat an enemy in combat, which limits in some cases the requirement of just compensation for a taking, 1 id. §§ 1.43, 1.44.

use of property so as to make it less valuable than it might otherwise be. The principles involved have been often stated, though they don't help much in deciding whether any specific governmental action amounts to a taking. The fact that the regulation or law reduces the value of property is not alone enough to require compensation[25/] but if the result of the regulation is to deprive the owner "of all or most of his interest in the subject matter,"[26/] or if the regulation "goes too far"[27/] then it will be considered a taking of property for which compensation must be paid.

Deciding in a given case whether government action amounts to a taking under these principles is obviously difficult. But for the Marianas right now the parameters of the taking doctrine are irrelevant to its decision on its position with respect to the federal eminent domain power. For either the federal government will be able to exercise this power, or it won't. If it can, then just compensation will be due upon any taking, as that concept has developed in the case law (assuming the relevent portion of the Fifth Amendment applies or the Compact requires compensation). If the United States cannot exercise the power of eminent domain, then its action, if it amounts to a taking, would violate the due process

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25/ United States ex rel. Tennessee Valley Authority v. Powelson, 319 U.S. 266, 284 (1943).

26/ United States v. General Motors Corp., 323 U.S. 378 (1945).

27/ Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922); see also Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); United States v. Causby, 328 U.S. 256 (1946) (low altitude aircraft flights over land amounted to a taking of an easement by the United States for which compensation must be paid).

clause[28/] (assuming its applicability) and the law creating the new political status (which by hypothesis denies it the eminent domain power).

Far more important to the Marianas in preparing a position for the negotiations is the fact that it is virtually impossible successfully to challenge in court a decision by the federal government to take private property. Given that the property will be put to a "public use,"[29/] the courts have consistently held that "the necessity, expediency, location and extent of taking property by eminent domain are legislative and administrative questions that ordinarily

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28/ The due process clause of the Fourteenth Amendment prohibits a taking without compensation, Chicago, Burlington and Quincy R.R. Co. v. Chicago, 166 U.S. 226, 241 (1897), so presumably the same clause of the Fifth Amendment would too. To exercise a taking, however, there must be an exercise of the eminent domain power, Pennsylvania Coal Co. V. Mahon, 260 U.S. 393, 415 (1922). By hypothesis the United States would not have the eminent domain power and could not take property, so its act of taking would violate due prccess, e.g., Yara Engineering Corp. v. Newark, 40 A.2d 559 (N.J. 1945) (airport zoning ordinance held unconstitutional as a taking which could only be accomplished by eminent domain)

With respect to the assumption of the applicability of the Fifth Amendment to the Marianas, see Puerto Rico v. Eastern Sugar Associates, 156 F.2d 316, 321 (1st Cir.), cert. denied 329 U.S. 772 (1946) (Puerto Rico's "state of social, economic and political development is such that under [Supreme Court cases] Congress, in the exercise of its broad power under the Constitution Art. IV, § 3 to establish an insular government for Puerto Rico, cannot deprive the inhabitants . . . of the protection of the last two clauses of the Fifth Amendment" (footnote omitted); dicta); Mora v. Mejias, 206 F.2d 377, 382 (1st Cir. 1953) (under Compact, Puerto Ricans, as U.S. citizens, are entitled to the protections of the due process clause).

29/ See pp. 13-14 , infra.

are not subject to judicial review."[30/] This means that Marianas' land owners whose land was condemned could have no expectation in the ordinary situation of prevailing in a challenge to the number of acres taken[31/] or the decision to take a fee rather than a lesser interest in the land[32/] -- both matters of tremendous importance to the Islanders.

There may, however, be extraordinary situations. The Ninth Circuit noted in Southern Pacific Land Co. v. United States[33/] that the Supreme Court has never locked the door against the possibility of judicial review where the decision to take was arbitrary, capricious or in bad faith, that various lower courts have said that decisions to take (including the extent and necessity of taking) are reviewable on these grounds, and that the Administrative Procedure Act might re-

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30/ United States ex rel. Tennessee Valley Authority v. Two Tracts of Land, 456 F.2d 264, 267 (6th Cir. 1972), cert. denied, 409 U.S. 887 (1973) (landowners contended the acquistion was unnecessary); United States v. Gettysburg Electric Ry. Co., 160 U.S. 668, 685 (1896). Nichols puts the rule this way: "The overwhelming weight of authority makes clear beyond any possibility of doubt that the question of the necessity or expediency of a taking in eminent domain lies within the discretion of the legislature and is not a proper subject of judicial review," 1 Nichols § 4.11 (footnote omitted).

31/ United States v. 2,606.84 Acres in Tarrant County, Texas, 432 F.2d 1286, 1290-91 (5th Cir. 1970), cert. denied, 402 U.S. 916 (1971) (alternate holding); United States v. Gettsburg Electric Ry. Co., 160 U.S. 668, 685 (1896).

32/ Berman v. Parker, 348 U.S. 26, 35 (1954); Swan Lake Hunting Club v. United States, 381 F.2d 238, 241 N.4 (5th Cir. 1967).

33/ 367 F.2d 161 (9th 1966), cert. denied, 386 U.S. 1030 (1967).

quire such review of a decision to take.[34] But the court went on to hold that, assuming review were available, the Navy's decision to take a fee interest in land, including the mineral rights, was not arbitrary or capricious because the government might need the minerals later or because holding the interests would make it easier to dispose of the land later.

Though my review was not exhaustive, I found only one case in which a court in effect permitted review of a decision to take by eminent domain and that did not involve the federal government. Progress Development Corp. v. Mitchell[35] involved a municipality which, very shortly after a developer announced that he planned to sell homes in his project to Negroes, decided to take the developer's land by eminent domain for a park. The Court held that the plaintiff stated a cause of action against the taking by its allegation that the taking was "solely for the purpose of preventing" sales of homes to Negroes in violation of the federal civil

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34/ 367 F.2d at 162. In United States v. Southerly Portion of of Bodie Island, North Carolina, 114 F. Supp. 427, 130 (E.D.N.C. 1953), vacated on other grounds sub nom. United States v. Cunningham, 246 F.2d 330 (4th Cir. 1957), the court defined "bad faith" in this context as "actual malevolence by an officer towards the complaining party."

Presumably if the decision to take land in the Marianas or elsewhere were made specifically by Congress, then no review of the decision could be had, other than on due process grounds such as lack of public use.

35/ 286 F.2d 222, 230 (7th Cir. 1961).

rights acts and the Constitution. In a later case involving a somewhat similar challenge to an urban renewal project, however, the same court distinguished Mitchell on the ground that it involved "essentially" civil rights, not eminent domain, in "exceptional circumstances," and opined that "[g]iven a public purpose or use, the motives that underlie the exercise of that power [eminent domain] may not be questioned."36/

In short, it takes a compelling and unusual case to obtain, much less succeed, in judicial review of a decision to condemn. If the United States has the power of eminent domain in the Marianas, no reliance should be placed on the courts to protect against takings of a size and degree the Islanders would find unacceptable.

Public Use: Property may be taken under the eminent domain power only for a public use, and a taking for private use violates the due process clause.37/ A congressional determination of a public use is, of course, given considerable weight by the courts, particularly in the territories where the federal power is plenary,38/ but the congressional determination is not conclusive.39/ A taking

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36/ Green Street Ass'n v. Daley, 373 F.2d 1, 6 (7th Cir.), cert. denied, 387 U.S. 932 (1967).

37/ Hairston v. Danville and Western Ry. Co., 208 U.S. 598, 605-07 (1908); O'Neill v. Learner, 239 U.S. 2-4, 249 (1915).

38/ Berman v. Parker, 348 U.S. 26, 31 (1954).

