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July 15, 1974

To: Mike Helfer, Howard Willens
From: Erica Ward
RE: Marianas, Applicability of the United States Constitution

Attached is the first portion of a memorandum on the applicability of the United States Constitution to the Commonwealth of the Marianas. It is structured as follows:

I. Provisions Agreed to by both the United States and the Marianas

II. Provisions Proposed by Only One Party

III. Other Potentially Relevant Provisions

I have included a brief sketch of the most important principles, doctrines, and areas of conflict under each of the relevant provisions of the Constitution, together with citations to the leading cases. While this "mini-hornbook" summary will probably prove unnecessary for the current negotiations, I felt that it was important in case unexpected controversies should arise. Further, it might eventually serve as a basis for an explanation to the client of this portion of the Commonwealth Agreement.

The remainder of the memorandum will be typed and delivered to you by Tuesday night.

E.A.W.

MEMORANDUM

TO: Mike Helfer, Howard Willens
FROM: Erica Ward
RE: Marianas

Applicability of the United States Constitution

The proposed Commonwealth Agreement for the Northern Marianas Islands provides that certain specific provisions of the United States Constitution will be applicable in the Marianas. These provisions are intended to place the same sorts of limitations on the exercise of governmental power by the federal and the Commonwealth governments as are placed by the U. S. Constitution on the actions of the federal and state governments in every state of the Union. This memorandum will sketch the most important judicial interpretations of these provisions, and will examine the major doctrines and central lines of cases which have been developed under them. Any provisions which might be troublesome if applied without special exception to the Marianas will be particularly noted. I will discuss first those provisions which both the United States and the Marianas have included in their proposals, and secondly, those provisions which only one side has suggested. Finally, I will suggest any other provisions of

the Constitution which might be considered for express applicability.

It should be noted that certain provisions of the Constitution will apply to the Marianas even if they are not expressly provided for in the Commonwealth Agreement. To date, both sides have ignored this fact and have simply included in their drafts all provisions which they wanted to insure would be applicable. For both certainty and clarity, this is undoubtedly a wise practice. However, there is little to be gained by opposing the express inclusion of a provision which, like some of the United States' proposals, would apply even if it were not specifically mentioned. It is worthwhile, then, to mention here the three situations in which the courts have held that constitutional guarantees apply outside of the United States. (For greater detail, see, Memo, Ex Proprio Vigore Application of the Constitution in Unincorporated Territories, Gil Kujovich, August 6, 1973.) In Downes v. Bidwell, 182 U.S. 244, 277, 294 (1922) (in the opinion of the Court and of J. White, concurring), the Supreme Court suggested that particular provisions of the Constitution are applicable beyond the United States and its incorporated territory. First, if a constitutional prohibition is

expressly extended to areas other than those incorporated into the United States, then of course it is applicable to unincorporated territories. The only example of this discovered by the Court was the Thirteenth Amendment, which prohibits slavery "within the United States, or any place subject to their jurisdiction." 182 U.S. at 251, 336-337 (emphasis added). Secondly, if a constitutional prohibition goes "to the very root of the power of Congress to act at all, irrespective of time or place," or if it is, "an absolute denial of all authority under any circumstances or conditions to do particular acts," then it will apply even to unincorporated territories. 182 U.S. at 277, 294. The Court suggested that Article I, Section 9, Clause 3 (no bills of attainder or ex post facto laws) and Clause 9 (no titles of nobility) are examples of these absolute prohibitions. These two tests of extraterritorial applicability have not been specifically followed by other courts, however, and most decisions rely on the vague concept of "fundamental rights" in determining what constitutional provisions apply to unincorporated territories. See, e.g., Balzac v. Puerto Rico, 258 U.S. 298, 312 (1922), Virgin Islands v. Bode, 427 F.2d 532,533 (3rd Cir. 1970). Finally, in Reid v. Covert, 354 U.S. 1 (1957), the Supreme Court

established a third basis for the application of certain constitutional provisions in unincorporated territories. The Court there rejected "the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights." 354 U.S. at 5. United States citizens thus carry certain fundamental constitutional rights with them, no matter where they go. The Court in Reid held that "trial before a civilian judge and by an independent jury picked from the common citizenry" is such a fundamental right in criminal cases.

I. PROVISIONS AGREED TO BY BOTH THE UNITED STATES AND THE MARIANAS

I will simply sketch the major rules and doctrines which have been developed under these constitutional provisions, note any important areas within them which are unsettled at this time, and mention the possible difficulties, if any, which might arise if they were applied without special exception to the Marianas.

Article 1, Section 9, Clause 2 -- Writ of Habeas Corpus

Section 9 is devoted to restraints on the powers of the Congress and of the national government. Barron v. Baltimore, 7 Pet. (32 U.S.) 243 (1883). It does not affect the states in the regulation of their own domestic affairs. Munn v. Illinois, 94 U.S. 113, 135 (1877). The

Supreme Court has at least implied that this guarantee of the privilege of the writ of habeas corpus is binding only on the federal government, and not on the states. Gasquet v. Lapeyre, 242 U.S. 367, 369 (1917). Its express application would therefore impose no special obligations upon the Commonwealth government, and would afford a valuable protection against the federal government.

Article I, Section 9, Clause 3 -- Prohibition of Bills of Attainder and of Ex Post Facto Laws

According to the rule in the Downes case, supra, this provision, which constitutes an express prohibition, would be binding whether or not it was expressly applied to the Marianas. It "goes to the competency of Congress to pass a bill of that description." Downes v. Bidwell, 182 U.S. 244, 277 (1901) (emphasis in original). This clause is also intended to protect individuals and groups against the federal government, and does not apply to the states. The prohibition against bills of attainder is intended to ban the traditional bills of pains and penalties as well, and has been broadly construed to prohibit all trials by legislatures. United States v. Brown, 381 U.S. 437, 441-442 (1965). The prohibition against ex post facto laws, on the other hand, applies only to penal and criminal statutes. Calder v. Bull, 3 Dall. (3 U.S.) 386, 393 (1798).

