July 5, 1974

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MEMORANDUM FOR THE MARIANAS POLITICAL STATUS COMMISSION FILE

Subject: Meeting of the Joint Drafting Committee

A meeting of the Joint Drafting Committee was held on July 2, 1974, in the Interior Department offices of James Wilson. Attending for the United States were Mr. Wilson, Adrian DeGraffenreid, and Andre Surena. Herman Marcuse joined the meeting shortly before its conclusion. Attending for the Marianas Political Status Commission were Howard Willens, Erica Ward, and Michael Helfer.

Mr. Wilson announced that the United States was attempting to contact Senator Pangelinan to request an organizational meeting of the Land Negotiating Committee on July 15 in Saipan. The purpose of this meeting would be to agree on an agenda, a schedule, and final terms of reference. There would be no need for technical or support people at this meeting. The United States will be represented by Mr. Wilson, Emmett Rice, and two persons from the Department of Defense. Mr. Wilson stated that the United States would like to have another meeting of the Land Negotiating Committee about a week or ten days later to begin work on the substance of the matters assigned to it. The United States' view is that the Committee's work should be divided into three general areas: the physical survey; joint use and lease back arrangements; and the means of acquisition, mode of payment, and price issues. Mr. Willens stated that this information would be passed on to James White.

Mr. Willens gave a response to the presentation made at the last meeting by Mr. Wilson concerning those provisions of the status agreement which should be subject to mutual consent. Mr. Willens read a list of nine provisions which he said he understood that the United States had proposed to make subject to mutual consent. Mr. Wilson confirmed this list. [The list appears in the Memorandum concerning the June 28, 1974 meeting of the Joint Drafting Committee.] Mr. Willens agreed that these nine areas are fundamental and should be subject to mutual consent.

Mr. Willens went on to explain that there are several other areas which may or may not be covered by the United States list which should be subject to mutual consent. These are provisions dealing with local governmental authority, C.A. § 205(a), limits on United States legislative authority, C.A. § 207(a), and the concept that the status agreement governs the relationship between the Marianas and the United States and is mutually binding, C.A. § 201(a). It may very well be, Mr. Willens said, that the United States intended to include these areas within the broad wording of its list. With respect to two other areas considered fundamental by the Commission, Mr. Willens said, a more complete explanation of the reasons they were excluded from the U.S. list is needed. The first such area is citizenship. Mr. Willens said that preliminary research had covered no constitutional prohibition, absent mutual consent, against congressional alteration of C.A. § 303, dealing with citizenship of persons born in the Marianas after termination. The other such area is Phase II funding. This is a critical area for the Marianas, and should be on the list of provisions subject to mutual consent unless the United States can provide further assurances that the enactment of the status agreement into law will provide an enforceable commitment with respect to these funds.

Mr. Willens then stated that a review of the Commonwealth Agreement in light of the Joint Drafting Committees' discussions to date revealed that the following provisions of that Agreement could be removed from the Commission's list of provisions to be subject to mutual consent: Sections 201(b), 205(b), 206, 211, 305, 306, 606, 612, and 1203. There are other areas, Mr. Willens said, where a provision is on the Commission's list but is not on the United States' list because the U. S. draft does not deal with the issue at all. These cannot be dealt with at this time. With respect to provisions of the status agreement which deal with the applicability of United States law, some of which are not covered by the U. S. draft, Mr. Willens suggested that the question whether these provisions should be on the list of provisions subject to mutual consent should be considered after there has been agreement concerning the individual laws. In general, Mr. Willens said, it seemed most profitable to continue down the agenda proposed by the United States and to take up the question whether any particular provision should be subject to mutual consent when that provision is discussed.

Mr. Wilson said that the United States is still concerned about the practical difficulties which may be presented by a long list of provisions which will be subject to mutual consent. Perhaps it would be possible, he suggested, to consolidate many of these items under a single heading -- such as all items relating to the political relationship -- in order to make the list more acceptable to Congress. With respect to the concerns Mr. Willens expressed about the citizenship provisions and the Phase II funding provisions not being on the mutual consent list, Mr. Wilson said that Mr. Marcuse was the expert on these matters and had confirmed that there was no need for them to be on the list since they could not be altered in any event. Mr. Wilson said that the United States was prepared to agree that citizenship was a fundamental matter and would make it subject to mutual consent if there was a legitimate question about Congress' ability to change this portion of the status agreement absent mutual consent. With respect to Phase II finding, Mr. Wilson noted that this was also important and that it could be included if necessary.

Mr. Surena added that there were particular problems associated with applying mutual consent to the applicability of specific federal laws. He raised the question of what would happen if Congress later amended a law, the applicability of which to the Marianas was subject to mutual consent. Mr. Willens replied that Congress could not make minor changes in the wording or in the title of the law so as to avoid the mutual consent requirement, but that if Congress repealed a law and passed a new one in the same general area, it might well be valid under Congress' general powers with respect to the Marianas even without mutual consent. The provision requiring mutual consent to alter the applicability of a law which no longer exists would then become inoperative.

Mr. Wilson agreed that maximum progress could be made by moving from a discussion of the mutual consent lists to the individual provisions. In accordance with the agreement at the last meeting, Mr. Wilson presented the United States' views on C.A. § 207(a). Mr. Wilson said the United States had two major difficulties with this section. First, insofar as the section imposes a procedural limitation on the exercise of Congress's 4-3-2 power*/ with respect to the Marianas, it raises practical problems similar to those raised by Puerto Rico's request that no federal law apply to Puerto Rico unless that territory is specifically named. Mr. Wilson doubted that Congress would accept such

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*/ The phrase "4-3-2 power" is a shorthand used to mean that power which Congress possesses with respect to the territories which it does not possess with respect to the states.

a restriction. He said that such a restriction would create practical problems for the Executive Branch, too, because the other territories would demand like treatment; this limitation, he said, should be applied to all of the territories if applied to any. Second, Mr. Wilson said that the section created a legal problem because of the prospect that the courts would pass on the congressional judgment whether there was a sufficient "national interest" to justify the application of a particular law to the Marianas. In view of these problems, Mr. Wilson questioned whether there was enough of a practical danger to make such a provision worthwhile, since Congress does not typically interfere with the ordinary local governmental activities of the territories.