39/ United States ex rel. Tennessee Valley Authority v. Welch, 327 U.S. 546, 552 (1946) ("when Congress has spoken on this subject [public use] 'It's decision is entitled to deference until it is shown to involve an impossibility '", quoting Old Dominion Co. v. United States, 269 U.S. 55, 66 (1925)); Shoemaker v. United States, 147 U.S. 282, 298 (1893); 2A Nichols §§ 7.4, 7.4[1] (rev. third ed. 1970).

is considered to be for a public use if the purpose for which the property is sought is one which the government can lawfully carry out.40/ Public uses include, among many others, "forts, armories and arsenals . . . navy-yards and light-houses, . . . custom-houses, post-offices and court houses . . . ."41/

Arguably, a taking far in excess of what might reasonably be needed for the purpose which justifies the taking is a taking not for public use.42/ But any challenge on this ground would probably be sidetracked by the reluctance of courts to review the necessity and extent of the taking; and even if review were available it would surely be narrow and the challenge defeated if any sensible reason could be developed by the United States for the size of the taking. For this reason, and because the primary reason land in the Marianas would be taken is for military purposes, clearly a public use,43/ the possibility of judicial review of a taking on public use grounds offers little protection to the Islanders.

40/ United States v. Gettsburg Electric Ry. Co., 160 U.S. 668, 679-81 (1896) (upholding condemnation of land for preservation and marking sites of Battle of Gettsburg).

41/ Kohl v. United States, 91 U.S. 367, 371 (1875); see also Swan Lake Hunting Club v. United States, 381 R.2d 238, 241 (5th Cir. 1967) (protection of migratory waterfowl is a public use, though setting aside an area for hunting might not be; one valid public use is enough to justify taking).

42/ Cf. United States v. 2,606.84 Acres of Land in Tarrant County, Texas, 432 F.2d 1286, 1290 (5th Cir. 1970), cert. denied, 402 U.S. 916 (1971).

43/ 1 Nichols § 3.11 [9] (war power in time of peace supports eminent domain for military reservations).

Just Compensation: The question whether a claimant has received just compensation is, like the question of public use, a question of constitutional law for the courts.44/ Just compensation is defined as "the full monetary equivalent of the property taken."45/ This means "the fair market value of the property at the time of the taking";46/ and fair market value said to be "what a willing seller would pay in case to a willing buyer."47/ The burden of showing value is on the owner, 48/ who, in addition, is entitled to interest which begins to run upon the taking by the government as part of his just compensation.49/

Fair market value is determined by taking into account all factors which would influence a rational buyer and seller -- including, for example, the prospective "highest and best use of the property."50/ The market will reflect

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44/ Monongahela Navigation Co. v. United States, 148 U.S. 312, 327 (1893); 3 Nichols § 8.9 (rev. third ed. 1965).

45/ United States v. Reynolds, 397 U.S. 14, 16 (1970) (footnote omitted).

46/ Id. (footnotes omitted); see also United States v. Dow, 357 U.S. 17, 21 (1958) (owner at the time of physical possession by United States, not at time of declaration of taking, is entitled to compensation).

47/ United States v. Miller, 317 U.S. 369, 374 (1943).

48/ United States ex rel. Tennessee Valley Authority v. Powelson, 319 U.S. 266, 273 (1943).

49/ Albrecht v. United States, 329 U.S. 599, 603-05 (1947).

50/ United States v. Easement and Right of Way 100 Feet Wide, 447 F.2d 1317, 1319 (6th Cir. 1971).

not only technical legal rights, but also practical advantages and disadvantages of the property taken. Thus in Almota Farmers Elevator and Warehouse Co. v. United States[51] the Court held that where a leasehold was condemened, the award should reflect the "value [of] improvements in place [made by the lessee] over their useful life [not just the remaining term of the lease] -- taking into account the possibility that the lease would be renewed as well as the possibility that it might not" since the market would take this factor into account although the lessee had no right to renew. Similarly, the market value of land is influenced by its scarcity, and this is a factor which would properly be taken into account in paying just compensation in the Marianas.[52]

One factor which may not be considered in determining market value is the value added or subtracted by the proposed governmental project itself,[53] unless the project is one which a private party might have undertaken.[54] But the existence of a government project which enhances the value of neighboring lands which are later condemned will be considered in determining market value of those tracts.[55] On the other hand, the government's own increased

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51/ 409 U.S. 470, 474 (1973).

52/ 4 Nichols §12.2[3] (rev. third ed. 1971).

53/ United States v. Reynolds, 397 U.S. 14, 16-17 (1970).

54/ 3 Nichols § 8.61; 4 Nichols § 12,315. If a private party could have undertaken the project, then the free market would have reflected this possibility in the price. Cf. United States v. Lambert, 146 F.2d 469, 472 (2d Cir. 1944) (value of land as airfield which private company might have built was an element to be considered in determining market value; but need of land by government for airfield was not).

55/ United States v. Reynolds, 397 U.S. 14, 16-17 (1970).

need for property which creates a tight market and higher prices will not be reflected in an award.56/

The fair market value standard precludes an assessment by the court of value which is unique to the owner of the property or to the government.57/ The Supreme Court said in United States v. Miller58/ that "fairness" requires that in determining fair market value the court disregard the value added by "an owner who may not want to part with his land because of its special adaptability to his own use, and a taker who needs the land because of its peculiar fitness for the taker's purposes."59/ This statement has distressing applicability to the Marianas, where the owners want to retain their land for cultural reasons, and the United States wants it "because of its peculiar fitness for" military bases. As

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56/ United States v. Cors, 337 U.S. 325 (1949) (held, just compensation does not include increment of market value of tugboat attributable to government's increased demand generally for such vessels). In United States v. Fuller, 409 U.S. 488, 492 (1973), the Court perceived a "general principle that the government as condemnor may not be required to compensate a condemnee for elements of value that the government has created," but noted that this principle cannot "be pushed to its ultimate logical conclusion" in view of cases holding that the influence of a completed project will be reflected in later awards.

57/ United States v. Pelty Motor Car Co., 327 U.S. 372, 377 (1946); see also 4 Nichols § 12.32 (sentimental value not considered).

58/ 317 U.S. 369, 375 (1943).

59/ This principle was applied in United States v. Easement and Right of Way 100 Feet Wide, 447 F.2d 1317 (6th Cir. 1971), where the government took as easement for a high tension wire which prevented the owner from building an airstrip, which he planned to rent to the company he ran. If anyone else owned the land, its best use would have been agricultural. The court refused to allow compensation to turn on the circumstances peculiar to the owner. Id. at 1320.

noted, however, the determination of fair market value would reflect the scarcity of land in that part of the world -- as it presumably does in private transactions.

The Supreme Court has said that it will not "make a fetish . . . of market value,"[60/] and that it will apply another standard "when market value [is] too difficult to find or when its application would result in manifest injustice to owner or public."[61/] But cases in which the Court has actually applied another standard are highly unusual, and turn, as the quotations indicate, on the absence of a market for the property taken[62/] or a disruption of the usual market mechanism, as by price controls.[63/] Since there is a market for land in the Marianas, and land is freely bought and sold there, the chance that a court would look at anything but market value in determining just compensation in the Marianas seems very slight indeed.

60/ United States v. Cors, 337 U.S. 325, 332 (1949).

61/ United States v. Commodities Trading Corp., 339 U.S. 121, 123 (1950).

62/ See United States v. Certain Land at Irving Pl. and 16th St., 415 F.2d 265, 270-272 (2d Cir.), modified on other grounds, 420 F.2d 370 (1969) (because there was no market for the interest taken by the government, the court will "look to all the surrounding circumstances in order to arrive at a valuation which, although perhaps not exact, represents a fair adjustment of the controversy" (at 272)).