Article IV, Section 1 -- Full Faith and Credit Clause

This section is really a codification of the accepted principles of comity, which the framers wanted to raise to a level of constitutional obligation between the states. It has its main effect in the area of judicial judgments, when suits are brought in foreign jurisdictions for enforcement or defended against by a claim of res judicata from a judgment in another state. The Court has waivered as to the extent of the application of this section to other rights which are not yet final judgments, but it most recently appears to have said that when the statute or policy of a foreign state is asserted as a defense to a suit under the jurisdiction of another state or territory, or vice versa, the conflict is to be resolved by appraising the governmental interest of each jurisdiction, and deciding accordingly, and not by giving automatic effect to the full faith and credit clause. Alaska Packers Association v. Commissioner, 294 U.S. 532, (1935). By statute, 28 U.S.C. § 1738-1739, the full faith and credit rule requires the recognition by "every court within the United States" of the records and proceedings of courts of any territory or any country subject to the jurisdiction of the United States.

The potential impact of this clause of the Constitution has been relatively little developed to date. The Court might, under this Clause, give to state statutes whatever extraterritorial operation seemed reasonable to the Court. Congress could decree the effect that the statutes of one state shall have in all others, as, for example, by describing a certain type of divorce and by saying that it and no other shall be granted recognition by all states. If such a development were to occur, it might impose on the Marianas some obligations and rules which might prove troublesome; however, the possibility is sufficiently remote that it does not seem necessary to guard against it.

First Amendment -- Freedoms of Religion, Speech, the Press, Assembly, and Petition

The first clause of this amendment prohibits the establishment of religion, and guarantees the free exercise of religion. It was intended not to prevent some general governmental encouragement of religion, but to prevent the national establishment of any particular religion, and to guarantee against any religious persecution. The judicial standards and tests under both sections are the same; the Court will examine the legislative purpose, the primary effect, and the possibility raised of excessive government entanglement of any legislation or practice challenged under this amendment. Further, in free exercise cases, the plaintiff must prove an actual coercive effect. The

establishment cases are very complex, and unclear in the standards that they set, but should not prove troublesome for the Marianas. The only serious objection might be to the prohibition of substantive aid to parochial schools, but this concern does not seem serious enough to warrant a special exception. The free exercise cases are certainly not objectionable, especially if there is some custom in local religions that the Marianas want to retain. Such retention is not automatic, however, because the guarantee of free exercise of religion is subject to the police powers of the state, the clashes between the two have considerable litigation. See, e.g., Reynolds v. United States, 98 U.S. 145 (1878) (prohibition of polygamy), Jacobson v. Massachusetts, 197 U.S. 11 (1905) (compulsory vaccination), Sherbert v. Vernier, 374 U.S. 398 (1963) (religious refusal to work on Sunday), Wisconsin v. Yoder, 406 U.S. 205 (1972) (compulsory high school education).

The guarantees of freedom of speech and of the press bar not only most prior restraints on expression, but also the subsequent punishment of all but a narrow range of expression. New York Times v. Sullivan, 376 U.S. 254 (1964). There is a particularly heavy presumption against all prior restraints. Bantam Books v. Sullivan,

372 U.S. 58, 70 (1963). There are strict limits on subsequent punishment as well, and although the Court has waivered on its standards for impermissible speech, obscenity, and action, there is nothing in these standards which suggests particular problems for the Marianas. This is particularly so in the area of obscenity, because of the recently renewed stress on the importance of local community standards. Miller v. California, 413 U.S. 15 (1973). In fact, this portion of the First Amendment may prove particularly important, since it guarantees freedom of expression to any different traditions and beliefs which may exist in the Marianas. Since Tinian will be the site of a major military base, there are likely to be instances in which the United States Government will try to suppress various liberties of the local citizens, on the grounds of national security. Therefore, the First Amendment, which requires a balancing of the protected freedoms against the exigencies of national security, may be particularly important in the Marianas. The line of cases concerning loyalty oaths and security checks are also potentially valuable to those Marianans who might some day work for the United States Government or the military in some capacity. See, Keyishian v. Board of Regents, 385 U.S. 589 (1967). Also potentially important are the specific cases concerning

political activities and freedom of expression of federal employees. See United Public Workers v. Mitchell, 330 U.S. 75 (1947). The First Amendment will also limit the control that the United States might otherwise seek to exercise over the Marianan communications media, including not only the archetypal written press, but also over the movies, radio, and television (Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971)), books (Bantam Books v. Sullivan, 372 U.S. 58 (1963)), and stage products, (Schact v. United States, 398 U.S. 58 (1970)). This provision will also serve to restrict the categories of libel that can constitutionally be punished. New York Times. v. Sullivan, 376 U.S. 254 (1964). Certain kinds of expressive or symbolic conduct will be protected, and although others will not, this section could serve to allow some demonstrations which might otherwise be supressed. Brown v. Louisiana, 383 U.S. 131 (1966) (silent vigil in public library protected), Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969) (wearing armbands in high school protected unless it results in disruption), Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969)(precedural guarantee required of a permissible licensing system for parades and meetings).

This clause also protects the right of peaceable assembly, and the right to petition the government for redress of grievances. These are broadly protected rights, but have rarely been litigated, and are generally not important in themselves. They are usually merged with the guarantees of freedom of speech and of the press, as a part of the inclusive right to freedom of expression. Although certain conduct has been labelled as falling within these categories, no substantive issues to date have turned on such identifications. See, United States v. Harriss, 347 U.S. 612 (1954) (petition), Coates v. City of Cincinnati, 402 U.S. 611 (1971) (assembly).

