July 11, 1974

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 10, 1974 in the Interior Department offices of James Wilson. Attending for the United States were Herman Marcuse, Andre Surena, and Edward Grant. Attending for the Marianas Political Status Commission were Howard Willens, Erica Ward, and Michael Helfer.

In accordance with the previous agreement, Item 3 of the Agenda, concerning the Constitution of the Northern Marianas, was considered. With respect to Items 3(a) and (b), Mr. Helfer stated that it appeared that the primary differences between the Commonwealth Agreement (CA) and the Covenant (Cov.) were the following: The CA calls for the President to approve the Marianas Constitution after it has been approved by the people, while the Cov. provides that the Congress will approve the Marianas Constitution before the people of the Marianas approve it. Mr. Marcuse agreed that these were the primary differences. Mr. Surena stated that if the provisions of the Marianas Constitution cannot be altered by the United States without the consent of the Marianas, then Congress, not the Executive, should approve the Constitution, since it will be a limitation on the Congress' 4-3-2 power. Mr. Grant stated that Congressmen Burton and Bingham had expressed a desire that the Constitution be submitted to Congress for approval.

Mr. Willens stated that the United States had originally wanted the Executive Branch to approve the Marianas Constitution, while the Commission had suggested that Congress was the appropriate body. It now appeared to the Commission, after discussions and negotiations, that the Executive Branch was preferable because it was likely to be more expeditious and less intrusive into matters of local government. Mr. Helfer stated that the representatives of the Commission had not heard that Congress had a strong interest in reviewing the Marianas Constitution; but that if they did have such an interest, it could be protected by requiring the Executive Branch to consult with Congress or by permitting one house of Congress to disapprove

the Marianas Constitution. Mr. Marcuse replied that the policy of the Executive Branch is not to include in any legislation it submits to Congress a one-house disapproval provision, because of its questionable constitutionality.

Mr. Surena suggested that the question whether U. S. approval should come before or after approval by the people of the Marianas depended in good measure on whether U. S. approval would be done by Congress or by the Executive Branch, for if approval comes from the Executive Branch then it can be anticipated that informal consultations will go on during the Marianas Constitutional Convention so that approval by the Executive Branch would be very likely. If approval is to be done by Congress, on the other hand, then such consultations would be more difficult, and problems could be created if Congress disapproved a Constitution which had already been approved by the people of the Marianas. Mr. Willens pointed out that Congress acted on the Puerto Rican Constitution after the people of Puerto Rico had approved it, and that while a second vote in Puerto Rico was necessary, it did not seem to cause any serious problems. After further discussion, Mr. Surena suggested that Items 3(a) and (b) of the Agenda raised issues which required further consideration by both sides. Mr. Willens stated that the Commission could not agree to any approval mechanism which held out the prospect of lengthy delay, because the implementation of the local Constitution before termination of the Trusteeship was considered a substantial benefit to the people of the Marianas. It was not fair, Mr. Willens said, to delay this benefit and not delay the benefits the United States will get out of the relationship, particularly use of land. Mr. Willens stated that he would attempt to draft language which would recognize congressional interest in the Constitution but avoid all unnecessary delay.

A brief discussion was held on when the provisions of the Constitution will come into effect. The United States position is that the Commonwealth and its Constitution will come into effect at termination of the Trusteeship, but that the President could put such provisions of the local Constitution as he deemed proper into effect prior to termination. Mr. Willens stated that it seemed preferable to provide in the status agreement that all portions of the local Constitution which can legally come into effect before termination should automatically come into effect.

A number of minor differences between the CA and the Cov. with respect to the local Constitution were then discussed.

-- CA § 1202(b) refers to the High Commissioner of the Trust Territory, while Cov. § 304(a) refers to the Secretary of the Interior. It was agreed that the Secretary was the appropriate person to call a referendum because under separate administration the High Commissioner will probably have no further responsibilities with respect to Marianas.