63/ In United States v. Commodities Trading Corp., 339 U.S. 121 (1950), the Court held that the controlled price was the just compensation due, no special unfairness having been demonstrated, though the owner took an actual loss on the property (black pepper) and though a free market would presumably have added to the property's value a sum to reflect the fact that it could be held until the war and price controls were lifted -- as the owner planned to do.

Two other aspects of just compensation need to be mentioned: severance damages and consequential damages. The case law developed the rule that severance damages were available when the government took part of a tract of land from one owner leaving him with a portion whose value was impaired.64/ Conceptually, these cases are probably best understood as holding that there was a taking by the government of the small parcel in question, for which compensation was due.65/ If the taking benefits the remainder, "the benefit may be set off against the value of the land taken."66/ The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (hereinafter referred to as the Uniform Act) now which applies in the Trust Territory, and to all relevant government agencies,67/ establishes as federal policy68/ that in appropriate cases the Federal government will separately state in its written statement to the owner

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64/ 4A Nichols §§ 14.1[3], 14.2 (rev. third ed. 1971); see, e.g., United States v. 87.30 Acres of Land in State of Washington, 430 F.2d 1130, 1133 (9th Cir. 1970) (severance damages generally require "a single parcel owned in fee simple by one party," though the doctrine has been expanded).

65/ Cf. United States v. Gettysburg Electric Ry. Co., 160 U.S. 668, 685 (1896).

66/ United States v. Miller, 317 U.S. 369, 376 (1943); 3 Nichols § 8.6211[1].

67/ 42 U.S.C.A. §§ 4601(1), (2) (Supp. 1973). The Act is also applicable tc States (including TTPI) participating in a federal program, id. §§ 4627, 4628, 4630, 4655.

68/ Id. § 4602(a) provides that the policy provisions discussed "create no rights or liabilities and shall not affect the validity of any property acquisitions by purchase or condemnation."

offering to purchase the property, "the just compensation for the real property acquired and for damages to remaining real property."69/ That Act also states as federal policy that "[i]f the acquisition of only part of a property would leave its owner with an uneconomic remnant, the . . . agency concerned shall offer to acquire the entire property."70/

Consequential damages, such as the cost of moving and the losses due to disruption of business are generally not compensable under the case law.71/ This has been modified somewhat by the Uniform Act, under which any federal agency or a State in carrying out a federal program will make payments for moving and related expenses, or in some circumstances for loss of business, provide assistance for owners and tenants to find and purchase replacement housing, and offer relocation advisory assistance services.72/ In addition, the federal agency "to the extent the head of such agency deems fair and reasonable" will reimburse owners for expenses incurred for recording fees, transfer taxes and similar expenses, and certain

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69/ Id. § 4651(3).

70/ Id. § 4651(9).

71/ E.g., Mitchell v. United States, 267 U.S. 341, 344 (1925); United States v. Westinghouse Electric and Mfg. Co., 339 U.S. 261, 264 (1950) (where the United States takes a portion of a leasehold interest, removal costs may be taken into account in determining fair market value; but these "removal costs" or "consequential losses" cannot be considered when the United States take the whole fee or leasehold interest).

72/ 42 U.S.C.A. §§ 4622 (moving and displacement expenses), 4623 (replacement housing for homeowner), 4624 (replacement housing for tenants), 4625 (relocation assistance advisory services) (Supp. 1973).

other costs necessarily associated with the transfer of real property.[73]

PROCEDURAL ASPECTS OF EMINENT DOMAIN

Lawsuits arising out of the exercise of the eminent domain power will get to court in one of two ways:

1. The United States will simply take physical possession of the property and await a suit by the owner for just compensation or, if the taking is alleged to be unlawful, for his property. The district courts have jurisdiction for amounts up to $10,000 based on claims "against the United States . . . founded . . . upon the Constitution or any Act of Congress . . . or upon any express or implied contract with the United States . . . .";[74] the Court of Claims has identical jurisdiction without regard to the amount in controversy.[75] Title does not vest in the United States until just compensation has been paid.[76]

2. The United States will file in court "a declaration of taking . . . declaring that said lands are thereby taken for the use of the United States."[77] This

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73/ Id. § 4653.

74/ 28 U.S.C. § 1346(a)(2) (1970).

75/ Id. § 1491.

76/ United States v. Dow, 357 U.S. 17, 21 (1958). The statute of limitations for such actions is 6 years, 28 U.S.C. §§ 2401, 2501 (1970).

77/ 40 U.S.C. § 258a (1970).

declaration along with deposit in court "of the amount of the estimated compensation" the owner is entitled to, vests in the United States the title or estate in land it sought, and vests in the owner the right to just compensation for the property taken.78/ The district courts have jurisdiction without regard to the amount in controversy of "all proceedings to condemn real estate for the use of the United States . . . ."79/ Venue is in the district where the land is located.80/ As a practical matter the government almost always uses this procedure instead of the first.81/

Regardless of how an eminent domain case gets to court, there is no constitutional right to a jury trial.82/ Under the Civil Rules and in the absence of a special statute, any party may demand a jury trial in the District Court on the issue of just compensation unless the judge orders that that issue be determined by a three-person commission.83/ Other

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78/ The statute does not prevent an owner from challenging the validity of the taking, and in such situations it "is construed to confer upon the government . . . only a defeasible title . . ." Catlin v. United States, 324 U.S. 229, 241 (1945).

79/ 28 U.S.C. § 1358 (1970).

80/ 28 U.S.C. § 1403 (1970).

81/ Grant Reynolds told this to me with respect to the Defense Department; see also 42 U.S.C.A. § 4651(4) (Supp. 1973) stating federal policy to be that no owner will be forced to give up his property until the appraised value has been deposited in court or until he is paid.

82/ Bauman v. Ross, 167 U.S. 548, 593 (1897).

83/ F.R.C.P. 71A(h). The Court of Claims Rules have no special provisions relating to eminent domain proceedings.

issues are for the judge.84/

The Uniform Act established policies which the federal government "to the greatest extent practicable" is "guided by" in acquiring real estate.85/ Two of the policies discourage the government from physically taking land and awaiting a suit: one portion of the law provides that "[n]o owner shall be required to surrender possession of real property" before he has been paid an agreed purchase price or before not less than the "agency's approved appraisal of the fair market value of such property" is deposited in court as described in No. 2 above; another portion states that no agency "shall intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of his real property."86/ Another provision of law directs the court or the Attorney General in settling a suit for just compensation brought as described in No. 1 to award the plaintiff reimbursement for his reasonable costs, including attorney's fees.87/

Several of the other policies established by the Uniform Act are important enough to take note of:

84/ Id.; see United States v. Reynolds, 397 U.S. 14, 19 (1970) (held, question whether condemned property was within the scope of the project does not fall within issue of just compensation and thus is for the judge, not the jury).

85/ 42 U.S.C.A. § 4651 (Supp. 1973); see note 68, supra.

86/ Id. §§ 4651(4), (8).

87/ Id. § 4654(c). Litigation expenses, including attorney's fees, must be paid if the federal government brings an action to condemn land and loses or abandons the proceedings, id., § 4654(a).