Second Amendment -- Right to Keep and Bear Arms

This amendment, noting the necessity of a well-regulated militia to the security of a free state, prohibits infringement by Congress of the right to keep and bear arms, but it does not extend this prohibition to state action. Presser v. Illinois, 116 U.S. 252, 265 (1886). Thus, even though the nature and extent of the right are somewhat unclear the amendment would impose no special obligations on the Marianan government, and would afford some limitation on federal power. The one case which tested a Congressional enactment against the second amendment held that the required registration of sawed-off

shotguns was constitutional, because their possession bears no reasonable relationship to the preservation or efficiency of a well-regulated militia. In other words, the Court placed heavy emphasis on the subordinate clause in the amendment, which says that "[A] well-regulated Militia, being necessary to the security of a free State," the right to keep and bear arms is guaranteed. United States v. Miller, 307 U.S. 174 (1939). At what point the importance of a well-regulated Militia would mandate greater freedom to remain armed is not explained by this case, and remains unclear.

Third Amendment -- No Quartering of Soldiers in Houses

There has been no judicial explication of this amendment to date. It should cause no problems for the Marianas, however, since it is simply one guarantee of the preference of the Constitution for the civilian population over the military. It should be particularly reassuring, in fact, because of the planned military base.

Fourth Amendment -- Prohibition of Unreasonable Searches and Seizures

This provision is binding upon both the state and the federal governments, and so would regulate certain

activities of the commonwealth government. See, Wolf v. Colorado, 338 U.S. 25 (1949), Mapp v. Ohio, 367 U.S. 643 (1961). It is accepted today that the "principal object of the Fourth Amendment is the protection of privacy rather than property . . ." Warden v. Hayden, 387 U.S. 294, 304 (1967). It "protects people, no places," Katz v. United States, 389 U.S. 347, 353 (1967), and it protects against arbitrary arrests, as well as against unreasonable searches and seizures. Giordenello v. United States, 357 U.S. 480, 485-486 (1958). Further, it applies to non-criminal searches as well as to those conducted in criminal investigations. See, e.g., Camara v. Municipal Court, 387 U.S. 523 (1967) (administrative search of a home). The general rule is that "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant", Camara, supra, at 528-29. A valid search warrant requires issuance by a neutral magistrate, Shadwick v. City of Tampa, 407 U.S. 345 (1972), upon a showing which constitutes probable cause. Brinegar v. United States , 338 U.S. 160 (1949). The warrant must particularly describe the things to be seized, and so it will act to limit the scope of the search.

Stanford v. Texas, 379 U.S. 476 (1965). There are some situations, however, said to be "jealously and carefully drawn," in which searches without warrants are acceptable. Jones v. United States, 357 U.S. 493, 499 (1958). These include the stop-and-frisk, Terry v. Ohio, 392 U.S. 1 (1968), the search incident to arrest, Chimel v. California, 395 U.S. 752 (1969), Gustafson v. Florida, 42 U.S.L.W. 4068 (U.S., December 11, 1973), searches of vehicles, if the officer has probable cause to believe that they contain things properly subject to seizure, Carroll v. United States, 267 U.S. 132 (1925), and consent searches, Schneckloth v. Bustamonte, 412 U.S. 218 (1973). The application of the Fourth Amendment to the Marianas would require certain behavior by both the federal government and the Commonwealth government, and would apply the exclusionary rule in all of the courts in the Marianas. However, I cannot foresee that this would cause any particular difficulties.

Sixth Amendment -- In all Criminal Prosecutions, Speedy and Public Trial by Impartial Jury, Notice of Accusation, Right to Confront Witnesses, and Right to Assistance of Counsel

These guarantees in criminal prosecutions do not apply in unincorporated territories. Balzac v. Puerto Rico, 258 U.S. 298, 304-305 (1922). Thus, it is particularly important to expressly adopt this provision.

The Court has adopted an ad hoc balancing approach in determining whether the right to a speedy trial has been infringed. Barker v. Wingo, 407 U.S. 514 (1972). The right to a public trial has not been much litigated, and the only unclear area within it are the rules on prejudicial publicity. The Supreme Court has recently reexamined some of the traditional standards for acceptable juries under this provision, and has held that a jury twelve persons is not absolutely required, and that in State Courts although not in Federal Courts, a less than unanimous verdict is acceptable. Williams v. Florida, 399 U.S. 78 (1970), Apodaco v. Oregon, 406 U.S. 404 (1972). The jury selection must be structured so as to present a cross-section of the community, Williams, supra, and the jurors must be unbiased, and willing to decide the case on the basis of the evidence presented. Frazier v. U.S., 335 U.S. 497 (1948). The defendant must be specifically appraised of the crime with which he is charged, so that he can make his defense with reasonable certainty. The right of the criminal defendant to confront the witnesses against him is fairly straightforward, although lately, in cases like California v. Green, 399 U.S. 149 (1970), the Court seems to be stressing the fact that the Confrontation Clause will not bar the admission of an out-of-Court statement, if the

particular circumstances are such that the trier of fact has some satisfactory basis for evaluating the truth of the evidence. The right to compulsory process to obtain defense witnesses in a criminal trial guarantees not only the particular legal process, but also the underlying right to be allowed to introduce defense witnesses at all. Washington v. Texas, 388 U.S. 14 (1967) Finally, since Gideon v. Wainwright, 372 U.S. 335 (1963), both the State and the Federal Courts are required to provide the assistance of counsel to anyone who requests it. This right extends to any misdemeanor case in which imprisonment may result. Argersinger v. Hamlin, 407 U.S. 25 (1972) Still unclear is the extent to which the right applies in situations such as custodial interrogations or identifications. However, nothing in this Amendment should prove particularly troublesome to the Marianas.