-- Cov. § 302 refers to representation at the Constitutional Convention from "each of the present electoral districts within the Mariana Islands." Mr. Marcuse explained that this was intended to ensure Tinian and Rota adequate representation. Mr. Helfer stated that the reference to present electoral districts seemed inappropriate, because the apportionment of the representatives to the Convention should be determined at the time the Convention is called. Mr. Helfer stated that the selection of delegates is a matter of local concern, and need not be dealt with in the status agreement at all; but that if it is to be dealt with, only general language assuring representation to all persons in the Marianas should be included. Mr. Marcuse agreed that other language might accomplish the same goal.

-- CA § 1202(a) provides that the Constitutional Convention can begin any time after approval of the status agreement by the people of the Marianas. Cov. § 302 provides that it can begin only after approval of the status agreement by the people and by Congress. Mr. Marcuse said that the Ambassador's position was that preparatory work for the Convention, but not the Convention itself, could begin before congressional approval of the status agreement. Mr. Willens pointed out that there might be some advantage to expediting the Constitutional Convention so that Congress could review the Constitution at the same time as it was called upon to approve the status agreement. However, he noted, it would take a minimum of 18 months after the signing of the status agreement to draft the local Constitution and have it approved by the people of the Marianas. This was an undesirable delay. Mr. Surena noted that Congress might postpone its consideration of the status agreement in order to await the Constitution, which would also be undesirable.

-- Mr. Marcuse pointed out that Cov. § 304(b)

provided that "only affirmative and negative votes will be counted" in the referendum on the Constitution. CA § 1202(b), on the other hand, provided that "a majority of the qualified votes cast in the referendum" would be needed to adopt the Constitution. Mr. Marcuse said that the purpose of the Covenant's provision was to eliminate any incentive for persons to abstain or to cast defaced ballots. Mr. Surena noted that the United Nations does not count abstentions as votes cast, and that this might prevent any objection to Cov. § 304(b) from the U. N. Mr. Willens stated that the Commission shares the same goal as the U. S. in this regard -- encouraging people to vote yes or no -- and that the U. S. provision would be reviewed. In general, Mr. Willens said, it seemed preferable that the laws of the Trust Territory governing elections ought to apply to this election.

-- CA § 1202(c) requires only that the local Constitution be consistent with the Commonwealth Agreement, while Cov. § 303 requires that the Constitution not be "contrary to applicable provisions of the Constitution of the United States . . ., the terms of this Covenant and applicable federal law." Mr. Willens noted that there was no difference in intent and that if Mr. Marcuse believed it preferable to spell out the requirement that the local Constitution be consistent with applicable portions of the U. S. Constitution and applicable federal law, there was no objection.

It was agreed that there were no significant differences between the way Cov. § 305 and CA § 204(a) and (c) deal with amendments to the local Constitution [Item 3(c) on the Agenda]. Mr. Marcuse asked whether CA § 204(c) was intended to prevent the federal courts from reviewing the consistency of the original provisions of the Marianas Constitution with the status agreement, applicable portions of the U. S. Constitution and federal laws. Mr. Helfer pointed out that the words "United States" in the first sentence of CA § 204(c) referred to the Executive and Legislative Branches of the U. S. government, and that this was made clear by the second portion of the second sentence of CA § 204(c) which granted the federal courts competency to review both the original Constitution and amendments thereto. It was agreed that Section 204(c) could be revised to make this point clearer.

The discussion then turned to Item 3(d) on the Agenda, relating to the requirements to be imposed by the status agreement on the local Constitution. Mr. Marcuse suggested that the world "other" in the second portion of the sentence which

constitutes CA § 204(b) should be stricken as unnecessary. Mr. Willens had no objection. This was the only difference between the two drafts with respect to this Item on the Agenda.

A discussion was then held concerning Agenda Items 3(e) through (g). Mr. Willens pointed out that CA § 205 is intended to describe the authority of the Commonwealth of the Mariana Islands. The Covenant, he pointed out, treats the local government's authority in three separate sections, dealing with the Executive, Legislative and Judicial branches, respectively (Cov. §§ 307-09). This was unnecessary, for other portions of the agreement will require a republican form of government and a popularly elected legislature and chief executive. There is no need then to state, as the Covenant does, that the executive power of the Commonwealth will be vested in a popularly elected governor or that the legislative power of the Commonwealth will be vested in the popularly elected legislature, since these matters are dealt with elsewhere. Mr. Marcuse stated that it might be desirable in dealing with Congress and with the public to spell these fundamental provisions more clearly than CA § 205(a) does. Mr. Willens stated that it seems possible to satisfy that goal by specific reference to the three branches in a single section similar to CA § 205(a), and that he would prepare language along these lines. During this discussion, Mr. Marcuse said he would recommend to to Mr. Wilson that the second sentence of Cov. § 307, which requires the Commonwealth's Executive Branch to execute the laws of the United States be dropped.