-- the agency is to "make every reasonable effort to acquire expeditiously real property by negotiation";

-- the agency is to have the property appraised before negotiations begin, and the owner "shall be" permitted to accompany the appraiser;

-- the agency is to "make a prompt offer to acquire the property for the full amount" it believes to be just compensation, an amount which cannot be less than the appraisal of fair market value; the owner is to be provided "with a written statement of, and summary of the basis for, the amount . . . established as just compensation";

-- "[i]n no event" is the agency to speed up the time of condemnation or defer negotiations "or take any other action coercive in nature, in order to compel an agreement on the price to be paid for the property."88/

CONCLUSIONS AND RECOMMENDATIONS

The eminent domain power of the United States is vast, and, except for the issues of public use and just compensation, largely outside the scope of effective judicial review. Therefore, the assumption of the power of eminent domain by the federal government under a new political status agreement could well lead to takings far in excess of those the residents believe acceptable. For there will be far fewer practical

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88/ Id. §§ 4651(1), (2), (3), (7), respectively.

reasons for the United States to be sensitive to the views of the residents when it exercises the power of eminent domain in the Marianas than when it exercises the power in a State. The Marianas has no representation in Congress so the requirement of statutory authorization will not protect it (though a non-voting delegate would help some); and the most likely taker of land will be the military, so the restraint imposed by the requirement of public use will probably be non-existent, and the restraint imposed by the requirement of just compensation will probably be very slight. Moreover, the Marianas would be in a very weak bargaining position indeed after a new political status is arranged if the only thing the United States really wanted there -- land -- could be taken without the permission of the local government.

In short, there is nothing to be gained and much to be lost by permitting the United States to exercise the power of eminent domain in the Marianas. The Marianas accordingly ought to press the United States to agree not to exercise the eminent domain power in the Islands -- perhaps agreeing to exercise its own power of eminent domain in good faith upon a request from the United States.89/

If the Marianas take this position at the negotiations, then at least these three questions will arise: (1) Will the United States agree not to exercise the power

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89/ Until the 1870's the United States did not condemn land in the States itself; instead, the State would take the land under its own eminent domain power and convey it to the federal government. Kohl v. United States, 91 U.S. 367, 373 (1875).

of eminent domain? (2) Can it enter into such a binding agreement? (3) If the answer to either of these questions is no, then what kind of binding procedural or substantive restraints short of denial can be put on the United States in this regard?

1. The United States was prepared to agree in a Compact of Free Association formally to bind itself not to exercise power of eminent domain in Micronesia.90/ But under such a Compact Micronesia would have been an independent country, and arguably the United States would have lacked the power of eminent domain anyway. The Marianas now seek closer political and financial ties than Free Association contemplates in any event, the United States seeks to obtain the power of eminent domain it possesses in other territories and in the States.90a/ This is confirmed by the fact that under the Commonwealth Proposal of 1970, the United States would essentially have had the full eminent domain power it now possesses elsewhere after requesting the local government to

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90/ Letter from Ambassador Williams to President Nixon, Nov. 24, 1971, at 2.

90a/ Statement of James M. Wilson, Jr., Deputy Representative for Micronesian Status Negotiations at 7 (May 10, 1973).

cooperate.91/ It is also confirmed by my conversation with Grant Reynolds, who told me that in view of the status of land titles on Tinian a friendly condemnation suit might be necessary before the Armed Forces proceeded to build a base there.

2. Even assuming the United States was prepared to agree not to exercise the power of eminent domain in the Marianas, it is not at all clear that its agreement would be binding. This, of course, is part of the larger question whether the Compact could be made binding notwithstanding the

91/ Section 381 of the draft bill implementing the Commonwealth Proposal provided the following scheme: title to all real and personal property and property rights held by the Government of TTPI were transferred to the Government of Micronesia; for three years the United States retained its land use and retention rights, subject only to the requirement that the use and retention "be consistent with the public purposes of the United States;" after three years all retention and use rights terminate, unless the United States, under the Act, acquires "whatever rights in such lands may be considered necessary for the public purposes of the United States;" in any acquisition the price paid "shall be the current fair market value of the interest acquired, exclusive of any improvements made by the United States . . . and less any amount . . . previously paid, gratuitously or otherwise, therefore;" U.S. government agencies were empowered to acquire property interests (but none greater than a "fee on a conditional limitation," the limiting event being the "absence for . . . five years of the use of the land for public purposes") by purchase, lease, exchange, gift or other negotiations; if the United States could not obtain the property by negotiation, then it would submit to the Executive a statement describing the property and interest it wanted, the public purpose and the fair market value, and the Executive would submit a bill to the Congress of Micronesia requiring the conveyance of the property; the bill would be submitted to the Congress if in session, or, upon the request of the United States, to a special session of Congress, which could: (1) pass the bill, or (2) pass a bill conveying the land but submitting the question of fair market value "to the paramount court of Micronesia," or, (3) fail to pass a bill at the session at which it was introduced in which case the United States would "have the right to proceed in accordance with the established Federal law and procedures with respect to the acquisition of property or interest in property with the right of appeal under said Federal law and procedures to the"Ninth Circuit; if privately held land is taken and the owner disagrees with the fair market value determination, the United States would also proceed in accordance with established Federal law.

usual rules about one Congress binding another and the apparently plenary power of the United States over territories. But on this particular point Learned Hand expressed the view in United States v. Village of Highland Falls[92] that even if the United States had promised to surrender its power of eminent domain with respect to a particular project within a state, and even if that promise had been supported by valid consideration and appeared in all respects to be a contract, "it would not have tolled the [Federal Government's] power of eminent domain . . . [for] that power like other constitutional powers not even a legislature can surrender." And in Pennsylvania Hospital v. Philadelphia[93] the Supreme Court said that "the States cannot by virtue of the contract clause be held to have divested themselves by contract of the right to exert their governmental authority in matters which from their very nature so concern that authority that to restrain its exercise by contract would be a renunciation of power to legislate for the preservation of society and to secure the performance of essential governmental duties." The power of eminent domain was held to fall within this doctrine.

3. If the United States will not or cannot bind itself not to use the eminent domain power in the Marianas, a number of fall-back positions ought to be considered. Roughly in order of desirability these would include provisions in the Compact which would:

92/ United States v. Village of Highland Falls, 154 F.2d 224, 226, cert. denied sub. nom. Volkringer v. United States, 329 U.S. 720 (1946).

93/ 245 U.S. 20, 23 (1917).

-- require the Marianas government to approve any taking (perhaps only of land or only of land over a certain acreage); this would give the local government a powerful economic and political stick against the United States;

-- allow the local government to prevent a taking by affirmative vote of the legislature and approval of the executive; this shifts the burden of action to the Marianas;

-- allow the local government a veto as above, but in addition require it to state its reasons which would be reviewable in court; this provides some protection for the United States against being held up solely on the issue of compensation;

-- permit the United States to exercise eminent domain only in highly unusual conditions, such as an actual state of war, the conduct of which requires a taking in the Marianas, or other circumstances in which all would agree the taking was justified; this sort of standard could be molded to meet whatever arguments the United States throws up at the negotiations;

-- permit the United States to exercise eminent domain but make the policies laid out in the Uniform Act binding on federal agencies acting within the Marianas and add the requirements that the amount of the taking and the estate taken be the minimum necessary to accomplish the purpose intended[94/]

94/ Department of Defense Directive 4165.6. ¶ V(A)(3) (Sept. 15, 1955) provides that ". . . only the minimum amount of property necessary shall be acquired" in any real property acquisition.

(and make the taking reviewable in a local court before going on appeal to the Ninth Circuit); alternatively, the maximum estate permitted to be taken might be a relatively short-term lease with an option to renew, and special statutory provisions permitting the award to reflect the unusual importance the Islanders place on land could be sought;

-- permit the United States to exercise eminent domain but specifically allow review of the necessity of the taking in addition to the usual review of compensation and public use; and limit the estate the United States can acquire to "a fee on a conditional limitation," the limiting event being the absence of use for a public purpose for a period of time (this could be added to any of the above schemes too); these limitations were contained in the Unincorporated Territory Proposal of 1970;95/

--allow the United States to exercise eminent domain as it can elsewhere, but prohibit it from exercising the power for military purposes (perhaps allowing certain small takings) on the theory that the crucial issue of military lands has to be settled forever before the Compact is presented to the people.

