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April 27th

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MEMORANDUM FOR MR. WILLENS AND MS. KRAMER

Subject: Commonwealth Agreement -- U.S. Power and U.S. Constitution Sections

The attached drafts A through D are versions of Section 206, the U.S.-power-in-the-Marianas section of the Commonwealth Agreement. These drafts embody our latest discussion: they give the U.S. all the authority it has in a State plus some extra authority if there is a compelling national interest. The "except" clause is a reference to a number of other provisions of the Agreement: the mutual consent clause (see draft E), the applicability of the U.S. Constitution clause (see draft F), and the provisions which make certain laws apply in the Marianas (e.g., customs) in a way that the Constitution might prevent them from applying within a State or the several States. (In addition, a provision may have to be added, probably in Title VII, to permit the U.S. to delegate its maritime power to the Marianas, as it has to a limited extent to Puerto Rico, in a way it cannot delegate to a State.) The "in accordance with 4-3-2" clause is cosmetic and for U.S. consumption; it recognizes, as we have promised, that 4-3-2 will be applicable within the Commonwealth.

As you will see, drafts A and C are written in terms of the general "authority" of the U.S., while drafts B and D are written in terms of the power of the U.S. to make legislation applicable within the Marianas. The Covenant is written in terms of the power to make legislation applicable. But some of our early drafts speak in terms of authority generally, recognizing that the U.S. acts through the executive and judicial branches as well as the legislative. Since U.S. judicial power is handled in Title V, the only authority of the U.S. not specifically covered is the executive. If the U.S. sees no need to pick this up explicitly, why should we?

Certainly in most if not all instances the executive branch will act in the Marianas on the basis of legislation. Indeed, 4-3-2 itself is a grant of power to Congress, not the executive, and Article II of the Constitution does not mention territories at all. But it is possible to conceive of the executive attempting to act in the Marianas (on the basis of his commander-in-chief power, for example) in the absence of legislation. How would the scope of his authority so to act be determined or limited? Under drafts A and C,

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the same test would apply to the executive as to legislation. Under drafts B and D, the issue would not directly be faced. But in any event the executive would be limited by the applicable portions of the U.S. Constitution so the issue may not be too important. Note further that under Section 205 the U.S. will have full authority for defense and foreign affairs. Whatever the executive tries to do in the Marianas could probably be justified under this power (limited by the applicable constitutional provisions) regardless of what we do in Section 206.

The other major difference between the four draft versions of Section 206 is that drafts A, C and D use a statehood model quite explicitly, while draft B attempts to use 4-3-2 instead of referring specifically to states. The issue here is almost entirely political: which is the United States most likely to accept?

I am inclined to use draft D, on the following grounds: the issue of executive authority is either handled elsewhere (in Sections 205 and 401) or it is something for the U.S., not us, to raise; and the simplicity of using the statehood model rather than 4-3-2 makes it worthwhile trying this with the U.S.

A brief word of explanation about draft F. It is written in a way which reflects my view that when we talk about the applicability of the U.S. Constitution, we are really talking about a short-hand way of imposing certain limits on the exercise of governmental authority by the Commonwealth or the U.S. We are not talking about applying powers granted to the U.S. by its constitution in the Marianas; powers are handled in 205, 206 and a few other places. And we are certainly not talking about making provisions of the U.S. Constitution which relate to the election of the President or Congress applicable; nor do we mean to "apply" in the Marianas the power of the House to make its own rules. It is possible, on the other hand, simply to say that the power of Congress to make uniform rules of bankruptcy (1-8-4) applies in the Marianas as it does in a State, for example, though this seems unnecessary and, to me, confusing. A draft along these lines is included for your consideration, however (draft G).

One last question on the Constitution -- shall we make any reference in the Commonwealth Agreement to the Equal Rights Amendment now pending before the States? If we say nothing and the ERA is approved between the signing and the effective date of the section, then it would become applicable automatically. If we say nothing and the ERA is approved after the effective date, it will not be applicable against the Commonwealth Government; it might or might not be applicable against the U.S. Government (is it a fundamental right which travels around with U.S. citizens?); but in any event the Congress will have the power to make laws based on it applicable within the Marianas (for the ERA gives Congress the power to make such laws with respect to the States, and Section 206 is not frozen in time).

I would appreciate your views on all of the above, so we can choose the 206 and 401 we like, and I can adjust the memo to the client (and do further research on the Constitution), accordingly.

Michael S. Helfer

Attachments

09-306

DRAFT A

Section 206. Except as otherwise provided in this Commonwealth Agreement, the United States, in accordance with Article IV, Section 3, Clause 2 of the Constitution of the United States, shall have and may exercise within the Commonwealth of the Mariana Islands

(a) The same authority which the United States has within the several States, and

(b) Such additional authority as the United States has [within a territory or possession of the United States] [by virtue of said Article IV, Section 3, Clause 2 alone], if, taking into account the right of local self-government retained by the people of the Commonwealth, there is a compelling national interest in the exercise of such authority within the Commonwealth.