Eighth Amendment -- Prohibition of Excessive Bail, Fines, and Cruel and Unusual Punishment

The principle live issue in the area of excessive bail is whether this provision was intended only to forbid bail that was set too high, or also to guarantee the underlying right to bail in all cases. Dicta in various Supreme Court cases seems to go both ways; one case suggests that Congress has discretion to determine what persons may

be granted bail, Carlson v. Landon, 342 U.S. 524 (1952), while dicat in other cases appears to be contrary, Stack v. Boyle, 342 U.S. 1 (1951). On the determination of this conflict rests the question of the continutionality of "preventive detention." In any case, this provision is not applicable to the states and so would impose no special obligation on the Marianas. The Supreme Court has held that the prohibition against crue and unusual punishment forbids the use of capital punishment except in certain narrowly defined situations. Furman v. Georgia, 408 U.S. 238 (1972). This area is, of course, one of great current legislative activity, and so the final resolution remains entirely unclear. It is clear, however, that the provision also forbids penalties which are unnecessarily cruel and inhumane, or which subject the individual to a fate forbidden by the "principles of civilized treatment." Trop v. Dulles, 356 U.S. 8699 (1956) Also forbidden are punishments which by their excessive length or severity are greatly disproprotionate to the offense charged. Weems v. United States, 217 U.S. 349 (1910).

Ninth Amendment -- Enumeration of Certains Rights Does Not Deny Nor Disparage Others Retained by the People

It was originally assumed that this Amendment was merely a rule of construction. However, since Griswold v. Connecticut, 381 U.S. 479 (1965), it has been cited as a positive affirmation of the existence of rights not enumerated in the Constitution, but none the less protected by other provisions. It is not a substantive source of guarantees, but it is an affirmation that other fundamental rights not listed do exist.

Thirteenth Amendment -- Prohibition of Slavery

This section has been expressly incorporated by both the United States and the Marianas, but according to the Downes case, supra, it would apply to the Marianas even if it were not so specifically named. By its own terms, the prohibition against slavery and involuntary servitude extends to "the United States, or any place subject to their juridiction," which would certainly include unincorporated territories. This Amendment provides the constitutional support for the various congressional enactments against private racial discrimination, which Congress had previously based on the Commerce Clause. See,

Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (13th Amendment), as opposed to Heart of Atlanta Motel v. United States, 379 U.S. 241 (1965) (Commerce Clause). The Amendment also prohibits peonage, which is defined as any condition of inforced servitude by which an individual is compelled to labor against his will to liquidate some debt or obligation. Bailey v. Alabama, 219 U.S. 219 (1911).

Fourteenth Amendment, Section 1, Sentence 2 No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

The potential scope of this provision was drastically limited only five years after the amendment was passed, by the Supreme Court's holding that the only privileges which it was intended to protect are those, "which owe their existence to the Federal Government, its National character, its Constitution, or its Laws." Slaughter-House Cases, 16 Wall. (83 U.S.) 36, 79 (1873) These include, for example, the right of access to the seat of government, the right of assembly and privilege of habeas corpus, the rights secured by treaties, the right to enter public lands, the right to be protected against violence while in the custody of a U. S. Marshal, and the right to vote for national officers. Twining v. New Jersey, 211 U.S. 78 (1908).

It could perhaps be argued that Marianans are being impermissiblely denied the right to vote for national officers, because that is a privilege of American citizenship that cannot be abridged by the states. However, this argument would not prevail, because it is the Congress, rather than a state, which is refusing them the vote. Further, the constitutional provisions establishing the electoral college system, and the doctrines defining the power of the United States over an unincorporated territory, make clear that the citizens of these territories were not intended to be allowed to vote in national elections.

The Court has only occasionally chosen to use this clause to expand the restraints that the Constitution imposes on the states, but one such expansion is of particular concern to the Marianas. In Oyama v. California, 332 U.S. 633 (1948), the Court held that the right to acquire and to retain property is a privilege of American citizenship. As noted in the Joint Communiques and in other memoranda, this doctrine might prohibit the restraints on land alienation based on ancestry which both sides agreed are desirable. It is, therefore, vitally important that a special exception to the Constitution be expressly provided in the Commonwealth Agreement, so as to allow such

restraints to be established.

Nor shall any State deprive any person of life, liberty or property without due process of law.

This clause has been used by the courts to protect citizens against wide varieties of arbitrary state action, by imposing both substantive and procedural restraints on the powers of the state governments, in the same way that the Fifth Amendment curbs the Federal Government. The doctrine of substantive due process has been used to protect many different civil liberties, and yet to permit a wide variety of reasonable exercise of authority by the states, or in this case, by the Commonwealth. It has been construed as permitting the enactment by the states of laws which regulate the terms and conditions of employment, because these laws guarantee the civil liberty of the individual by imposing certain restraints on his behalf upon his neighbors. See, e.g., West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (minimum wage law for women), New York Central R.R. v. White, 243 U.S. 188 (1917) (workmen's compensation laws), Holdon v. Hardy, 169 U.S. 366 (1898) (maximum work hours in mines and smelters). The due process clause also allows the state to regulate the rates and conditions of various business enterprises,