Plainly, the ideas presented here can be combined in other ways as well.

cc: Mr. Lapin
Mr. Carter
Mr. Mode

95/ The proposal is similar to the Commonwealth Proposal except that it does not specifically permit the United States to proceed in accordance with established federal law; instead it appears to contemplate a direct appeal to the Ninth Circuit from a refusal by the local government to order conveyance of the land; on such an appeal the court will "make a final decision, binding on all parties as to need or value, or both, as may be appropriate in any particular case."

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purposes of this subchapter, be deemed to
.ll of the acquisition of real property.
Jan. 2, 1971, 84 Stat. 1902.

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1450 **Legislative History.** For legislative history and purpose of Pub.L. 91-646, see 1970 U.S.Code Cong. and Adm.News, p. 5850.
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Jan. 2, 1971, 84 Stat. 1902.

der", Works, and chapter 4 of Title 41, Public
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orm to former chapter 11 of Title 44, Public
erty Printing and Documents, but was re-
lass- pealed in the revision of Title 44 by Pub
note L. 90-620, § 3, Oct. 22, 1968, 82 Stat. 1209. The subject matter of such former Title V is now covered by chapters 21, 25, 27, 29, and 31 of Title 44.
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S. 63 **Legislative History.** For legislative
reof history and purpose of Pub.L. 91-646, see
f Ti- 1970 U.S.Code Cong. and Adm.News, p.
and 5850.

UNIFORM REAL PROPERTY
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real property acquisition practices

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than that due to physical deterioration within the reasonable control of the owner, will be disregarded in determining the compensation for the property. The head of the Federal agency concerned shall provide the owner of real property to be acquired with a written statement of, and summary of the basis for, the amount he established as just compensation. Where appropriate the just compensation for the real property acquired and for damages to remaining real property shall be separately stated.

(4) No owner shall be required to surrender possession of real property before the head of the Federal agency concerned pays the agreed purchase price, or deposits with the court in accordance with section 258a of Title 40, for the benefit of the owner, an amount not less than the agency's approved appraisal of the fair market value of such property, or the amount of the award of compensation in the condemnation proceeding for such property.

(5) The construction or development of a public improvement shall be so scheduled that, to the greatest extent practicable, no person lawfully occupying real property shall be required to move from a dwelling (assuming a replacement dwelling as required by subchapter II of this chapter will be available), or to move his business or farm operation, without at least ninety days' written notice from the head of the Federal agency concerned, of the date by which such move is required.

(6) If the head of a Federal agency permits an owner or tenant to occupy the real property acquired on a rental basis for a short term or for a period subject to termination by the Government on short notice, the amount of rent required shall not exceed the fair rental value of the property to a short-term occupier.

(7) In no event shall the head of a Federal agency either advance the time of condemnation, or defer negotiations or condemnation and the deposit of funds in court for the use of the owner, or take any other action coercive in nature, in order to compel an agreement on the price to be paid for the property.

(8) If any interest in real property is to be acquired by exercise of the power of eminent domain, the head of the Federal agency concerned shall institute formal condemnation proceedings. No Federal agency head shall intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of his real property.

(9) If the acquisition of only part of a property would leave its owner with an uneconomic remnant, the head of the Federal agency concerned shall offer to acquire the entire property.

Pub.L. 91-646, Title III, § 301, Jan. 2, 1971, 84 Stat. 1904.

References in Text. "Subchapter II of this chapter", referred to in par. (5), read in the original "title II", meaning Title II of Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970. For classification of Title II in the Code, see note under section 1621 of this title.

Savings Provision. Section 306 of Pub. L. 91-646 provided in part that: "Any rights or liabilities now existing under prior Acts or portions thereof shall not be affected by the repeal of such prior Act or portions thereof under this section [repealing section 3061 3053 of this title, section 111 of Title 23, and section 596 of Title 33]".

Legislative History. For legislative history and purpose of Pub.L. 91-646, see 1970 U.S.Code Cong. and Adm.News, p. 5850.

1. Notice

Condemnor's required "90-day notice" complied with federal requirements, and was not premature, despite claim that construction and development would not in fact commence on date stated in notice to be scheduled date. 815 Mission Corp. v. Superior Court for City and County of San Francisco, 1971, 99 Cal.Rptr. 558, 22 C.A.3d 651.

Decision of Court of Appeal in earlier proceeding to review contention of condemnor that superior court had abused its discretion and acted in excess of jurisdiction by denying condemnor's motion for writ of assistance for possession of property did not preclude superior court from considering condemnee's contentions that notice of removal was prematurely given and that condemnee was entitled to relocation assistance. Id.

§ 4652. Buildings, structures, and improvements

(a) Notwithstanding any other provision of law, if the head of a Federal agency acquires any interest in real property in any State, he shall acquire at least an equal interest in all buildings, structures, or other im-

provements located upon the real property so acquired and which he requires to be removed from such real property or which he determines will be adversely affected by the use to which such real property will be put.

(b)(1) For the purpose of determining the just compensation to be paid for any building, structure, or other improvement required to be acquired by subsection (a) of this section, such building, structure, or other improvement shall be deemed to be a part of the real property to be acquired notwithstanding the right or obligation of a tenant, as against the owner of any other interest in the real property, to remove such building, structure, or improvement at the expiration of his term, and the fair market value which such building, structure, or improvement contributes to the fair market value of the real property to be acquired, or the fair market value of such building, structure, or improvement for removal from the real property, whichever is the greater, shall be paid to the tenant therefor.

(2) Payment under this subsection shall not result in duplication of any payments otherwise authorized by law. No such payment shall be made unless the owner of the land involved disclaims all interest in the improvements of the tenant. In consideration for any such payment, the tenant shall assign, transfer, and release to the United States all his right, title, and interest in and to such improvements. Nothing in this subsection shall be construed to deprive the tenant of any rights to reject payment under this subsection and to obtain payment for such property interests in accordance with applicable law, other than this subsection.

Pub.L. 91-646, Title III, § 302, Jan. 2, 1971, 84 Stat. 1905.

Legislative History. For legislative history and purpose of Pub.L. 91-646, see 1970 U.S.Code Cong. and Adm.News, p. 5850.

§ 4653. Expenses incidental to transfer of title to United States

The head of a Federal agency, as soon as practicable after the date of payment of the purchase price or the date of deposit in court of funds to satisfy the award of compensation in a condemnation proceeding to acquire real property, whichever is the earlier, shall reimburse the owner, to the extent the head of such agency deems fair and reasonable, for expenses he necessarily incurred for—

(1) recording fees, transfer taxes, and similar expenses incidental to conveying such real property to the United States;

(2) penalty costs for prepayment of any preexisting recorded mortgage entered into in good faith encumbering such real property; and

(3) the pro rata portion of real property taxes paid which are allocable to a period subsequent to the date of vesting title in the United States, or the effective date of possession of such real property by the United States, whichever is the earlier.

Pub.L. 91-646, Title III, § 303, Jan. 2, 1971, 84 Stat. 1906.

Legislative History. For legislative history and purpose of Pub.L. 91-646, see 1970 U.S.Code Cong. and Adm.News, p. 5850.

§ 4654. Litigation expenses

(a) The Federal court having jurisdiction of a proceeding instituted by a Federal agency to acquire real property by condemnation shall award the owner of any right, or title to, or interest in, such real property such sum as will in the opinion of the court reimburse such owner for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of the condemnation proceedings, if—

(1) the final judgment is that the Federal agency cannot acquire the real property by condemnation; or

(2) the proceeding is abandoned by the United States.

(b) Any award made pursuant to subsection (a) of this section shall be paid by the head of the Federal agency for whose benefit the condemnation proceedings was instituted.