Mr. Willens made the following points in response. Abuse of the 4-3-2 power has been unusual, particularly in recent years, and especially given the broad scope of Congress' authority with respect to the states. However, the possibility of abuse does exist, and there can be no guarantee that Congress will not interfere with matters of local concern if there is no limitation on the 4-3-2 power. Second, the Commission's proposal imposes no major procedural obstacles against the exercise of 4-3-2 power. The Commission is prepared to concede that the United States will have authority in the Marianas which it does not have in the states; the Commission has simply insisted that that authority be exercised purposely and not inadvertently, and only when there is a justifiable national interest. It has been represented to the Commission that only in such circumstances is the 4-3-2 power exercised by Congress, and C.A. § 207(a) simply codifies the existing practice. With respect to the notion that potential court review is a problem, Mr. Willens noted that all legislation is subject to review for consistency with the Constitution, and that, the Congress having found that the national interest requires the exercise of the 4-3-2 power in the Marianas, the extent of the review of the Congressional judgment would likely be minimal. Mr. Willens added that Section 207(a) is the Commission's attempt to deal with a very fundamental problem -- how to assure maximum self-government in the Marianas. If the United States has an alternative method of providing this assurance, or if it has alternative language, the Commission would be pleased to receive it. But this is, Mr. Willens emphasized, an issue which must be dealt with in the status agreement.

Mr. Wilson replied that there will be problems convincing Congress to approve the agreement even as drafted by the United States, and that the more closely the usual territorial pattern was followed, the easier it would be to convince Congress to approve it. C.A. § 207(a), he said, is a major exception to the usual pattern, and if it is granted to the Marianas, it should be granted to the other territories. The fear is not that Congress will disapprove the agreement, Mr. Wilson said, but rather that Congress will simply take no action on it because of its complexity and the number of exceptions the Marianas have requested. Mr. Wilson concluded that the United States saw no other way than the second sentence of Covenant § 102 to deal with this issue.

Mr. Willens replied that there must be other ways to assure that local institutions of government, established under the local constitution, would not be interferred with by Congress. There should be assurances in the status agreement, he said, that the Congress will act with extreme care and deference when it exercises its admitted power under 4-3-2 to legislate with respect to the Marianas concerning local matters in a way that it cannot legislate with respect to a state. Mr. Wilson replied that the United States was prepared to work on language to accomplish this goal, and would present its draft at the earliest possible time.

The discussion then turned to the citizenship provisions of the two drafts. Mr. Wilson noted that the citizenship sections are very similar, and accordingly proposed to go directly to C.A. § 304 dealing with naturalization in the Marianas. He said that the Covenant had purposely omitted this section because the United States position was that the immigration and naturalization laws must apply in the Marianas in full as they do in other territories. This meant, Mr. Wilson said, that C.A. § 701 would also be unacceptable if it altered the application of these laws with respect to the Marianas. Mr. Wilson stressed that Congress opposes any exceptions with respect to immigration since this is a problem common to all territories. Congress does not want to deal with it on a piecemeal basis, but rather wants to wait until comprehensive legislation is enacted. In response to Mr. Willens' questions, Mr. Wilson said (a) that to his knowledge Congressman Won Pat was not presently working on any such legislation; and (b) that the basis of his conclusion with respect to Congress' view was conversations with members of the House Territories Subcommittee, whose interest in the matter was triggered by a meeting Congressman Burton had with the MPSC in Saipan in January.

Mr. Willens emphasized that immigration was a highly emotional issue, and was very important to the Commission. He asked whether there was any administrative mechanism which could be created to assure local input as to the need for alien labor. Mr. Wilson replied that there had been no investigation of this matter. He suggested that the agreement which the United States had entered into with respect to parolees brought into Guam for military construction purposes could be extended to the Marianas. Mr. Helfer replied that this was desirable, but that it covered only parolees, and not non-immigrant or immigrant aliens. Mr. Willens asked whether the United States was agreeable to the Commission's proposal made at the last round of negotiations that the immigration laws not be applicable until termination of the Trusteeship and that the applicability of such immigration laws as existed at that time be determined then. Until termination, Mr. Willens said, authority to control immigration would reside in the local government, presumably the Marianas government under separate administration. Mr. Wilson indicated that there was a legal question whether the U.S. could apply its immigration laws prior to termination, and, accordingly, the Commission's proposal was probably acceptable to the United States. The question whether provisions like C.A. § 304 would be needed if the U.S. did agree to the Commission's proposal was left open.

It was agreed that the next meeting of the Joint Drafting Committee would be held on Wednesday, July 10, at 9:30 a.m. in Mr. Wilson's office. Mr. Wilson will be away, and the United States will be represented by Mr. Marcuse. The Committee will continue to work on the items on the agenda through 5(d) during the period that Mr. Wilson is away. The United States will be prepared to discuss its view of how the status agreement should deal with the Marianas Washington representative, and will have draft language of its own, or comments on the Commission's draft. It was further agreed that to the extent possible each side would begin drafting language to implement the agreements already reached in the Joint Drafting Committee.

Michael S. Helfer

cc: Howard Willens