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Memorandum

April 18, 1974

To: Messrs. Willens, Helfer, Ms. Kramer

Re: Marianas; establishment of a federal court

Attached is a draft Memorandum which is written in a form that could be submitted to the Political Status Commission. Certain parts of the Memorandum may seem elementary, but I felt it necessary to provide the Commission with a certain amount of background in the federal court system in general.

Once we have agreed as to our recommendations, the drafting of the necessary Status Agreement provisions should not require significant further effort.

DGT

Enclosure

(1) 1332 - diversity - Marianas citizens - Tidewater - 4,3,2 : need special provision?

(2) jurisdiction alternative: ART III - fed ct diversity w/o limit + full removal.

a) symbolic interests satisfied + no potential IV 32 conflict

b) only 8's in local cts will be M v. M on non-fed Q ; not great burden + properly local

(3) FORNARIS problem; sup ct even Appeal to ct of appeals holds fed ct cannot be state statute unconstitutional.

(4) maritime admiralty jurisdiction

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DRAFT
4/18/74

MEMORANDUM

SUBJECT: Mariana Islands: United States District Court for the District of the Mariana Islands; Status Agreement Provisions.

The Joint Communique issued following the negotiating sessions held from May 15 to June 4, 1973, evidences agreement that a United States District Court be established in the Marianas; that such court have jurisdiction at least equal to that of a federal district court in a State; that the Marianas retain the right to establish local courts to decide cases arising under local law; and that such local courts be compatible with the federal court system and consistent with applicable federal law. (Joint Communique, ¶ 6.)

This Memorandum discusses those aspects of the establishment of a United States District Court in the Marianas that should be explicitly dealt with in the Status Agreement. Specifically, the Memorandum focuses on the following subjects: jurisdiction, appointment, tenure and compensation of judges; relationship of the federal court to the local courts of the Marianas; constitutional status of the court; certain miscellaneous provisions that should be included in the Status Agreement; and the appropriate manner to implement our recommendations with respect to the above matters.

The Memorandum begins with a discussion of the authority of Congress to establish a federal court in the Marianas. The next section discusses other federal district courts which might serve as analogies for the establishment of a District Court in the Marianas. In this connection, we studied the district courts in the 50 States, in the District of Columbia, in the Commonwealth of Puerto Rico, and in the Territories of Guam and the Virgin Islands.*/ There follows a section which presents a discussion of our recommendations as to the provisions that should be included in the Status Agreement governing the establishment of a Marianas District Court. Finally, the Memorandum discusses the relationship between our recommendations and the proposals contained in the United States Working Draft of December, 1973.

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*/ There is also a United States District Court in the Canal Zone. However, since the political status of the Canal Zone, essentially a federal reservation, is so markedly different from the status to be achieved by the Marianas, we do not consider that court a useful analogy and include no discussion of it herein.

TABLE OF CONTENTS

I

SOURCES OF CONGRESSIONAL POWER TO ESTABLISH A FEDERAL COURT IN THE MARIANAS: "CONSTITUTIONAL" v. "LEGISLATIVE" COURTS

The sources of Congressional power to establish inferior federal courts and define their jurisdiction has given rise to complex questions, many of which have not been fully settled in the decisions. The complexity is manifested in the blurred distinction which has arisen between "constitutional courts" and "legislative courts". Briefly, and at the risk of over-simplification, a "constitutional court" is one created by Congress pursuant to Article III. */

Article III contains three basic limitations upon "constitutional courts":

> (1) Their business must be "judicial" in nature -- that is, for example, they may decide only justiciable cases or controversies and cannot render advisory opinions or be invested with administrative or legislative functions;
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> (2) Their jurisdiction must be the federal jurisdiction enumerated in Art. III, § 2; and
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> (3) Their judges enjoy tenure during good behavior and assurance against dimunition of salary.

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*/ "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Constitution, Art. III, § 1. Article I, Section 8, Clause 9 grants Congress power "To constitute Tribunals inferior to the Supreme Court." This clause refers only to the inferior courts referred to in Art. III. See Katz, Federal Legislative Courts, 43 Harv.L.Rev. 894, n. 2 (1930).

The primary examples of the present inferior constitutional courts are the United States district courts in the States and the United States courts of appeals for the 10 circuits.

Article III, however, does not define the limits of Congress' power to create federal courts. Pursuant to the exercise of its power under other Articles, Congress may establish additional inferior federal courts, which are termed "legislative" courts. The primary examples of "legislative" courts are the federal courts established in the territories pursuant to Congress' plenary power to legislate for the territories pursuant to Art. IV, § 3, cl. 2. See American Ins. Co. v. Canter, 1 Pet. 511 (1828). Legislative courts may be endowed with one or more of the attributes enumerated in Article III. They may perform functions which are essentially "judicial" in nature. They may be vested with jurisdiction over cases and controversies enumerated in Art. III, Section 2. However, vesting a territorial court with jurisdiction similar to that vested in Article III courts, such as a district court of the United States, does not alone make it an Article III court. See Mookini v. United States, 303 U.S. 201 (1938). Legislative courts may also have judges granted life tenure, but such a statutory assurance is said to be "a matter of legislative grace and not of constitutional compulsion." Glidden Co. v. Zdanok, 370 U.S. 530, 548 (1962). While legis-

lative courts may perform one or more of the functions of courts created under Article III, they are not subject to the limitations of that Article, and Congress may vest them with additional, non-Article III jurisdiction and provide them with judges of limited tenure. As Justice Harlan stated in Glidden Co. v. Zdanok, supra,

> . . . in the territories cases and controversies falling within the enumeration of Article III may be heard and decided in courts constituted without regard to the limitations of that article; courts, that is, having judges of limited tenure and entertaining business beyond the range of conventional cases and controversies. 370 U.S. at 545.