provided only that such regulation is not arbitary, discriminatory, or demonstratively irrelevant to the policy that the legislature is free to adopt. Nebbia v. New York, 291 U.S. 502 (1934). The power of the states to regulate public utlities is subject to the standards of substantive due process, which are offended by any arbitary or unreasonable exercises of power. See, e.g., Chicago and G. T. Ry. Co. v. Wellman, 143 U.S. 339 (1892). The same is true for state regulation of corporations, business, professions, and trades, and for protection of the resources of the state. See , e.g., Lake Shore and M.S. Ry. Co. v. Smith, 173 U.S. 684 (1899) (corporations), Nebbia v. New York, 291 U.S. 502 (1934) (business), McNaughton v. Johnson, 242 U.S. 344 (1917) (medicine), Lehon v. Atlanta, 242 U.S. 53 (1916) (detectives), Thompson v. Consolidated Gas Co., 300 U.S. 55 (1937), Hudson Water Co. v. McCarter, 209 U.S. 349 (1908). Because of their possession of the police power, the states may place some limitations on the rights of ownership of real property, Reinman v. Little Rock, 237 U.S. 171 (1915) (zoning), provided that they are not violative of substantive due process, Euclid v. Ambler Co., 272 U.S. 365 (1926). The police power also grants to the states the authority to safeguard by appropriate means the public health, safety, and morals, limited only

by the rights guaranteed to individuals by the Constitution. See, e.g., Sligh v. Kirkwood, 237 U.S. 52 (1915) (impure foods), Hutchinson v. Valdosta, 277 U.S. 52 (1913) (sewers), Ah Sin v. Wittman, 198 U.S. 500 (1905) (gambling).

The 14th Amendment will not restrain the power of the Commonwealth Government to tax its people, except by forbidding arbitary legislation, Tonawanda v. Lyon, 181 U.S. 389 (1901), and by establishing some doctrines as to the jurisdiction of a state to levy taxes. See, e.g., Union Transit Co. v. Kentucky, 199 U.S. 194 (1905) (tangible property outside of the state), International Harvester Co. v. Department of Taxation, 322 U.S. 435 (1944) (dividends of a corporation paid to nonresident stockholders). Some recent cases have suggested the extension of the protections of substantive due process to include noneconomic liberties. See, e.g., Loving v. Virginia, 388 U.S. 1 (1967) (statute prohibiting interracial marriage violates substantive due process right to marriage); Poe v. Ullman, 367 U.S. 497 (1961) (J. Harlan, dissenting, would have applied a due process standard to a law banning the use of all contraceptives).

None of these substantive due process restrictions should cause any particular difficulties in the Marianas. On the contrary, the fact that both sides feel that it is important to so limit the powers of the Commonwealth governments at less suggests that they are agreed that the government

shall have at least most of these power to exercise.

The requirements of procedural due process of law in civil cases vary with the circumstances, and do not require uniformity of procedure in all state courts, or regulate specific practices in state proceedings. However, the laws must operate alike for all, and must not subject the individual to the arbitary exercise of governmental power. Marchant v. Pennsylvania Railroad, 153 U.S. 380 (1894). The right to procedural due process is so fundamental that it is guaranteed to all United States citizens, no matter where they may be. Reid v. Covert, 354 U.S. 1, 10 (1957). The states have broad powers to regulate the procedures of their courts, so long as they do not offend fundamental principles of justice. See, e.g., Boddie v. Connecticut, 401 U.S. 371 (1971). States may also establish their own jurisdictional principles, but in general may not attempt to exercise their powers with respect to persons or things beyond their borders. Pennoyer v. Neff, 95 U.S. 714 (1878). The requirements of Fourteenth Amendment procedural due process apply only to the deprivation of interests encompassed within the terms of "life, liberty and property." Morrissey v. Brewer, 408 U.S. 471, 481 (1972) The Courts have recently recognized the concept of "entitlements," which are not

within the traditional common-law concept of property, but of which people cannot be deprived without due process. See, e.g., Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare), Perry v. Sindermann, 408 U.S. 593 (1972) (teaching position). Also important in this area has been the recent demise of the right-privilege distinction, since until recently it was regularly argued that if something was "only" a privilege, the guarantees of procedural due process did not apply. See, e.g., Barsky v. Board of Regents, 347 U.S. 442 (1954) (the old privilege argument); for the current view, see, Goldberg , and Perry, supra, and Bell v. Burson, 402 U.S. 535 (1971). Generally speaking, the basic requirements of procedural due process are as follows: notice, Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950); hearing, Armstrong v. Manzo, 380 U.S. 545 (1965); an impartial tribunal, Goldberg, supra, 397 U.S. at 271; confrontation and cross examination, Goldberg, supra, 397 at 270. In drafting the provision to exempt the Marianas from the various constitutional prohibitions against restrains on land alienation based on ancestry, these requirements of procedural due process must be scrupulously satisfied.

Procedural due process is also important for the limitations that it places on the state or Commonwealth criminal justice system. Again, the basic standard is

whether in a particular case, the challenged policy or practice violates the fundamental principles of liberty and justice. Twining v. New Jersey, 211 U.S. 78, 106 (1908). In recent years, the Court has held that these principles include, but are not limited to, virtually all of the criminal procedure guarantees of the Bill of Rights. Duncan v. Louisiana, 391 U.S. 145 (1968) Pursuant to the requirements of procedural due process in criminal cases, the courts have elaborated the void-for-vagueness doctrine, Cantwell v. Connecticut, 310 U.S. 296 (1940), and various rules to ensure a fair trial, including not only the guarantees of the Bill of Rights, but also procedures to guard against any indication of of bias or lack of essential justice, Tumey v. Ohio, 273 U.S. 510 (1927). There are strict requirements for acceptable guilty please (Boykin v. Alabama, 395 U.S. 238 (1969)), the standard of proof (In Re Winship, 397 U.S. 358 (1970)). Procedural due process requires special treatment of the incompetent or insane defendant, Pate v. Robinson, 383 U.S. 375 (1966), and of juvenile offenders, In Re Gault, 387 U.S. 1 (1967). Procedural due process also sets some standards for appeals, Griffin v. Illinois, 351 U.S. 12 (1956), the treatment of prisoners, Coffin v. Reichard, 143 F.2d 443, 445 (5th Cir. 1944), cert. denied,

325 U.S. 887 (1945), and the administration of probation and parole, Morrissey v. Brewer, 408 U.S. 471 (1972).

Nor shall any State deny to any person within its jurisdiction the equal protection of the laws.