(c) The court rendering a judgment for the plaintiff in a proceeding brought under section 1346(a) (2) or 1491 of Title 28, or for the taking of property by a Federal agency, the Attorney General effecting a settlement of any such proceeding, shall award or allow to such plaintiff, as a part of such judgment or settlement, such sum as will in the opinion of the court or the Attorney General reimburse such plaintiff for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of such proceeding.

Pub.L. 91-646, Title III, § 304, Jan. 2, 1971, 84 Stat. 1906.

Legislative History. For legislative history and purpose of Pub.L. 91-646, see 1970 U.S.Code Cong. and Adm.News, p. 5850.

1. Persons entitled
Landowner awarded compensation for taking of 468 acre tract of land for inclusion in National ... recover reasonable ... ney, appraisal ... curred in pr... Bay Land Co. ... 2d 501.

§ 4655. Requirements for uniform land acquisitions of expenses incidental to transfer of real payment of litigation expenses in certain cases

Notwithstanding any other law, the head of a Federal agency shall not approve any program or project or any grant to, or contract or agreement with, a State agency under which Federal financial participation is available to pay all or part of the cost of any program or project which will result in the acquisition of real property on and after January 2, 1971, unless he receives satisfactory assurances from such State agency that—

(1) in acquiring real property it will be guided, to the greatest extent practicable under State law, by the land acquisition policies in section 4651 of this title and the provisions of section 4652 of this title, and

(2) property owners will be paid or reimbursed for certain expenses as specified in sections 4653 and 4654 of this title.

Pub.L. 91-646, Title III, § 305, Jan. 2, 1971, 84 Stat. 1907.

References in Text. "This subchapter", referred to in introductory text, read in the original "this title", meaning Title III of Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970. Such Title III is classified to this subchapter, repealed sections 3071-3073 of this title, section 111 of Title 23, and section 556 of Title 33, and enacted provisions set out as a note under section 4651 of this title.

Effective Date. Section as completely applicable to all States after July 1, 1972, but until such date applicable to a State to extent the State is able under its laws to comply with this section, see section 221(b) of Pub.L. 91-646, set out as a note under section 4601 of this title.

Legislative History. For legislative history and purpose of Pub.L. 91-646, see 1970 U.S.Code Cong and Adm.News, p. 5850.

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whose benefit the condemna-

(c) The court rendering a judgment for the plaintiff in a proceeding brought under section 1346(a) (2) or 1491 of Title 28 awarding compensation for the taking of property by a Federal agency, or the Attorney General effecting a settlement of any such proceeding, shall determine and award or allow to such plaintiff, as a part of such judgment or settlement, such sum as will in the opinion of the court or the Attorney General reimburse such plaintiff for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of such proceeding.

Pub.L. 91-646, Title III, § 304, Jan. 2, 1971, 84 Stat. 1906.

Legislative history. For legislative history and purpose of Pub.L. 91-646, see 1970 U.S.Code Cong. and Adm.News, p. 5850.

1. Persons entitled

Landowner awarded compensation for taking of 16.3 acre tract of land for nature in National Seashore was entitled to recover reasonable costs by way of attorney, appraisal and engineering fees incurred in prosecution of case. Drakes Bay Land Co. v. U. S., Cl.Ct.1972, 459 F. 2d 201.

§ 4655. Requirements for uniform land acquisition policies; payments of expenses incidental to transfer of real property to State; payment of litigation expenses in certain cases

Notwithstanding any other law, the head of a Federal agency shall not approve any program or project or any grant to, or contract or agreement with a State agency under which Federal financial assistance will be available to pay all or part of the cost of any program or project which will result in the acquisition of real property on and after January 2, 1971, unless he receives satisfactory assurances from such State agency that—

(1) in acquiring real property it will be guided, to the greatest extent practicable under State law, by the land acquisition policies in section 4651 of this title and the provisions of section 4652 of this title, and

(2) property owners will be paid or reimbursed for necessary expenses as specified in sections 4653 and 4654 of this title.

Pub.L. 91-646, Title III, § 305, Jan. 2, 1971, 84 Stat. 1906.

References in Text. "This subchapter", referred to in introductory text, read in the original "this title", meaning Title III of Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970. Such Title III is classified to this subchapter, repealed sections 3071-3073 of this title, section 111 of Title 23, and section 5[illegible] of Title 33, and enacted provisions set out as a note under section 4651 of this title.

Effective Date. Section as completely applicable to all States after July 1, 1972, but until such date applicable to a State to extent the State is able under its laws to comply with this section, see section 221(b) of Pub.L. 91-646, set out as a note under section 4651 of this title.

Legislative History. For legislative history and purpose of Pub.L. 91-646, see 1970 U.S.Code Cong. and Adm.News, p. 5850.

1. State law

The ruling of New York Attorney General that under New York law the state agencies could not participate in cost-sharing under this chapter, effective January 2, 1971, did not preclude New York agencies operating under pre-January 2, 1971 contracts from complying with this chapter, where whole rationale of Attorney General was premised on existence of a cost sharing requirement which he saw as impermissible under New York law, and Comptroller General thereafter interpreted this chapter to mean that there was no such requirement for said agencies. Barnes v. Tarrytown Urban Renewal Agency, D.C.N.Y.1972, 338 F.Supp. 262.

2. Review

Displaced person who was denied relocation financial assistance would be permitted to by pass state agency procedures since they apparently did not yet exist, and was entitled to ask for redetermination of the decision of the state agency directly from HUD which should inform the displacee to which official she should address her appeal from denial of the financial assistance. Barnes v. Tarrytown Urban Renewal Agency, D.C.N.Y. 1972, 338 F.Supp. 262.

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(b) Section 401 (a) of the Anti-Smuggling Act, as amended (19 U.S.C. sec. 1709(a)), is hereby amended by inserting "Micronesia," immediately after "Johnston Island."

(c) Sections 542, 544, and 545 of Title 18 of the United States Code are hereby amended by inserting "Micronesia," immediately after "Johnston Island," each place it appears therein.

(d) For the purpose of the Tariff Schedules of the United States, Micronesia shall be entitled to the same privileges as the insular possessions of the United States which are outside the custom territories of the United States.

(e) This section shall apply with respect to articles entered or withdrawn from warehouse, for consumption after the effective date of this Act.

U.S. Unincorporated Territory Proposal

LANDS

SEC. 405. (a) The title to all property, real and personal, owned by the Government of the Trust Territory of the Pacific Islands, and all interest including rights of use in property held by the Government of the Trust Territory of the Pacific Islands, are hereby transferred to the Government of Micronesia, including all right, title, or interest of the Government of the Trust Territory of the Pacific Islands in tidelands, submerged lands, or filled lands in or adjacent to the islands of Micronesia. The term "tidelands, submerged lands, or filled lands"

shall have the meaning ascribed to it in Section 1(a) of Public Law 88-183 (77 Stat. 338), but shall not include any such lands which by local or customary laws or rights are held in private or communal ownership.

(b) During the three year period referred to in subsection (c), nothing herein shall impair the existing agreements between the Trust Territory Government and the United States Government or any agency or instrumentality thereof insofar as they relate to land use and retention, and the Government of Micronesia takes all such land as set forth in Section (a) above subject to such agreements; provided, however, that such retention and use will at all times be consistent with the public purposes of the United States.

(c) (i) Within three years from the effective date of this Act, the retention and use rights of the United States Government covered by subsection (b) shall terminate, unless, within that time the United States proceeds to acquire, in accordance with subsection (d) or (e) hereof, whatever rights in such lands may be considered necessary for the public purposes of the United States.

(ii) In any such acquisition, the amount to be paid for the land, or interest therein, shall be the current fair market value of the interest acquired, less any amount or amounts previously paid, gratuitously or otherwise, therefor.

(d) The departments and agencies of the United States Government are hereby authorized to, and may acquire real property or any interest in real property, including any temporary use for public purposes in Micronesia, in accordance with provisions of this subsection and subsection (e).