There are two sources of authority available to Congress for the establishment of a federal court in the Marianas. Clearly, Congress has the power to establish such a court under Art. IV, § 3, cl. 2. It is probable, although less certain, that Congress also has the power to establish such a court pursuant to Article III. In Glidden, supra, Justice Harlan laid down the following test to determine whether a court is one created under Article III:

> . . . whether a tribunal is to be recognized as one created under Article III depends basically upon whether its establishing legislation complies with the limitations of that article; whether, in other words its business is the federal business there specified and its judges and judgments are allowed the independence there expressly or impliedly made requisite. 370 U.S. at 552.

Thus, it would seem that Congress has power to create an Article III court, irrespective of the place where the court is situated, so long as Congress complies with the limitations set forth in Article III. Whatever doubt there may be as to the foregoing conclusion, arises from an unbroken line of cases holding that the courts created by Congress in the territories are not Article III courts. As Justice Sutherland stated in O'Donoghue v. United States, 289 U.S. 516, 535 (1933),

> This court has repeatedly held that the territorial courts are "legislative" courts, created in virtue of the national sovereignty or under Art. IV, § 3, cl. 2, of the Constitution, . . . and that they are not invested with any part of the judicial power defined in the third article of the Constitution. And this rule, as it affects the territories, is no longer open to question.

The seminal decision on this subject is that of Chief Justice Marshall in Canter, supra, in which it was stated that the territorial courts "are not constitutional Courts, in which the judicial power conferred by the constitution on the general government, can be deposited. They are incapable of receiving it." 1 Pet. at 546. Canter, and the cases that have followed it, should not, however, be construed to hold that Congress has no power under Article III to create constitutional courts in the territories. Canter, itself, was concerned with an argument that Article III required judges of life tenure in the territorial courts in Florida, even

though Congress had provided only for appointment for four-year terms. In rejecting this argument, Chief Justice Marshall did not hold that Congress had no power to create Article III courts in the territories, but rather that the particular courts in question were not created pursuant to Article III, as evidenced by the limited tenure of the judges, and therefore the limitations of Article III did not apply to them. The decision was a necessary recognition of the temporary and provisional character of territorial governments, and the practical difficulties that would be faced if Congress were required to invest the judges there with life tenure. The same practical considerations justifying the investiture of judges with limited tenure have governed the decisions in subsequent cases holding Article III inapplicable to the federal courts created in unincorporated territories. See Glidden Co. v. Zdanok, supra at 544-48. As Justice Harlan put it in Glidden Co., supra, a presumption, based on the practical necessities existing in the territories, has arisen that the territorial courts created by Congress are not created pursuant to Article III:

> Since the conditions obtaining in one territory have been assumed to exist in each, this Court has in the past entertained a presumption that even those territorial judges who have been extended statutory assurances of life tenure and undiminshed compensation have been so favored as a matter of legislative grace and not of constitutional compulsion. 370 U.S. at 548.

The presumption, however, is rebuttable, and Justice Harlan specifically left open the question whether, due to changed circumstances, Congress might wish to establish an Article III court in a territory:

> We do not now decide, of course, whether the same conditions still obtain in each of the present-day territories or whether, even if they do, Congress might not choose to establish an Article III court in one or more of them. 370 U.S. at 548, n. 19.

In conclusion, it is probable that Congress has the power to establish a federal court in the Marianas under Article III, as well as under Article IV. Whether or not the court so created is an Article III court will depend upon whether its enabling legislation meets the limitations imposed by Article III and on the intent of Congress in creating it.

Clearly, if the judge(s) of the federal court in the Marianas is appointed for a limited term rather than granted life tenure, then one of the limitations of Article III would be violated, and the court could not be an Article III court. On the other hand, if the judge(s) is granted life tenure, then the court could be an Article III court provided that its jurisdiction and the nature of its business meets the other limitations contained in that Article.

If the court were to exercise jurisdiction beyond that granted in Article III, such as jurisdiction over matters arising purely under the local law of the Marianas, then its

status as an Article III court would be open to question. In Ex parte Bakelite Corp., 279 U.S. 438 (1929), the Supreme Court drew a rigid distinction between "constitutional" and "legislative" courts and held that the former could exercise no jurisdiction other than that enumerated in Article III. Subsequent decisions, however, have eroded somewhat the rigidity of this distinction.

In Bakelite the Court referred to the district court and the court of appeals for the District of Columbia as legislative courts, since they exercised non-Article III jurisdiction over purely local matters arising within the District. Then in 1933 in O'Donoghue v. United States, supra, the Court held that the district court and the court of appeals for the District of Columbia were constitutional courts created pursuant to Article III and that their judges were protected as to compensation and tenure. Congress had exercised dual powers in vesting jurisdiction in the courts of the District of Columbia. It had conferred upon them the judicial power of the United States pursuant to Article III and in so doing had observed the limitation of that Article with respect to life tenure for the judges. It had also conferred upon them local jurisdiction and certain non-judicial, legislative and administrative functions pursuant to its plenary power to legislate for the District of Columbia under Article I, Section 8, clause 17. Thus, the District of Columbia courts

were "hybrid". They were Article III, or constitutional, courts with respect to jurisdiction that was similar to that of the district courts in the States, and Article I, or legislative, courts with respect to local and non-judicial jurisdiction.

The reasoning of O'Donoghue would seem to apply equally to the establishment of an Article III court with some local jurisdiction in the Marianas, since Congress has power to legislate with respect to the Marianas by virtue of Art. IV, § 3, cl. 2, similar to its power to legislate for the District by virtue of Art. I, § 8, cl. 17. O'Donoghue, however, drew a distinction between the territorial courts created pursuant to Art. IV, § 3, cl. 2 and the courts of the District of Columbia, based on the impermanent and provisional nature of the territorial governments. Congress' power over the territories was intended to be temporary, since they were intended from the beginning for admission into the Union as States. Thus, there were sound practical reasons for not applying the Article III requirements of permanent tenure to territorial judges who would serve only for a limited time under purely provisional governments. On the other hand, the District of Columbia was intended to be the permanent seat of the national government, and likewise Congress' power over it would be permanent in nature. Thus, the practical considerations

against applicability of Article III in the territories did not apply with respect to the District of Columbia, and therefore the courts of the latter could be created under Article III. "The fact that Congress, under another and plenary grant of power has conferred upon these courts jurisdiction over non-federal causes of action, or over quasi-judicial or administrative matters, does not affect the question." O'Donoghue v. United States, supra at 545.

