HM:rsn

cc: Marcuse

MEMORANDUM

TO: Ambassador F. Haydn Williams DATE: July 10, 1974

FROM: Herman Marcuse
Office of Legal Counsel

SUBJECT: Section 307 of Draft Covenant with the Northern Marianas.

At today's meeting with Howard Willens I suggested to postpone the discussion on the second sentence of section 307 of the Covenant until I had an opportunity to consult with you and Jim Wilson on that matter. The sentence provides in effect that the executive branch of the Commonwealth Government would be responsible for the faithful execution of the laws of the United States applicable to the Northern Marianas. I indicated that we might want to consider dropping that sentence for reasons of our own which are quite different from theirs. I stressed that we emphatically disagree with their reasoning.

My main consideration is that it may not be in the interest of the United States to have the Governor of the Northern Marianas assert any responsibility for the execution of U. S. laws in the Marianas. The Governor may claim for instance that the immigration laws of the United States are not properly administered in the Marianas by the Immigration and Naturalization Service and claim a power under this provision to interfere with their administration. The Governor of Guam recently claimed that the Federal Trade Commission failed to enforce in re Guam some of the laws under the jurisdiction of the Commission, and hinted that he might exercise some "residual power" in that field. The omission of that clause thus may eliminate a potential area of conflict.

In addition, the clause presents a fundamental constitutional difficulty. Basically the laws of the United States are to be enforced by officers of the United States. Officers of the United States are to be appointed according to Article II, section 2 of the Constitution by the President by and with the advice and consent of the Senate, or, where authorized

by statute, by the President alone, the courts of law, or the heads of Departments. Moreover, they are subject to Presidential control and removal. The Governor of the Northern Marianas is not appointed in any of those ways, and, hence, not an officer of the United States; nor is he subject to direction or removal by the President.

It is true that the Organic Acts for Guam and the Virgin Islands contain similar provisions for their elected Governors. Those clauses were retained at the insistance of the Department of the Interior over the objections of the Department of Justice. It could possibly be argued that Article II of the Constitution does not apply to the Territories, and that the laws of the United States could be enforced there either by persons who are not officers of the United States in the constitutional sense, or by officers who have not been appointed in the manner provided for in Article II, section 2 of the Constitution. Neither consideration, however, answers the basic practical objection underlying my first argument, viz., that the laws of the United States should not be enforced by persons who are not subject to the control of the President.

In sum: At worst the clause could result in the interference by the Governor of the Northern Marianas with the operations of the federal agencies in the Northern Marianas. At best the functions of the Governor under this clause would be merely of a ceremonial or residual nature, as suggested in the comments of the Department of Justice on the Elected Governor bill for Guam and the Virgin Islands. Consequently, there seems to be little reason to insist on the retention of a sentence which is either troublesome or meaningless.