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DEPARTMENT OF STATE
Washington, D.C. 20520

November 30, 1973

MEMORANDUM

TO: OMSN - Ambassador Franklin Haydn Williams

FROM: L/EA - Oliver T. Johnson, Jr.

SUBJECT: The Authority of the United States Government with Respect to the Northern Mariana Islands Following Termination of the Trusteeship

It is clear that the extent of Congress' power to legislate with respect to the northern Mariana Islands following termination of the Trusteeship will be a key issue in the upcoming round of talks in Saipan. We have proposed that the United States have sovereignty over the Marianas and that Article 4 Section 3 Clause 2 of the United States Constitution specifically be made applicable to the Marianas. While the Marianas Political Status Commission (MPSC) has indicated an initial willingness to say in the status agreement that the Marianas are under United States sovereignty, they have also indicated that they are not willing to vest in the United States plenary legislative authority over the Marianas. How we should go about reconciling these differences in our positions is essentially a political matter. However, it will be helpful in moving the negotiations along if both sides share a common understanding of the legal aspects of the question of federal authority in the Marianas.

A. The Source of Federal Legislative Power with Respect to the Marianas.

Once the Trusteeship is terminated the United States Government will have only that authority vis-a-vis the northern Mariana Islands which may have been granted to it by the people of the Marianas in the status agreement we are presently negotiating. This fact is basic to any consideration of United States authority in the Marianas following termination of the Trusteeship. What we are negotiating about in the status talks is the amount and type of authority which the people of the Marianas will grant to the federal government upon entering into their new political relationship with the United States.

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B. The Applicability of Article 4 Section 3 Clause 2 of the United States Constitution in the Marianas.

We have frequently used the notion that Article 4 Section 3 Clause 2 ought to apply in the Marianas as shorthand for the notion that Congress ought to have plenary legislative authority in the Marianas. In Section 102 of our draft agreement (November 27 draft) we have not used the shorthand. Instead, we say, "[t]he relations of the Commonwealth of the northern Mariana Islands with the United States shall be governed by these articles and subject to the power of the United States Congress to legislate with respect to areas under the sovereignty of the United States..." (Emphasis added). Article 4 Section 3 Clause 2 is not referred to for two reasons:

(1) It is not completely clear that this Article is the source of Congress' authority to legislate for United States territories.*/

(2) If, as a matter of constitutional law, Article 4 Section 3 Clause 2 does not apply to the situation of the Marianas, it is to no avail to say that it does in the status agreement.

These same considerations make it desirable that, in the course of the negotiations, we continue to eschew the 4-3-2 shorthand and discuss what is really at issue -- extensive, if not plenary, legislative authority over the Marianas.

C. Sovereignty.

The United States has taken the position that it must have sovereignty over the Marianas. It is important that we not confuse "sovereignty" with the precise extent of federal authority in the Marianas. Clearly, United States sovereignty over the Marianas does not require that we also have plenary legislative authority with respect to those Islands. Indeed, we have already

*/ Some cases hold that this authority "is the inevitable consequence of the right to acquire and to hold territory" (Sere and Laralde v. Pitot et al, 6 Cranch 332 (1810)). Other cases say this authority "is an incident of sovereignty" (National Bank v. City of Yankton, 101 U.S. 129 (1879)). Other cases, of course, affirm the idea that Article 4 Section 3 Clause 2 is the source of this authority. (See Hoover and Allison Co. v. Evatt, 324 U.S. 652 (1945)).

tentatively agreed, in the mutual consent provision, that this authority will not be plenary. Just as clearly, a grant of sovereignty can be made meaningless by extensive specific restrictions on federal authority in the Marianas. Therefore, we should take care that we neither forego necessary specific grants of authority solely because we have been granted "sovereignty" nor seek unnecessary grants of authority.

There would appear to be only a few specific grants of authority which are essential to a claim of the United States to sovereignty over the Marianas. These are: (1) that the United States have the authority to veto any change in the Marianas' status; (2) that the United States have complete authority in the areas of defense and foreign affairs; and (3) that the federal government have adequate authority in the Marianas to conduct its legitimate activities effectively and without local interference.