Since it is contemplated that the new union between the Marianas and the United States will be permanent in nature it can be argued that the situation with respect to the establishment of a federal court under Article III in the Marianas is closer to that of the District of Columbia than to the territories. Congress will retain certain enumerated powers under Art. IV, § 3, cl. 2 to legislate for the Marianas. And, like the courts of the District of Columbia, the fact that Congress may in the exercise of those powers confer local jurisdiction upon the federal court in the Marianas should not affect that court's Article III status.

Subsequent decisions provide authority both for and against the proposition that granting the federal court in the Marianas with some non-federal jurisdiction would not deprive it of Article III status. In National Mutual Insurance Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949), the Court upheld the constitutionality of a statute which treated citizens

of the District of Columbia as if they were citizens of a State for purposes of diversity jurisdiction in the federal district courts. Three Justices thought that Congress could confer such non-Article III jurisdiction on all of the Article III district courts in the States pursuant to its power to legislate with respect to the District of Columbia under Article I. Six Justices, however, rejected the theory that Congress' power to confer additional, non-Article III jurisdiction extended to courts other than those in the District of Columbia itself. While the opinions of the six Justices do constitute authority that the jurisdiction conferred by Article III is a limitation insofar as the Article III courts in the States are concerned, those opinions do not necessarily extend to situations where Congress does have authority to legislate with respect to local matters, such as the District of Columbia and the territories.

In Glidden Co. v. Zdanok, supra, the Court held that the Court of Claims and the Court of Customs and Patent Appeals are courts created under Article III, even though those courts have certain non-Article III functions. The Court noted that all of the cases heard by those courts arise under federal law and that their non-judicial functions, which were incompatible with Article III, amounted to only a small percentage of their business, and were insufficient to change the basic character of the courts as constitutional. Justice Harlan

referred to the proportion of non-judicial functions of the courts in question as "miniscule". Whether a more substantial proportion of non-judicial or non-Article III jurisdiction would be sufficient to change the basic character of a court from constitutional to legislative is a question unanswered in Glidden.

Glidden is also authority for the proposition that Congress' intention to create an Article III court is an important factor in determining the status of the court so created. In two earlier decisions, Bakelite, supra, and Williams v. United States, 289 U.S. 553 (1933), the Supreme Court ruled that the Court of Customs and Patent Appeals and the Court of Claims, respectively, did not exercise Article III power. Subsequent to those decisions Congress provided as to each of those courts that "such court is hereby declared to be a court established under article III of the Constitution of the United States."*/ Justice Harlan, along with two other Justices, thought that Congress' declaration, while not controlling, was entitled to "due weight." The other two Justices of the majority thought the declaration of congressional intent controlling.

Although it is difficult to draw clear principles from the decisions dealing with the distinction between "legislative" and "contitutional" courts, we think the following

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*/ 28 U.S.C. § 211 (Court of Customs and Patent Appeals) and 28 U.S.C. § 251 (Customs Court).

represents a reasonable distillation of the decisions insofar as they would apply to the establishment of a federal court in the Marianas. Congress probably has authority to create an Article III court in the Marianas. Granting the federal courts in the Marianas with additional, non-Article III jurisdiction over cases arising under purely local law would raise questions as to the constitutional status of the court. The decisions do not provide a clear indication of how such questions might be resolved. However, we think there are arguments that granting the court local jurisdiction should not deprive it of Article III status. We think that these arguments would become stronger if in establishing the court Congress declares its intent to create an Article III court and if such local jurisdiction as is granted the court is clearly intended to be of limited or transitional duration.

why probably - O'D didn't say more; can't estab. Art III ct in DC or territories give Art III jurisdiction?

II

THE FEDERAL DISTRICT COURTS

A. The 50 States.

Inasmuch as the Joint Communique reflects an agreement that the United States district court in the Marianas have jurisdiction at least equal to that of a United States district court in a State, the United States district courts in the 50 States provide a useful starting point for a discussion of the available analogies to a new United States district court in the Marianas.

1. Jurisdiction.

The United States district courts in the States ("the district courts") are the general courts of original jurisdiction in the federal system. The jurisdiction exercised by the district courts is exclusively federal in nature, as defined and limited by Article III. Pursuant to Article III, Congress has enacted two broad grants of original jurisdiction to the district courts -- federal question and diversity of citizenship. The statute conferring federal question jurisdiction does so in language virtually the same as that contained in Article III: */

> The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States. 28 U.S.C. § 1331(a). **/

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*/ The $10,000 minimum amount in controversy requirement is not found in Article III.

**/ The meaning of the phrase "arising under" (the formulation contained in Article III) has given rise to substantial quantities of judicial opinion and scholarly debate. See generally Wright on Federal Courts, § 17, pp. 48-52. Professor Mishkin has offered the following test: "a substantial claim founded 'directly' upon federal law." Mishkin, the "Federal Question" in the District Courts, 53 Colum.L.Rev. 157, 165, 168 (1953).