One important difference between the two drafts, Mr. Willens said, was that Cov. § 308 states that the legislative power of the Commonwealth will "extend to all subjects of local application" while under CA § 205(a) "the authority of the Commonwealth . . . shall extend into all matters of local concern." Mr. Helfer noted that the term "local application" was presently used with respect go Guam. That term, however, had been narrowly construed by the Supreme Court in a case involving the Virgin Islands and Congress subsequently amended the Virgin Islands Organic Act to eliminate the phrase "local application" and insert the phrase "all rightful subjects of legislation." Accordingly, Mr. Helfer said, the use of the term "local application" in the status agreement might indicate that Congress intended that the local authority of the Marianas would be less than that of the Virgin Islands. Mr. Marcuse replied

that while this position seemed sensible, the phrase "local concern" was not used with respect to any of the other territories and might be read to grant the Marianas power over matters outside its territory with which it was "concerned". Mr. Willens suggested that perhaps a phrase based on the Virgin Islands Revised Organic Act and including a reference to the distribution of local authority provided for in the local Constitution might be used. It was agreed that this was a viable alternative and that Mr. Willens would prepare draft language.

A discussion was held concerning Agenda Item 3(h), Oaths of Office, CA § 211 and Cov. § 310. The primary differences between the drafts seem to be the following: (a) CA § 211 requires that the oath be taken before the officials enter upon their duties, while Cov. § 310 simply requires the officials to take the oath; (b) CA § 211 expands the oath to include support of the laws of Commonwealth, which is not included in Cov. § 310; and (c) and it appears that CA § 211 includes more persons than are included in Cov. § 310. Mr. Willens stated that the Commission would be willing to withdraw on point (a), and Mr. Marcuse said that the U. S. was willing to withdraw on point (b). Mr. Willens stated that he would investigate point (c) but that he thought the Commission would be willing to accept the narrower U. S. vision.

Discussion turned to Item 4 on the Agenda, Washington Representative for the Marianas. Mr. Surena stated that the U. S. position was still the same, that it did not want the status agreement to deal at all with Washington representation, on the ground that this was solely within congressional discretion. Mr. Willens asked whether the U. S. would agree to including provisions in the status agreement relating to a Washington representative like American Samoa's, but not to a nonvoting delegate. Mr. Surena saw no objections but asked why such provisions should be included. Mr. Willens replied that there were political and symbolic reasons for including it, that it was important to have the federal government recognize officially the representative from the Marianas, and that the status agreement might deal with the compensation of the representative. Mr. Surena stated that he could not respond to Mr. Willens' suggestion that the U. S. might pay the cost of the Washington representative. Mr. Willens asked whether the U. S. had any views with respect to a Western Pacific nonvoting delegate, to represent Guam and the

Marianas, if both jurisdictions approve. Mr. Marcuse and Mr. Surena indicated that Congress was more likely to approve this arrangement than a nonvoting delegate for the Marianas alone. Mr. Willens asked whether the provision in the Commonwealth Agreement guaranteeing to the Marianas a nonvoting delegate when it had a population of 50,000 had been discussed with Congress. Mr. Marcuse and Mr. Surena thought not. Mr. Helfer asked whether the U. S. delegation had given any consideration to a more formal statement of the commitment, reflected in the Joint Communique, to support the Marianas' request for a nonvoting delegate. Mr. Marcuse said that this matter should be taken up with Mr. Wilson.

It was agreed to begin with Agenda Item 5(a), dealing with applicability of the U. S. Constitution, at the next meeting. That meeting will be held at 10 a.m. on Wednesday, July 17, at the offices of Wilmer, Cutler & Pickering.

Michael S. Helfer

cc: Howard P. Willens