Of course, the question of sovereignty is not now a problem, inasmuch as the MPSC has tentatively agreed that sovereignty shall be vested in the United States. However, should the MPSC indicate a desire to back away from this agreement we could acknowledge that the Marianas Commonwealth would possess some of the attributes of sovereignty without jeopardizing the claim of the United States to sovereignty. As already stated, sovereignty need not be complete to be real. States of the union have sovereign authority beyond federal control and no one questions United States sovereignty over those states. Furthermore, an acknowledgment of some sovereign authority residing in the Marianas would probably be consistent with the political relationship which will be defined in our agreement. Even under the tentative agreements already reached the Marianas would have some authority which could be called sovereign in that it would be beyond our control.

D. Possible Limitations on Federal Authority in the Marianas.

During the last round of talks in Saipan and in the meetings of the Lawyers Working Group it has become apparent that the MPSC would like to limit the authority of Congress to enact legislation affecting the Marianas in two says. They have proposed, and we have tentatively agreed, that certain provisions of the agreement (as yet

unspecified) would be subject to modification only by mutual consent. It has also been proposed in the Lawyers Working Group that Congress' power vis-a-vis the Marianas be generally limited to that which the Congress would have were the Marianas a state. For the reasons outlined above there is no legal difficulty involved in our accepting either of these proposals. Whether Congress would find them acceptable is, of course, another question. However, the principal objection which the Congress has raised to the Puerto Rican situation -- that the power of Congress with respect to Puerto Rico is unclear -- would not apply in the case of either of these limitations. All of the proposals that have come forward regarding the extent of congressional authority vis-a-vis the Marianas have one thing in common -- they clearly delineate the extent of that authority.

E. Recommendations:

(1) To the greatest extent possible we should avoid the use of the word "sovereignty" and specific reference to Article 4, Section 3 Clause 2. Rather, we should focus on the substantive authority we are really seeking.

(2) The MPSC will be particularly concerned that those parts of the agreement dealing with the structure of the Commonwealth Government and its relationship to the federal government be made subject to the mutual consent requirement. We should be prepared to agree to such a proposal. It is difficult to think of a justification for vesting in the federal government authority unilaterally to reorganize the Marianas Government; and a claim that the federal government must or should have the power unilaterally to change the status of the Marianas amounts to a claim that the federal government should be able unilaterally to increase its authority over the Marianas. Such a claim is inconsistent with the whole notion of a mutual consent clause and, therefore, is indefensible at this stage in the talks.

(3) We should be very reluctant to agree to a provision in the agreement that would restrict federal authority vis-a-vis the Marianas to that which would obtain were the Marianas a state. Such a restriction

is so general that we might give something away unintentionally. We certainly should not agree to limit federal authority in this manner without advance approval from the Hill.

F. Application of Existing Federal Laws in the Marianas Upon Termination of the Trusteeship

This question is substantially different from the question of federal authority in the Marianas following termination of the Trusteeship. Here we are dealing only with the question of which federal laws will, by agreement of the parties, be applicable in the Marianas at the time the Trusteeship terminates. It is possible that this class of laws could include some which, under the terms of the agreement, the Congress would be powerless to make applicable to the Marianas unilaterally. It will certainly include laws which Congress could, following termination of the Trusteeship, unilaterally make inapplicable to the Marianas.

Substantial agreement has been reached in the Lawyers Working Group on a description of this class of laws. Essentially, we have agreed that the United States laws applicable in the Marianas upon termination of the Trusteeship should be those which are then both applicable in the United States and in Guam.

Agreement has not been reached on the proper role to be played by the Statutory Commission envisaged in our draft agreement. Counsel for the MPSC has proposed that the role of the Commission be limited to that of suggesting deletions from the agreed class of laws and recommending which laws should apply in the Marianas as if it were a state and which should apply as they do in Guam. This last function of the Commission is related to counsel's suggestion that the power of Congress to legislate with respect to the Marianas be limited to that power which Congress would have were the Marianas a state. Though we have not yet responded to counsel's suggestions regarding the Commission, they do not appear objectionable. (The acceptability of the latter suggestion, of course, depends upon the restrictions on federal authority in the Marianas contained in the final agreement.)