The diversity jurisdiction of the district courts applies to three classes of civil actions: Those between "citizens of different States," between "citizens of a State, and foreign states or citizens or subjects thereof," and between "citizens of different States and in which foreign states or citizens or subjects thereof are additional parties." 28 U.S.C. § 1332(a). As used in the statute, the word "States" includes "the Territories, the District of Columbia, and the Commonwealth of Puerto Rico." 28 U.S.C. § 1332(d). Like the federal question jurisdiction, the diversity jurisdiction is also subject to a $10,000 minimum amount in controversy requirement. As a general rule, where diversity is the sole basis of jurisdiction, there must be "complete diversity" -- that is, jurisdiction is lacking in a multi-party action if any of the parties on one side is a citizen of the same "State" as any on the other. */ There are certain exceptions to the diversity jurisdiction, including cases where a party has been improperly or collusively joined to invoke federal jurisdiction, 28 U.S.C. § 1359, in rem actions where the property is in the custody of state court, and domestic relations and probate matters. The latter exceptions do not apply in the territories since there the basis for jurisdiction is not diversity but Art. IV, § 3, cl. 2.

*/ There is an exception to the rule of "complete diversity" in interpleader actions which require only "two or more adverse claimants, of diverse citizenship." 28 U.S.C. § 1335.

The jurisdictional amount requirements with respect to federal question and diversity jurisdiction were increased from $3,000 to $10,000 in 1958. Act of July 25, 1958, 72 Stat. 415. While the purpose was to reduce congestion in the federal courts, the increase apparently has had little practical effect. See Address of Chief Justice Warren to the American Law Institute, 25 F.R.D. 213 (1960).

In addition to the two broad jurisdictional grants discussed above, there are particular statutes granting jurisdiction to the district courts, regardless of the amount in controversy, in a large number of cases that would otherwise fall within the federal question jurisdiction. 28 U.S.C. §§ 1333 et seq. Examples are admiralty and maritime cases; bankruptcy; review of orders of the Interstate Commerce Commission; patent, copyright and trademark cases; internal revenue actions; civil rights cases; and cases where the United States is a party. The practical effect of these particular jurisdictional grants is that there remain few, if any, federal question cases that could not be brought under one or more of them, without regard to the $10,000 minimum requirement of the general federal question statute.

So far the discussion has centered on the original jurisdiction of the district courts. Inasmuch as the district courts are the federal "trial courts" they have no appellate

jurisdiction to review the judgments of other federal courts. The only federal administrative agency whose orders are reviewed by the district courts is the I.C.C. The remaining federal agencies are subject to review by the federal courts of appeals pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 1031-1042.

Generally, final decisions and interlocutory orders of the district courts are reviewable on appeal to the federal courts of appeals. 28 U.S.C. §§ 1291, 1292. In addition, some decisions of the district courts, principally those holding an act of Congress unconstitutional, 28 U.S.C. § 1252, are reviewable by the Supreme Court on direct appeal.

2. Appointment, tenure and compensation of judges.

The district court judges are appointed by the President with the advice and consent of the Senate, 28 U.S.C. § 133, and hold office during good behavior -- that is, they have life tenure. 28 U.S.C. § 134(a). All judges of the district courts, except the chief judge for the District of Columbia, receive the same salary,*/ which is protected from dimunition by Article III.

3. Relationship of federal courts to local state courts.

The district courts have no appellate jurisdiction with regard to the decisions of the courts constituted by the States in which they sit. Indeed, district court inter-

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*/ Currently, $30,000; $30,500 for the chief judge of the District of Columbia.

pretation of State law questions is not binding on the State courts. The power of the federal courts to enjoin or stay State court proceedings is restricted by statute. 28 U.S.C. § 2283.

Except in those areas involving federal law where Congress has made the jurisdiction of the federal courts exclusive, the State courts have concurrent jurisdiction with the federal courts to entertain federal claims. The most important areas in which Congress has made federal jurisdiction exclusive include admiralty and maritime, bankruptcy, patent and copyright, crimes against the United States, and cases in which the United States is a defendant.

An important source of jurisdiction of the district courts, deferred for discussion until this section, is the removal jurisdiction applicable to certain actions commenced originally in the State courts. 28 U.S.C. § 1441 et seq. In general, and with some limited exceptions, the defendant in an action commenced in a State court may remove the action to the appropriate district court if the action is one of which the district courts have original jurisdiction. One of the most important exceptions is that diversity cases are not removable unless none of the defendants is a citizen of the State in which the action is brought.

Final judgments "rendered by the highest court of a State in which a decision could be had" are reviewable by the Supreme Court of the United States by appeal in certain cases involving the validity of federal or state statutes and by writ of certiorari in certain other cases involving constitutional question. 28 U.S.C. § 1257.

4. Constitutional status of the district courts.

The district courts are full-fledged Article III courts exercising the judicial power of the United States. They have no non-Article III jurisdiction, and the provisions governing tenure and compensation meet the limitations of Article III.

The district courts are established by Chapter 5 of the Judicial Code, which constitutes judicial districts, 28 U.S.C. §§ 81-131, and provides for a district court in each district "known as the United States District Court for the district." 28 U.S.C. § 132. Section 451 of the Code defines the district courts thus established as "court[s] of the United States," and defines the term "district court" and "district court of the United States" to mean those courts constituted by Chapter 5. As a practical matter, these definitions have the effect that the remaining provisions of the Code applicable to "district courts" do not apply to district courts, such as in Guam and the Virgin Islands, not constituted by Chapter 5, unless made expressly applicable.

B. The District of Columbia.

The United States District Court for the District of Columbia is constituted by Chapter 5 of the Judicial Code among the regular district courts in the States. Everything said in the preceding section with respect to the jurisdiction and the appointment, tenure and compensation of judges of the district courts in the States applies equally to the district court in the District of Columbia. Until very recently, however, the district court in the District of Columbia had a special jurisdiction unique among the district courts of the United States. In addition to its jurisdiction as a district court of the United States, the court had general common law jurisdiction of civil and criminal actions arising in the District of Columbia similar to that of a local trial court of general jurisdiction in a State. See, e.g., former D.C. Code §§ 11-521-11-523.

As discussed earlier, in O'Donoghue v. United States, supra, it was held that the "local", non-Article III jurisdiction conferred upon the courts of the District of Columbia by the Congress did not deprive those courts of Article III status, and hence the salaries of the judges were constitutionally protected from dimunition.