(i) In no event may the estate in property sought to be acquired by the United States be of a greater quantum than a base or determinable fee. The limiting event which will terminate such a fee will be the cessation for a period of five years, of the use of the land for the public purposes of the department or agency for which it was acquired. Upon termination, fee ownership in the land shall revert automatically to the person, persons or entity from whom it was acquired, or their heirs, or successors.

(ii) At least one month prior to any regular session of the Congress of Micronesia, the United States may present to the Governor of Micronesia a description of any land in which it wishes to acquire an interest together with a complete statement of the nature of the interest sought to be acquired, the full justification, in the public interest, of the need for such interest and a detailed appraisal report of the fair market value of the interest, prepared by qualified independent appraisers.

(iii) The Governor shall thereupon prepare and immediately submit to the Congress of Micronesia, for consideration in its regular session, a bill which will contain a description of the land in which the United States wishes to acquire an interest, the nature of the interest, together with a complete statement of justification of the public need for such interest, and a detailed appraisal of the fair market value of the interest prepared in accordance with paragraph (ii) of this subsection.

(iv) Upon the request of the United States, the Governor shall call and submit to a special session of the Congress of Micronesia any bill otherwise covered by subsection (iii) hereof. The Governor shall, upon request, also include such a bill with any other business for which a session of the Congress of Micronesia may be specially called.

(v) In the event the Congress of Micronesia agrees with the need for the acquisition by the United States of the interest in any particular piece of land sought to be acquired, and with the appraisal for the value of the interest, it shall pass the bill, or that part of the bill relating to that particular piece of land, and the bill, or the part thereof passed, shall become law, binding as to such interest, on all parties.

(vi) In the event that the Congress of Micronesia agrees with the need for the acquisition by the United States of the interest in any particular piece of land sought to be acquired, but disagrees with the appraised value of the interest, the United States shall be entitled to immediate possession of the land in question; but the parties shall proceed forthwith to attempt to agree upon the question of value. If agreement is reached, the bill shall be appropriately amended to reflect the agreed upon value, and when passed shall become law. If no agreement can be reached then the value question shall be submitted immediately to the highest court of Micronesia which will then proceed to determine whether the price proposed by the appraisal represents the fair market value. In order to assist in making this determination, such court may, in accordance with such rules as it may promulgate, convene a special jury of Micronesian citizens from the district in which the land is located to render an advisory verdict on the question of fair market value. The decision of the court shall be final, subject, however, to review, on appeal, by the United States Court of Appeals for the 9th Circuit, as provided in subsection (vii).

(vii) In the event that the Congress of Micronesia fails to act on a bill in the session at which it has been introduced or disagrees

with the need for the acquisition by the United States of the interest in any particular piece of land sought to be acquired, or in the event that the United States wishes to appeal from a final decision of the highest court of Micronesia rendered in accordance with subsection (vi), then an appeal may be taken to the United States Court of Appeals for the 9th Circuit, which shall entertain such appeal in accordance with such rules as it may prescribe and shall make a final decision, binding on all parties either as to need or value, or both, as may be appropriate in any particular case.

(e) After the effective date of this Act, no privately or communally owned real property, or use rights in such property in Micronesia may be transferred, sold, alienated or leased for a term in excess of ten years to non-residents or corporations owned or controlled by non-residents of Micronesia unless such transfer, sale, alienation, or lease is first approved in writing by the majority vote of a commission to be especially established for that purpose in accordance with the laws of Micronesia.

SEC. 406. The Public Land Laws of the United States shall not apply to land, if any, ceded to the United States, but the Congress of the United States shall enact special laws for its management and disposition.

SEC. 407. The territorial sea of the islands of Micronesia shall be delimited in accordance with the laws and treaties of the United States, and shall not exceed the limits maintained by the United States in its international relations. All laws and treaties of the United States of general application regarding navigable waters, the territorial sea, the high seas, including but not limited to the contiguous zone and the continental shelf, and fisheries shall be applicable with respect to Micronesia.

MISCELLANEOUS PROVISIONS

SEC. 408. Upon the effective date of this Act the President is authorized to appoint a Comptroller for the territory of Micronesia. He shall have the same duties and authorities in Micronesia as those prescribed by Public Law 90-497, 48 U.S.C. 1422d (Supp. IV, 1965-1968), for the government comptroller for Guam.

SEC. 409. Upon the effective date of this Act, no employees of the Government of Micronesia shall be appointed as Federal employees as long as they are employed by the Government of Micronesia. Those Federal employees who, on the effective date of this Act, have served one year or less under their then current transportation agreement shall be terminated as Federal employees upon the expiration of that agreement. Those Federal

employees with less than one year to serve under their then current transportation agreement shall upon completion of that agreement be offered not to exceed one additional year of employment as Federal employees.

SEC. 410. No person who advocates, or who aids or belongs to any party, organization, or association which advocates, the overthrow by force or violence of the Government of Micronesia or of the United States shall be qualified to hold any public office in Micronesia.

SEC. 411. Paragraph 29 of subsection (a) of section 101 of the Immigration and Nationality Act (66 Stat. 163, 8 U.S.C. 1101(a)(29) is hereby amended by inserting "Micronesia," immediately before "American Samoa," where it appears in the paragraph.

SEC. 412. All appropriations made to or by the Government of the Trust Territory of the Pacific Islands prior to the date this Act becomes effective shall be available to the Government of Micronesia.

SEC. 413. The President of the United States shall appoint a commission of seven persons, at least three of whom shall be residents of Micronesia, to survey the field of Federal statutes and to make recommendations to the Congress of the United States within twelve months after the effective date of this Act as to which statutes of the United States not applicable to Micronesia on such date should be made applicable to Micronesia, and as to which statutes of the United States applicable to Micronesia on such date should be made inapplicable.

SEC. 414. The laws of the Trust Territory of the Pacific Islands in force on the effective date of this Act, except as modified herein, are hereby continued in force, subject to modification or repeal by appropriate authority. Whenever the terms "High Commissioner", "Deputy High Commissioner" and "Trust Territory" or "Trust Territory of the Pacific Islands" occur in such laws, they are amended to read "Governor", "Lieutenant Governor", and "Micronesia".

SEC. 415. There are hereby authorized to be appropriated such sums as may be necessary to carry out the provisions of this Act.

SEC. 416. (a) As soon as possible after the enactment of this Act, the President of the United States shall certify such fact to the High Commissioner of the Trust Territory of the Pacific Islands. Thereupon, the High Commissioner shall, within thirty days after receipt of the official notification of such approval, issue a proclamation for a referendum to be held not to exceed ninety days later, on the following proposition:

"Shall the peoples of the Trust Territory of the Pacific Islands join in a political association with the United States as provided in the Act of Congress, approved _____, known as the
(date of approval of this Act)
Micronesian Political Status Act."

(b) The High Commissioner of the Trust Territory of the Pacific Islands shall, within thirty days following the referendum, certify the results to the President. If the President finds that a majority of the legal votes cast at the said referendum are in favor of adopting the

proposition, he shall issue a proclamation so stating and this Act shall become effective upon the date specified in his proclamation. In the event the foregoing proposition is not adopted at the said referendum by a majority of the legal votes cast on said submission,none of the provisions of this Act, except the provisions of this section, shall be effective.

(c) Sections 542, 544, and 545 of Title 18 of the United States Code are hereby amended by inserting "Micronesia", immediately after "Johnston Island", each place it appears therein.

(d) For the purposes of the Tariff Schedules of the United States, Micronesia shall be entitled to the same privileges as the insular possessions of the United States which are outside the custom territories of the United States.

(e) This section shall apply with respect to articles entered or withdrawn from warehouse, for consumption after the effective date of this Title.