This clause prohibits state action which denies the right to equal protection of the laws. State action, of course, includes far more than the obvious legislative denials of equal protection, but the extent to which the Court will find that private actions are sufficiently significantly related to or brigaded by state actions so as to invoke the amendment is unclear. In Shelley v. Kraemer, 334 U.S. 1 (1948), the Court found state action in the fact that the challenged racially restrictive covenants on real property were secured by state judical enforcement. See also, Reitman v. Mulkey, 387 U.S. 369 (1967). The Court appears to have drawn back from this extreme position in such recent cases as Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), in which the Court held that the fact that a private club was required to and did have a liquor license did not bar it from discriminating against Negroes.

Together with other provisions of the Constitution, the Equal Protection Clause would normally operate to prevent the restraints on land alienation based on ancestry which

both the United States and the Marianas think are desirable. It would also prevent the Commonwealth from structuring its legislature, or one house of its legislature, to provide an equal number of representatives from each island, because of the "one-man, one-vote" rule elaborated in Reynolds v. Sims, 377 U.S. 533 (1964). (See Steve Lawrence's memo on these problems.) Special provisions will therefore be necessary in the Commonwealth Agreement to ensure that the Constitution will not prevent the Marianas from carrying out these two policies should it choose to do so.

In the area of equal protection challenges to economic regulation, the Court developed the traditional standard of review, which looks only to the reasonableness of the classification, to ascertain that it has some fair and substantial relationship to the objective of the legislation. See, e.g., Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911). However, when legislation acts either on the basis of a suspect classification or with regard to a fundamental interest, the Court will exercise strict scrutiny; the Government must then show a compelling interest justifying the legislation, and must prove that the challenged classifications are necessary to serve that vital purpose. See, e.g., Korematsu v. United States, 323 U.S.

214 (1944), Graham v. Richardson, 403 U.S. 365 (1971). In the most recent cases, the Court has apparently been developing a new standard of review of equal protection cases, which falls somewhere between the two described above, but the precise formula remains unclear. The Court has so far spoken of applying "close scrutiny" to determine whether a classification was "reasonably necessary" to the accomplishment of state aims. Bullock v. Carter, 405 U.S. 134, 144 (1972). See also, Weber v. Aetna Casualty and Surety Co., 406 U.S. 165 (1972).

The equal protection clause has been used to some extent by the Court in regulating classifications established for the purpose of taxation. See, e.g., Bell's Gap R. Co., v. Pennsylvania, 134 U.S. 232 (1890), Cargill Co. v. Minnesota, 180 U.S. 452 (1901). Challenges are often made under the equal protection clause to actions taken under the state police power, or to the regulation of business and employment relations, but these are only occasionally sustained. See, e.g., McGowan v. Maryland, 366 U.S. 420 (1961) (police power), New York Central R. Co. v. White, 243 U.S. 188 (1917) (workmen's compensation laws). Equal protection has of course been most important in cases involving racial discrimination. See, e.g., Peters v. Kiss, 407 U.S. 493 (1972) (juries), Burton v.

Wilmington Parking Authority, 365 U.S. 715 (1961) (public facilities), Brown v. Board of Education, 347 U.S. 438 (1954) (education). The Court has lately been concerned with other suspect classifications as well as race, including religion, alienage and nationality, Hirabayashi v. United States, 320 U.S. 81 (1943), and perhaps sex, Frontiero v. Richardson, 411 U.S. 677 (1973), and illegitimacy, Levy v. Louisiana, 391 U.S. 68 (1968). In the area of fundamental interests, the Court has acted to protect, amongst others, the right to vote, Dunn v. Blumstein, 405 U.S. 330 (1972), the reasonable apportionment of voting districts, Baker v. Carr, 369 U.S. 186 (1962), the right to travel, Shapiro v. Thompson, 394 U.S. 618 (1969), and the right to equal treatment by the criminal justice system, Griffin v. Illinois, 351 U.S. 12 (1956).

Fifteenth Amendment,-- The right to vote shall not be denied or abridged on account of race, color or previous condition of servitude.

The Supreme Court has held that this amendment is not only the source of a prohibition against racial discrimination in voting,but it also in some circumstances an immediate source of the right to vote. Ex parte Yarbrough,

110 U.S. 651 (1884) It has been used to condemn various state efforts to either overtly or covertly disenfranchise black citizens. These include the "grandfather clauses," Guinn v. United States, 238 U.S. 347 (1915), and the white primary elections or political parties, Smith v. Allwright, 321 U.S. 649 (1944).

Nineteenth Amendment -- The right to vote shall not be denied or abridged on account of sex.

The Supreme Court has never interpreted this amendment, but the state courts which considered it have ruled that it does not confer upon women the right to vote, but only the right not to be discriminated against on the basis of sex in setting voter qualifications. See, e.g., In re Cavellier 287 N.Y.S. 739 (1936). This is, of course, only a formalistic distinction, but it has served to restrain any far-reaching applications of this amendment.