The District of Columbia Court Reorganization Act of 1970, Pub.L. 91-358, July 29, 1970, 84 Stat. 475, withdrew the local jurisdiction of the district court in the District of

Columbia, except for a 30 month transitional period now expired, and transferred such jurisdiction to a revamped system of local District of Columbia courts. See D.C. Code § 11-101 et seq. Thus, the United States District Court for the District of Columbia now exercises only its jurisdiction as a United States district court and certain other federal jurisdiction conferred on it by law. The 1970 Act provides that the United States District Court for the District of Columbia is a court "established pursuant to article III of the Constitution." D.C. Code § 11-101(1).

C. Commonwealth of Puerto Rico.

1. Jurisdiction.

The United States District Court for the District of Puerto Rico is constituted among the regular United States district courts in the States established by Chapter 5 of the Judicial Code. 28 U.S.C. §§ 119, 132. Thus, the jurisdiction of the United States District Court in San Juan is the same as that of the federal district courts in the States.*/ The court has no non-federal original or appellate jurisdiction to hear and decide cases arising under local law where diversity of citizenship is not present. Appeals are to the United States Court of Appeals for the First Circuit, 28 U.S.C. §§ 41, 1291,

*/ The 1948 revision of the Judicial Code, did not alter the jurisdiction of the already-existing United States district court for Puerto Rico, but for the first time it placed provisions relating to that court in a general federal courts act. See 28 U.S.C. §§ 119, 133. The House Committee Report stated that Puerto Rico was included as a judicial district "since in matters of jurisdiction, powers and procedure" its court is "in all respects equal to other United States district courts." H.R.Rep. No. 308, 80th Cong., 1st Sess. 6 (1947).

1292, 1294, and then by certiorari or appeal to the Supreme Court. 28 U.S.C. §§ 1252, 1254.

Prior to 1970, the United States District Court in San Juan had a special jurisdiction beyond that granted the federal district courts in the States. See former 48 U.S.C. § 863. The Puerto Rican Federal Relations Act of 1950 provided that a number of then existing provisions of earlier acts dealing with Puerto Rico continue in force and effect. See 48 U.S.C. § 731e. One such provision was Section 863 providing, among other things, that the United States District Court for the District of Puerto Rico have jurisdiction "of all controversies where all of the parties on either side of the controversy are citizens or subjects of a foreign State or States, or citizens of a State, Territory, or District of the United States not domiciled in Puerto Rico, wherein the matter in dispute exceeds, exclusive of interest or cost, the sum or value of $3000, . . ." This */ expanded analogue to the traditional diversity jurisdiction, and not found in Article III, was repealed by Congress in 1970. Pub.L. 91-272, § 13, June 2, 1970, 84 Stat. 298.

i.e., no diversity w/ fed Q req'd.

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*/ The diversity statute specifically provides that the word "States" "includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico." 28 U.S.C. § 1332(d). The Commonwealth of Puerto Rico was included by Act of July 26, 1956, c. 740, 70 Stat. 658. Prior to amendment of Section 1332 in 1956 it had been held that Puerto Rico was a "territory" for purposes of the diversity statute. Detres v. Lions Building Co., 234 F.2d 596, 600 (7 Cir. 1956).

Is this construed insofar as territories are concerned

Even though Section 863 had been made a part of the Federal Relations Act, it has been held that Congress' unilateral repeal of Section 863, thereby withdrawing the additional, non-Article III jurisdiction of the United States District Court for the District of Puerto Rico, did not violate the Compact:

> When Congress before 1952 legislated to reserve a special jurisdiction to Puerto Rico, a right then emanating from Article IV of the Constitution of the United States, it did so unilaterally and in the exercise of those powers. At no time during the process which evolved between the years 1950 and 1952 did Puerto Rico and the United States agree that Congress or the Puerto Rican government were bound to maintain the jurisdiction of their respective systems of courts untouched. Long v. Continental Casualty Company, 323 F.Supp. 1158, 1161 (D.P.R. 1970)

Thus, Congress has power unilaterally to alter the jurisdiction of federal courts granted pursuant to Article IV, at least where there has been no agreement between the United States and the political entity involved limiting Congress' power in this area. Should the Marianas opt for the establishment of a federal court with some jurisdiction over purely local matters, then the Status Agreement should contain a provision limiting Congress' power unilaterally to alter the court's local jurisdiction.

2. Appointment, tenure and compensation of judges.

Puerto Rico is currently entitled to three district judges, who, as with a State, are appointed by the President, with the advice and consent of the Senate. 28 U.S.C. § 133.

Under former 28 U.S.C. Section 134(a) the district judges in Puerto Rico had tenure not for life but only for eight years. In 1966, Congress amended Section 134(a) to provide life tenure for the judges of the court appointed thereafter. Pub.L. No. 89-571 § 1, September 12, 1966, 80 Stat. 764. The House Committee Report accompanying the bill passed in 1966 granting life tenure states:

> The U.S. district court in Puerto Rico is in its jurisdiction, powers, and responsibilities the same as the U.S. district courts in the several States. It exercises only Federal jurisdiction, local jurisdiction being exercised by a system of local courts headed by a Supreme Court of the Commonwealth of Puerto Rico.
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> In the revision of Title 28 of the United States Code in 1948, one of the objects was to integrate the Federal district courts, both of Hawaii and Puerto Rico as well as the District of Columbia, into the system of the U.S. courts. This was accomplished as to the District of Columbia but not as to Hawaii and Puerto Rico. Subsequently, the Hawaii Statehood Act of 1959 accomplished it for that State.
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> Under Section 119 of Title 28, Puerto Rico was constituted a Federal judicial district on the same standard as the Federal judicial districts throughout the country. It was incorporated by Section 133 into the first judicial

> circuit and authorized the appointment of a district judge along with the authorization for the appointment of all other Federal district judges. In defining the term, "court of the United States," in Section 451, the provision specifically includes the U.S. District Court for the District of Puerto Rico. The enactment of the revised Title 28, however, contained one provision which was inconsistent with the intention to have the U.S. District Court for the District of Puerto Rico completely integrated into the Federal judicial system. This provision was contained in Section 134(a) which continued the tenure of the district judge in Puerto Rico as eight years, whereas all the other Federal district judges have a life tenure. U.S. Code Cong. and Admin. News 1956, p. 2787.