DRAFT B

Section 206. Except as otherwise provided in this Commonwealth Agreement, the United States, in accordance with Article IV, Section 3, Clause 2 of the Constitution of the United States, may make applicable within the Commonwealth of the Mariana Islands legislation for which authority is found in another provision of the Constitution of the United States provided,

(a) That legislation for which authority cannot be found in any other provision of the Constitution of the United States, may be made applicable within the Commonwealth if such legislation specifically provides that it shall be applicable within the Commonwealth of the Mariana Islands, and if, taking into account the right of self-government retained by the people of the Commonwealth, there is a compelling national interest in the application of such legislation within the Commonwealth; and

(b) That nothing in this Section shall be deemed to restrict the power of the United States to dispose of and make all needful rules and regulations respecting property held by the United States within the Commonwealth.

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DRAFT C

Section 206. Except as otherwise provided in this Commonwealth Agreement, the United States, in accordance with Article IV, Section 3, Clause 2 of the Constitution of the United States, may exercise its constitutional authority within the Commonwealth of the Mariana Islands, except that authority which the United States could not exercise within the several States may be exercised within the Commonwealth only if, taking into account the right of self-government retained by the people of the Commonwealth, there is a compelling national interest in the exercise of such authority within the Commonwealth.

DRAFT D

Section 206. Except as otherwise provided in this Commonwealth Agreement, the United States, in accordance with Article IV, Section 3, Clause 2 of the Constitution of the United States, may make legislation applicable within the Commonwealth of the Mariana Islands, except that legislation which the United States could not make applicable within the several States may be made applicable within the Commonwealth only if such legislation specifically provides that it shall be applicable within the Commonwealth of the Mariana Islands and if, taking into account the right of self-government retained by the people of the Commonwealth, there is a compelling national interest in the application of such legislation within the Commonwealth.

DRAFT E

Section 201. . . .

(c) Notwithstanding any provision of this Commonwealth Agreement, or of the Constitution or laws of the United States, or of the Constitution or laws of the Commonwealth of the Mariana Islands, neither the United States nor the Commonwealth shall have any authority to alter or to impair, without the consent of the other, the following provisions of this Agreement: [list].

DRAFT F

Section 401. (a) Except as provided in subsection (b), the exercise of the authority of the United States or of the Commonwealth of the Mariana Islands, as the case may be, shall, within the Commonwealth, be in accordance with the following provisions of the Constitution of the United States as if the Commonwealth were a State of the Union:

Article I, §9, cl. 2 [habeas];

Article I, §9, cl. 3 [bill of attainder/ex post facto] [?]

Article I, §9, cl. 4 [no direct tax unless in
proportion] [?];

Article I, §9, cl. 6 [no preference in ports] [?];

Article I, §9, cl. 8 [no titles of nobility/no presents
from foreign princes] [?];

Article I, §10, cl. 1 [states prohibited from treaties;
coining money; passing
bills of attainder, ex
post facto laws or im-
pairing contracts];

Article I, §10, cl. 3. [states prohibited from laying duty
on tonnage, entering into
agreements with another
state, engaging in war];

Article III, §2 cl. 3 [crimes to be tried by jury in
state where committed];

Article IV, §1, [full faith and credit];

Article IV, §2, cl. 1 [state privileges and immunities];

Article IV, §2, cl. 2 [extradition];

Amendment I [speech; press; religion; assembly;
petition government];

(Draft F)

- Amendment II [right to bear arms];
- Amendment III [quartering soldiers in peacetime];
- Amendment IV [search and seizure];
- Amendment V [indictment; double jeopardy; self-incrimination; due process; just compensation];
- Amendment VI [speedy public trial in state of offense; confrontation; process; assistance of counsel];
- Amendment VII [civil jury trial];
- Amendment VIII [excessive bail; cruel and unusual punishment];
- Amendment IX [enumeration of rights does not disparage others];
- Amendment XI [suits against state];
- Amendment XIII, § 1 [slavery];
- Amendment XIV, § 1 [citizenship of U.S. and state; U.S. privileges and immunities; due process, equal protection];
- Amendment XV, § 1 [vote: race, color, previous servitude];
- Amendment XIX, cl. 1 [vote: sex];
- Amendment XXVI, § 1 [vote: 18 year old].

(b) Nothing in this Commonwealth Agreement, or in the Constitution or laws of the United States, shall be deemed to prohibit the Commonwealth of the Marianas

(Draft F)

(1) from regulating, in the interest of maintaining the culture and traditions of the people of the Commonwealth, the alienation of interests in real property located within the Commonwealth so as to restrict the acquisition of such interests to the persons described in Section 301 and their direct descendants; or

(2) from providing in the Constitution of the Commonwealth that one house of a bicameral legislature may consist of [representatives of certain islands or groups or portions of islands, regardless of population] [members chosen by election without regard to population].

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DRAFT G

Section 401. (a) The Constitution of the United States shall have the same force and effect within the Commonwealth of the Mariana Islands as it does within the several States, as if the Commonwealth were a State of the Union, except for the following provisions:

(1) those provisions relating to the selection or eligibility of the President, Members of Congress or judges, or relating to the amendment or ratification of the Constitution; and

(2) [provision to take care of customs and perhaps maritime applicability]; and

(3) the first sentence of Article III, Section 2, Clause 2 [giving the Supreme Court original jurisdiction where a State is a party]

(b) [same as in draft F].

Note: this version makes the 10th Amendment apply.