II. PROVISIONS PROPOSED BY ONLY ONE PARTY

A. Provisions Proposed By the Marianas

Article IV, Section 2, Clause 1 -- Citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

This clause is actually proposed in both drafts, but only the Marianas proposal includes it in the listing of specific provisions of the United States Constitution which are made expressly applicable to the Commonwealth. The United States draft includes it instead in Section 402, which is primarily concerned with the retention of authority by the Marianas to regulate and to limit the alienation of land by ancestry. This placement is extremely ill-advised, because it suggests both that this clause is to apply with different force and effect than those mentioned in the listing, and that this is the only constitutional provision which might prohibit such regulation. Since neither implication is correct, the Marianas draft proposal which places this provision in the regular list is certainly preferable.

This clause guarantees the privileges and immunities of citizens between and among the states, in the same way that the Fourteenth Amendment guarantees them within the United States. It forbids any state, and so in this case

the Commonwealth, to discriminate against citizens of other states in favor of its own citizens. Paul v. Virginia, 8 Wall. (75 U.S.) 168 (1869) A provision has been added to the draft Commonwealth Agreement to require the states of the Union to respect the privileges and immunities of the citizens of the Marianas. The privileges and immunities protected are those rights that are fundamental and that belong to the citizens of all free governments. Corfield v. Coryell, 6 Fed. Cas. 546 (E.D. Pa. 1823) (J. Washington on circuit). This provision has particularly protected non-residents in their right of access to state courts, Chambers v. Baltimore and Ohio R.R., 207 U.S. 142 (1907), and from discriminatory taxation, Ward v. Maryland, 12 Wall, (79 U.S.) 418 (1871). It has been expressly extended to Puerto Rico, Guam, and the Virgin Islands.

Fifth Amendment -- No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces . . .

Both drafts contain provisions making this amendment expressly applicable in the Marianas, but the United States draft excepts the clause which provides a right to indictment by a grand jury. We can see no reason why this exception should be agreed to by the Marianas.

Since 1968, this entire amendment has applied to Guam and to the Virgin Islands, 48 U.S.C. § 1421b and § 1561, although in the Virgin Islands, certain exceptions are made to the requirement of an indictment, in order to conform to prior local laws. It has repeatedly been held that the requirement of a grand jury indictment does not apply to the states through the Fourteenth Amendment, and so it would not be binding upon the Commonwealth Government. Hurtado v. California, 110 U.S. 516 (1884). The United States must apparently be attempting to prevent the grand jury requirement from applying against its own actions. They must certainly provide some impressive justification for this exception before the Marianas could seriously consider agreeing to it. The United States may assert, however, that this exception was accepted by the Marianas during the May-June 1973 negotiations in Saipan. The Joint Communique from that meeting said that, "[t]he requirements in the United States Constitution of indictment by grand jury and of a jury trial in civil cases need not be made applicable to the Marianas." (at ¶ 8, p. 4) It is certainly reasonable to argue, however, that this sentence referred only to the requirements to be placed on the Marianan Government. There would be no reason for the Marianas to agree to such an expansion of United States

authority, and in fact, the proposal of such a diminution of procedural safeguards must give rise to some serious questions regarding the United States intentions.

The constitutional function of grand juries in the federal courts is, of course, to return criminal indictments in "infamous" cases. They also serve a vital investigative function, and may issue reports indicating the presence of non-indictable misbehavior. Whether a crime is "infamous" depends on the quality of the punishment which may be imposed for it, and may change with public opinion over time. Ex parte Wilson, 114 U.S. 417 (1885). A person can be tried only upon the offenses charged in the grand jury indictment, and only upon the particular language found in the charging part of the document. Stirone v. United States, 361 U.S. 212 (1965). The exception to the grand jury requirement for the military was intended to facilitate trial by court-martial of members of the armed services, even for crimes which under the Fifth and Sixth Amendments might otherwise have been cognizable in civil courts. Ex parte Quirin, 317 U.S. 1 (1942).

Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.

The constitutional prohibition against being tried more than once for the same alleged offense is binding upon both the states and the federal government, and so would place requirements on both the Commonwealth and the United States Governments. Benton v. Maryland, 395 U.S. 784 (1969). A retrial is barred once jeopardy has attached in the first trial, which according to federal court rules, occurs very early in the proceedings. United States v. Jorn, 400 U.S. 470 (1971). There are a few situations in which a retrial will be permitted if the first case did not go to a judgment, United States v. Tateo, 337 U.S. 463 (1964), but if it continued to judgment, a second trial is partically always barred. Green v. United States, 355 U.S. 184 (1957).

Nor shall [any person] be compelled in any criminal case to be a witness against himself.

This privilege may be invoked in any situation in which an individual is compelled to make testimonial disclosures, if those disclosures might be used against him in any criminal proceeding. See, Mirana v. Arizona, 384 U.S. 436 (1966), Reina v. United States, 364 U.S. 507 (1960). This provision is fully applicable against the states, as well as against the federal government. Malloy

v. Hogan, 378 U.S. 1 (1964). A criminal defendant who chooses to take the stand is considered to have waived the privilege as to matters reasonably related to his direct examination, Brown v. United States, 356 U.S. 148 (1958), but neither the prosecutor nor the judge may comment in the presence of the jury if the defendant chooses not to testify. Griffin v. California, 380 U.S. 609 (1965). One important line of cases has held that both the transactional and the use immunity statutes are constitutional, but that the latter is all that is required by the Fifth Amendment. See, e.g., Kastigar v. United States, 406 U.S. 441 (1972). In 1966, the Court announced that no statements made by a defendant during a custodial interrogation could be introduced in court unless he had been fully informed of his rights. Miranda v. Arizona, 384 U.S. 436 (1966). Although recently narrowed in some of its applications, this rule remains basically valid. Michigan v. Tucker, 42 U.S.L.W. 4887 (U.S., June 11, 1974).

Nor [shall any person] be deprived of life, liberty, or property without due process of law.