The major reasons cited in the House Report in favor of granting life tenure were to recognize the degree of local autonomy achieved by Puerto Rico and to insure independence for the judges. In this respect, the Report states,

> [T]he Commonwealth of Puerto Rico is a free state associated with and subject to the Constitution and laws of the United States, but not a State of the Union. It has virtually complete local autonomy and it seems proper, therefore, to accord it the same treatment as a State by conferring upon the Federal district court there the same dignity and authority enjoyed by other Federal district courts. Another reason for providing life tenure for the judges of the U.S. district court for Puerto Rico is that the court is now the only judicial agency in Puerto Rico which is independent of the Commonwealth government and it will aid

> the district judges to perform their functions impartially, particularly in those cases involving the Federal Government on one side and the Commonwealth government on the other if they have the full independence inherent in a life tenure appointment. (Id. at 2788.)

Although the House Report evidences the belief that granting life tenure would fully integrate the District Court in Puerto Rico into the federal judicial system, it remained for the 1970 repeal of the court's special jurisdiction, noted above, to finally accomplish the goal of placing the court on a par with the federal district courts in the states.

The District Court judges in San Juan also have equal pay and retirement benefits to those of a United States district judge in a State. 28 U.S.C. § 135.

3. Relationship of federal courts to local courts.

Puerto Rico has its own local court system, the highest court of which is the Supreme Court of the Commonwealth of Puerto Rico. See Puerto Rico Constitution Art. V. As noted above, the United States District Court in Puerto Rico has no jurisdiction to review decisions of the Puerto Rican local courts. Final judgments rendered by the Supreme Court of Puerto Rico may be reviewed by the Supreme Court by appeal or by writ of certiorari on the same grounds that appeals and writs of certiorari may be taken from the final judgment of the highest court of a State. 28 U.S.C. § 1258.

Over time a doctrine of judicial deference to the interpretation of local law rendered by the local courts has developed. During the time that the First Circuit retained appellate jurisdiction to review decisions of the Supreme Court of Puerto Rico, it reversed a large number of cases on the basis of a different interpretation of local law. In 1940, in Bonet v. Texas Co. of Puerto Rico, 308 U.S. 463, 470-71 (1940), the Supreme Court held that "to justify reversal in such cases, the error must be clear or manifest, the interpretation must be inescapably wrong; the decision must be patently erroneous." Since the establishment of the Commonwealth, the Supreme Court has heard only one case from Puerto Rico and in that case it affirmed this doctrine. See Fornaris v. Ridge Tool Co., 400 U.S. 41 (1970).

The Supreme Court's authority to formulate criminal rules extends to the Supreme Court of Puerto Rico. 18 U.S.C. §§ 3771, 3772. The Federal Rules of Criminal Procedure, however, have never been applied to the Puerto Rican Supreme Court. Fed.R.Crim.P. 54.

4. Constitutional status of federal court.

Prior to the establishment of the Commonwealth it was well-settled that the District Court in Puerto Rico was not an Article III court exercizing the judicial power of the United States, but rather was created by Congress pursuant

to Article IV, § 3, l. 2, the Territories Clause. As the Supreme Court stated in Balzac v. Porto Rico, 258 U.S. 298 (1922),

> The United States District Court [for Porto Rico*/] is not a true United States court established under Article III of the Constitution to administer the judicial power of the United States therein conveyed. It is created by virtue of the sovereign congressional faculty, granted under Article IV, § 3, of that instrument, of making all needful rules and regulations respecting the territory belonging to the United States. The resemblance of its jurisdiction to that of true United States courts in offering an opportunity to non-residence of resorting to a tribunal not subject to local influence, does not change its character as a mere territorial court. 258 U.S. at 312.

Since the District Court in Puerto Rico is now the coequal of the district courts in the States in jurisdiction and tenure of judges, it has in all likelihood become an Article III court.**/ The latest court to face the issue, however, avoided the necessity of deciding whether the court had by 1953 become an Article III court. See United States v. Montanez, 321 F.2d 79 (1967), cert. denied, 389 U.S. 884. In any event, prior to the granting of life tenure in 1966, Congress had

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*/ "Porto Rico" was officially changed to "Puerto Rico" by Act of May 17, 1932, c. 190, 47 Stat. 158.

**/ One of the implications of the Supreme Court opinions in Glidden v. Zdanok, supra, is that a change over time in the composition of a court's jurisdiction, as well as the tenure of its judges, may be a relevant consideration in characterizing a court as constitutional (Art. III) or territorial (Art. IV). See Glidden v. Zdanok, supra at 547-48, 585-89. The Notes of the Advisory Committee on the Federal Rules of Criminal Procedure, however, indicate the belief that the court is a legislative court. Notes of Advisory Committee on Rules, F.R.Crim.P. 54, Note (a)(1)7.

constituted the District Court in Puerto Rico among the regular district courts with its own judicial district under Chapter 5 of the Judicial Code. Moreover, Congress had expressly defined the District Court in Puerto Rico as a "court of the United States", see former 28 U.S.C. § 451, a designation which even today does not apply to the District Courts in Guam, the Virgin Islands or the Canal Zone. With the granting of life tenure to judges of the District Court in Puerto Rico, it was no longer necessary to maintain the express inclusion of that court in Section 451 and the reference was deleted. Pub.L. 89-571, § 3, September 12, 1966, 80 Stat. 764. */

D. Guam.

The Organic Act of Guam creates "a court of record to be designated the 'District Court of Guam'" and provides that "the judicial authority of Guam shall be vested in the District Court of Guam and in such court or courts as may have been or may hereafter be established by the laws of Guam." 48 U.S.C. § 1424. Thus, the District Court of Guam is not constituted among the United States district courts established by Chapter 5 of the Judicial Code; it is not designated a United States district court; and it is not vested with the judicial power of the United States but with the "judicial authority of Guam." The language reflects an intent not to create an Article III court.