SEC. 367. The Executive Authority of the Government of Micronesia shall make to the President of the United States or his delegate an annual report of the transactions of the Government of Micronesia for transmission to the Congress of the United States and such other reports at such other times as may be required by the Congress or under applicable Federal law.

U.S. Commonwealth Proposal

Chapter 7.

GOVERNMENT PROPERTY

SEC. 381. (a) The title to all property, real and personal, owned by the Government of the Trust Territory of the Pacific Islands, and all interests in such property including rights of use and including all right, title, or interest of the Government of the Trust Territory of the Pacific Islands in tidelands, submerged lands, or filled lands in or adjacent to the islands of Micronesia, held by the Government of the Trust Territory

of the Pacific Islands, are hereby transferred to the Government of Micronesia. The term "tidelands, submerged lands, or filled lands" shall have the meaning ascribed to it in Section 1(a) of Public Law 88-183 (77 Stat. 338). This subsection shall not apply to any interest in lands, which interest by local or customary laws or rights is held in private or communal ownership.

(b) During the three-year period referred to in subsection (c), nothing herein shall impair the existing agreements between the Trust Territory Government and the United States Government or any agency or instrumentality thereof insofar as they relate to land use and retention, and the Government of Micronesia takes all such land as set forth in subsection (a) above subject to such agreements; provided, however, that such retention and use will at all times be consistent with the public purposes of the United States.

(c) (1) Within three years from the effective date of this Title, the retention and use rights of the United States Government covered by subsection (b) shall terminate, unless, within that time the United States proceeds to acquire, in accordance with subsection (d) or (f) hereof, whatever rights in such lands may be considered necessary for the public purposes of the United States.

(2) In any such acquisition, the amount to be paid for the property, or interest therein, shall be the current fair market value of the interest acquired, exclusive of any improvements made by the United States or assigns, and less any amount or amounts previously paid, gratuitously or otherwise, therefor.

(d) The United States Government its departments and agencies, are hereby authorized to, and may acquire for public purposes in Micronesia property or any interest in property, including any temporary use, in accordance with this subsection and subsection (f). Such property, including that owned or controlled by private parties or the Government of Micronesia, may be acquired under this subsection by purchase, lease, exchange, gift, or otherwise under such terms and conditions as may be negotiated by the parties, subject to the limitations in subsection (g).

(e) In no event may the estate in property sought to be acquired by the United States be of a greater quantum than a fee on a conditional limitation. The limiting event which will terminate such a fee shall be the absence for a period of five years of the use of the land for public purposes of the United States Government. Upon termination, fee ownership in the land shall revert automatically to the person, persons or entity from whom it was acquired, or their heirs, or successors.

(f) In the event the United States is unable to acquire property or an interest in property by negotiation in accordance with subsection (d), then it may acquire property or an interest therein in accordance with the following procedure:

(1) At least one month prior to any regular session of the Congress of Micronesia, the United States may present to the Executive of Micronesia a statement describing the property in which it wishes to acquire an interest including therein the nature of the interest

sought to be acquired, the public purposes for such interest, and a detailed appraisal report of the fair market value of the interest prepared by qualified independent appraisers. The Executive shall thereupon prepare and immediately submit to the Congress of Micronesia, for consideration in its regular session, a bill incorporating the statement and requiring the conveyance of the property or interest or both therein to the United States.

(2) Upon the request of the United States the Executive shall immediately call and submit to a special session or submit to a regular or special session already convened of the Congress of Micronesia any bill otherwise covered by subsection (1) hereof.

(3) In the event the Congress of Micronesia agrees with the need for the acquisition by the United States of the property or any interest in property sought to be acquired, and further agrees with the appraisal for the value of the property or interest, it shall pass the bill, or that part of the bill relating to that particular piece of land, and the bill, or the part thereof passed, shall become law.

(4) In the event that the Congress of Micronesia agrees with the need for the acquisition by the United States of the property or interest sought to be acquired, but disagrees with the appraised value thereof, the United States shall be entitled to immediate possession of said property or right to exercise its interest; but both parties shall proceed forthwith to attempt to agree upon the question of value. If agreement is reached, the bill shall be amended to reflect the agreed upon value, and when passed shall become law. If no agreement can

be reached, the question of value shall be promptly submitted to the paramount court of Micronesia which will proceed to determine whether the price proposed by the appraisal represents the fair market value. To assist in making this determination, such court may, in accordance with such procedures as it may by rules adopt, convene a special jury of Micronesia citizens from the geographical area in which the property is located to render an advisory verdict on the question of fair market value. The decision of the court shall be final, subject, however, to further proceedings and review as provided in subsection (5) and (6).

(5) In the event an interest in private or communally owned property is acquired pursuant to subsection (f)(1), (2), (3) and (4) and the owner or owners disagree with the fair market value and wish a further review, the United States shall proceed immediately in accordance with established Federal law and procedures to have the fair market value determined with the right of appeal under said Federal law and procedures to the United States Court of Appeals for the Ninth Circuit.

(6) In the event that the Executive does not introduce a bill as required by this subsection, or the Congress of Micronesia fails to act promptly on a bill in the session at which it has been introduced, or it does not pass the bill, or it disagrees with the need for the acquisition by the United States of property or interest in property sought to be acquired, or in the event that the United States wishes to appeal from a final decision of the paramount court of Micronesia rendered in accordance with subsection (4), then the United States

shall have the right to proceed in accordance with established Federal law and procedures with respect to the acquisition of property or interest in property with the right of appeal under said Federal law and procedures to the United States Court of Appeals for the Ninth Circuit.

(7) Final decisions of the United States Court of Appeals for the Ninth Circuit rendered in accordance with subsections (5) and (6) may be reviewed by the United States Supreme Court on petition for a writ of certiorari in accordance with 28 U.S.C. 2101.

(g) After the effective date of this Title, no privately or communally owned real property, use rights, or interests in such property in Micronesia may be transferred, sold, alienated or leased for a term in excess of ten years to non-residents, corporations owned or controlled by non-residents of Micronesia, or the United States Government under the provisions of subsection (d), except by descent or devise, unless such transfer, sale, alienation, gift, or lease is first approved in writing by the majority vote of a commission to be especially established from residents in the geographic area where the real property is located for that purpose in accordance with the laws of Micronesia.

TITLE IV

PROVISIONS OF A TRANSITIONAL NATURE

SEC. 401. After the effective date of this Title, no employees of the Government of Micronesia shall be appointed as Federal employees as long as they are employed by the Government of Micronesia; except that Federal employees in the Government of Micronesia on the effective date

of this Title shall not be terminated as Federal employees until the expiration of their current transportation agreements.

SEC. 403. (a) The High Court of the Trust Territory of the Pacific Islands is abolished as of the effective date of this Title and all causes decided by or pending before said Court on the effective date of this Title are transferred to the District Court of Micronesia or to the courts of Micronesia as may be appropriate for disposition.

(b) The District and Community Courts for each of the Districts of the Trust Territory of the Pacific Islands are abolished on the effective date of this Title and all causes decided by or pending before the respective Courts of said Districts on the effective date of this Title are transferred to the courts of Micronesia as may be appropriate for disposition.

SEC. 403. All appropriations made to or by the Government of the Trust Territory of the Pacific Islands prior to the effective date of this Title shall be available to the Government of Micronesia.

SEC. 404. The President of the United States shall appoint a commission of seven persons, at least three of whom shall be residents of Micronesia, to survey the field of Federal statutes and to make recommendations to the Congress of the United States within twelve months after the effective date of this Title as to which statutes of the United States not applicable to Micronesia on such date, shall be made applicable to Micronesia on such date and which statutes shall be made inapplicable.

SEC. 405. There are hereby authorized to be appropriated such sums as may be necessary to carry out the provisions of this Act.