*/ Section 451 automatically applies to courts created by Congress whose judges "hold office during good behavior."

1. Jurisdiction.

The jurisdiction of the District Court of Guam is "the jurisdiction of a district court of the United States in all causes arising under the Constitution, treaties, and laws of the United States regardless of the sum or value of the matter in controversy." 48 U.S.C. § 1424. Thus, the court has the same jurisdiction as a district court in a State but without the jurisdictional amount requirement. In addition, the District Court of Guam is granted "original jurisdiction in all other causes in Guam, jurisdiction over which has not been transferred by the legislature to other court or courts established by it" and "such appellate jurisdiction as the legislature may determine." 48 U.S.C. § 1424.*/ Thus, the court, unlike the district courts in the States, has both original and appellate jurisdiction to hear non-federal cases, arising purely under the local law of Guam. Note that this local jurisdiction is completely controlled by the Guam legislature.

Pursuant to its power to establish other courts and to transfer to them the local jurisdiction of the District Court of Guam, on December 12, 1973 the Guam Legislature passed a court reform act to become effective July 1, 1974. Among other things, the act transfers local jurisdiction in all civil and criminal cases from the District Court to new Superior and Supreme Courts of Guam.

*/ There are special procedures for appeals to the District Court of Guam, which are "heard and determined by an appellate division of the court consisting of three judges." 48 U.S.C. § 1424(a).

The basic intent of the act appears to be to ensure that local problems are determined locally. Under the current Guam court system misdemeanors and civil cases involving amounts less than $5000 are tried in the Island Court, while felonies and civil cases involving more than $5000 are tried in the District Court. In addition, Island Court cases may be appealed to the District Court and District Court cases may be appealed to the Ninth Circuit. Under the new act, all local civil and criminal cases would be tried in the local Superior Courts with appeal to a local Supreme Court of Guam. The District Court would have only the jurisdiction of a district court in a State.

Advantages of the act that have been cited include amelioration of the current situation where the single District Court judge is overburdened with a heavy volume of cases. In addition, it has been said that appealing cases to a local Supreme Court would be more advantageous because in some instances the Ninth Circuit does not fully understand local problems, and the cost of trips to the Ninth Circuit Court of Appeals in San Francisco would be reduced.

Disadvantages of the act cited by some include higher costs and the appointment of new judges. Guam will lose some federal funds if the District Court no longer has jurisdiction over local cases. In addition, there has been criticism of the provision for appointment of local judges by the Legislature,

rather than by the Governor with legislative approval. (Sources: Pacific Daily News, Thursday, December 13, 1973, Friday, December 14, 1973.)

2. Appointment, tenure and compensation of judges.

The revised Organic Act requires the appointment of a single judge for the District Court of Guam by the President with the advice and consent of the Senate for a term of eight years. 48 U.S.C. § 1424b(a). The judge may be removed sooner by the President for cause. Salary is equal to the rate prescribed for judges of the United States district courts. Additional judges may be assigned to the District Court of Guam when "necessary for the proper dispatch of business of the court." Such assignments may be made by the Chief Judge of the Ninth Circuit with respect to certain judges or by the Chief Justice of the United States with respect to any other United States Circuit or District Judge.

3. Relationship of federal court to local courts.

As noted above, the District Court in Guam is granted jurisdiction over purely local matters unless such jurisdiction is transferred by the Legislature to other courts. Subsequent to the court reform act, the District Court of Guam will have no jurisdiction over purely local matters, and will have concurrent jurisdiction with the local courts over those matters

arising under federal law exclusive jurisdiction over which is not conferred upon the district courts of the United States. Moreover, the District Court in Guam will no longer have jurisdiction to hear appeals from the local courts.

The removal provisions of the Judicial Code, 28 U.S.C. §§ 1441 et seq., by their own terms do not apply to the local courts of Guam, since Guam is not a State. Nor is there any provision in the Organic Act of Guam for the transfer of cases brought in the local courts to the District Court of Guam.

A doctrine of judicial deference to the interpretation of local law by the local courts has developed, similar to that which has developed with respect to the local courts of Puerto Rico. "[D]ecisions of local courts of United States territories on matters of purely local law will not be reversed unless clear and manifest error is shown." Gumataotao v. Government of Guam, 322 F.2d 580, 582 (9 Cir. 1963).

The Organic Act of Guam contains no provision for direct appeals from the highest local court to the United States Supreme Court. A provision for such appeals will apparently require an act of Congress after the jurisdiction of the District Court of Guam over appeals from the local courts is withdrawn by the new court reform act.

4. Constitutional status of federal court.

Since the judge of the District Court of Guam does not have life tenure, the court is not an Article III court but rather a legislative or territorial court created pursuant to Article IV, § 3, cl. 2. Inasmuch as Guam is an unincorporated territory, constitutional guarantees such as the right to jury trial and the right to indictment by grand jury do not apply of their own force to proceedings in the District Court of Guam unless made expressly applicable by statute. See Pugh v. United States, 212 F.2d 761 (9 Cir. 1954). In 1968 certain provisions of and amendments to the Constitution of the United States were extended to Guam to have the same force and effect there as in any State. Those provisions include the First through Ninth Amendments and the Privileges and Immunities Clause of the Fourteenth Amendment. 48 U.S.C. § 1421(b)(u).

The District Court of Guam is not a United States district court constituted under Chapter 5 of the Judicial Code, nor is it a court of the United States as defined by Section 451 of the Code. Therefore, the provisions of the Judicial Code respecting the jurisdiction, procedure, and administration of the United States district courts do not apply to the District Court of Guam unless expressly made applicable to that court. The jurisdictional provisions of the Code are made applicable by the section of the Organic Act granting the court the jurisdiction of a district court of the United States. 48 U.S.C.

§ 1424(a). The general provisions relating to courts and judges contained in Chapter 21 of the Code are expressly made applicable to the District Court of Guam by Section 460 of the Code. Resignation and retirement is expressly governed by Section 373 of the Code. The jury selection procedures established by Chapter 121 of the Code are expressly made applicable to the District Court of Guam by Section 1869(f).

Provision for the appointment of a United States Attorney and United States Marshall for Guam and applicability of Chapters 31 and 33 of the Code to those offices is made in the Organic Act. 48 U.S.C. § 1424(b)(b). (United States Attorneys and United States Marshalls are now governed by Chapters 35 and 37, respectively, of the Code.) In addition, Chapters 43 and 49 of the Code dealing with United States Commissioners and other officers of the district courts are expressly made applicable to the District Court of Guam. 48 U.S.C. § 1424(b)(c). Finally, the rules promulgated by the United States Supreme Court for civil, admiralty, criminal, and bankruptcy cases are expressly applicable to the District Court of Guam. 48 U.S.C. § 1424(b). Both jurisdiction and procedure in the courts of Guam other than the District Court of Guam are within the exclusive control of the Guam Legislature. 48 U.S.C. § 1424(a).

The provisions of the Code governing appeals from the district courts are expressly made applicable to the District Court of Guam. 28 U.S.C. §§ 1252, 1291, 1292 and 1294. The District Court of Guam is placed within the Ninth Judicial Circuit. 28 U.S.C. § 41.

E. Virgin Islands.

The United States District Court of the Virgin Islands is similar to the District Court of Guam. The Revised Organic Act of 1954 provides that "the judicial power of the Virgin Islands shall be vested in a court of record to be designated as the 'District Court of the Virgin Islands' and in such court or courts of inferior jurisdiction as may have been or may hereafter be established by local law." 48 U.S.C. § 1611. Like the District Court of Guam, the District Court of the Virgin Islands is not constituted among the United States district courts by Chapter 5 of the Judicial Code; nor is it designated a "United States district court," or vested with the judicial power of the United States.

1. Jurisdiction.

Like the Guam court, the District Court of the Virgin Islands has the jurisdiction of a district court of the United States in all causes arising under the Constitution, treaties and laws of the United States regardless of the sum or value

of the matter in controversy. 48 U.S.C. § 1612. Such jurisdiction includes diversity jurisdiction. Ferguson v. Kwik-Chek, 308 F.Supp. 78 (D.V.I. 1970). The district court also has "general original jurisdiction" of all other causes in the Virgin Islands, except those over which exclusive jurisdiction has been conferred on the inferior courts of the Virgin Islands. There is no provision for control of the court's local jurisdiction in the legislature of the Virgin Islands. The exceptions to the court's local jurisdiction, where exclusive jurisdiction vests in the local courts, are specifically set out. Thus, the inferior courts of the Virgin Islands have exclusive jurisdiction of civil actions where the matter in controversy does not exceed $500 and criminal cases where the maximum punishment does not exceed a fine of $100 or emprisonment of six months or both. 48 U.S.C. § 613.

2. Appointment, tenure and compensation of judges.

The Organic Act provides for appointment of two judges for the District Court of the Virgin Islands by the President with the advice and consent of the Senate. 48 U.S.C. § 1614. The judges hold office for eight-year terms and until successors are chosen and qualified. Judges may be removed sooner by the President for cause. Salaries are equal to the rate prescribed for judges of the United States district

courts. Where necessary for proper dispatch of the business of the court, additional temporary judges may be assigned by the Chief Judge of the Third Circuit or the Chief Justice of the United States. The compensation of the judges and administrative expenses of the court are paid for from appropriations to the judiciary of the United States. A United States marshall for the Virgin Islands is appointed by the Attorney General. 48 U.S.C. § 1614(c).

3. Relationship of federal court to local courts.

As noted above, the District Court of the Virgin Islands has jurisdiction over purely local matters, exclusive jurisdiction of which is not conferred on the local courts. In other matters the local courts have original jurisdiction, concurrent with the District Court. Actions brought in the District Court that are within the jurisdiction of an inferior court may be transferred to the inferior court by the District Court in the interest of justice. The District Court may on motion of any party transfer to itself, in the interest of justice, any action or proceeding brought in an inferior court and has jurisdiction to hear and determine such action or proceedings. In addition, the district court has appellate jurisdiction to review the judgments and orders of the inferior courts of the Virgin Islands to the extent prescribed by local law. The District Court has the authority to establish rules of practice and procedure in the inferior courts.

Like Guam, the removal provisions of the Judicial Code do not apply to the local courts of the Virgin Islands. Moreover, there is no provision for appeal of local court decisions to the United States Supreme Court.

4. Constitutional status of federal court.

The District Court of the Virgin Islands is not an Article III court but rather a legislative court. United States v. Lewis, 456 F.2d 404 (3 Cir. 1972). Although it has been said that "Congress has clearly evidenced an intention to integrate the District Court of the Virgin Islands into the federal judicial system, as nearly and completely as is possible," Ferguson v. Kwik-Chek, supra at 480, the statutory powers granted to "court[s] of the United States" are not automatically applicable to the District Court of the Virgin Islands. United States v. Lewis, supra. Various provisions of the Judicial Code, however, are expressly made applicable to the court, in a manner similar to that with respect to the District Court in Guam.

As with Guam, the Constitution of the United States does not automatically apply in the Virgin Islands, but particular provisions and amendments are made applicable by statute. 48 U.S.C. § 1561. In addition there is a statutory guarantee of the right to trial by jury in all criminal cases originating