This clause, which is a restraint only against the federal government, does not apply of its own force to unincorporated territories. Public Utility

Comm. v. Ynchausti and Co., 251 U.S. 401 (1920). Since this Fifth Amendment due process clause co-exists with the other restraints on the federal government contained in the Bill of Rights, it is not precisely the same thing as the due process clause in the Fourteenth Amendment. However, both clauses do impose certain implicit requirements, such as fair trials, which exist separately from the express constitutional guarantees, and in this sense, the interpretation of the two clauses is at least substantially the same. The discussion above of the due process clause of the Fourteenth Amendment has therefore already identified the major doctrines and important areas of development under this clause as well. The essential difference is, of course, that this clause is binding only on the Federal Government, while the Fourteenth is binding on the states. It is important that this clause should apply in the Marianas, because it places significant restrictions on the actions of the United States in the Commonwealth.

Certain areas of law peculiar to the Federal Government have also been developed under the Fifth Amendment Due Process Clause. These include the procedural due process standards for federal administrative agency proceedings and federal criminal statutes and trials, and for the entry or deportation of aliens. See , e.g., Bowles

v. Willingham, 321 U.S. 503 (1944), United States v. National Dairy Prod. Corp., 372 U.S. 29 (1963), Jencks v. United States, 353 U.S. 657 (1957), United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950). Although the Fifth Amendment contains no equal protection clause, the Supreme Court has held that the Fifth Amendment due process clause makes many of the requirements of equal protection applicable against the Federal Government; the Court explained that discrimination in some cases will be equivalent to confiscation, and so will be prohibited by substantive due process. Bolling v. Sharpe, 347 U.S. 497 (1954). In two more recent cases, the Supreme Court has treated the two clauses as virtually co-extensive and interchangeable. Shapiro v. Thompson, 394 U.S. 618 (1969), Schneider v. Rusk, 377 U.S. 163 (1964).

Nor shall private property be taken for public use, without just compensation.

The federal power of eminent domain may be exercised only to effectuate a constitutionally granted power. United States v. Gettysburg Electric Ry. Co., 160 U.S. 668 (1896). The ambit of national powers is so broad-ranging, however, that vast numbers of objectives may actually be obtained. Berman v. Parker, 348 U.S. 26 (1954).

The states are required to adhere to almost the same standards under the Fourteenth Amendment due process clause as the Federal Government must meet under this amendment. Chicago, B. & Q. R.R. Co. v. City of Chicago, 166 U.S. 226 (1897). To the Marianans, however, the central importance of this provision lies in the limitations that it places on the powers of the Federal Government to take their land.

The general standard for "just compensation" is fair market value . United States v. Miller, 317 U.S. 369 (1943). The most important area of dispute under this doctrine is whether in a particular circumstance the Government's action has actually caused a "taking" in the Fifth Amendment sense. If damage to property results from Government actions not directed at that property, the Court has ruled that that property is "taken" only when "inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired." United States v. Dickinson, 331 U.S. 745 (1947).

Seventh Amendment -- In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the

United States, than according to the rules of the common law.

Both drafts of the Commonwealth Agreement include the Seventh Amendment in their lists of provisions to be made expressly applicable to the Marianas, but the United States seeks to exclude one clause from that applicability. The United States wants to exclude the right provided to trial by jury in non-criminal cases. As in the case of the Fifth Amendment, this provision is, by judicial decision, not applicable against the states through the Fourteenth Amendment, and so would impose no special obligations on the Commonwealth government. Minneapolis and St. Louis R.R. Co. v. Bombolis, 241 U.S. 211 (1916). It has been explicitly extended to Guam and to the Virgin Islands. 48 U.S.C. § 1421(b) and 1561. It appears then, that the United States is simply attempting to avoid the requirement of jury trials in non-criminal cases in the federal courts located in the Commonwealth. Unless the United States can offer some convincing justification for its position, I can see no reason why the Marianas should agree to this exception.

Traditionally, the Supreme Court has held that the Seventh Amendment preserves the right of trial by a

jury of the sort that existed under English common law. Baltimore and Carolina Line v. Redman, 295 U.S. 654 (1913) Since the Court has eased this requirement in criminal cases, however, it will probably do the same in civil cases in the near future. If a case presents a mixture of legal and equitable claims for decision, the Seventh Amendment requires that the issues pertaining to the legal relief must be tried by a jury. Dairy Queen v. Wood, 369 U.S. 469, (1962).

Twenty-Sixth Amendment -- The right of citizens of the United States, who are 18 years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

This provision, if applied to the Marianas, would have no practical effect on the United States Government's policies or actions, because Marianas cannot vote in federal elections in any case. It seems unlikely, then, that the Federal Government could seriously object to the desire of the Marianas to include this amendment in the Commonwealth Agreement. Its only effect will be to insure a voting age of 18 in the Marianan elections. Since this is in accord with the national policy of the United States, and also represents

the expressed desire of the Marianas, there is no reason that it should not be made expressly applicable.

B. Provisions Proposed by the United States

Article I, Section 9, Clause 6 -- No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay duties in another.

This clause is a restriction only upon the Federal Government, and in no way affects the states in the regulation of their domestic affairs. Morgan v. Louisiana, 118 U.S. 455 (1886). The clause does not apply by its own force to the ports of any territory, Alaska v. Troy, 258 U.S. 101 (1922), and has not been specifically extended to Guam or to the Virgin Islands. Since it can only restrict the powers of the United States Government, however, I can see no reason to object to its being made expressly applicable to the Marianas. The only possible reason to object would be if there was some real possibility that, absent this prohibition, Congress might enact a statute favoring Marianan ports over domestic ports. This seems, at best, highly unlikely,

and is not sufficient reason to oppose inclusion of this provision.

The provision was designed to prevent preferences granted as between certain ports because of their locations in different states; it does not forbid discrimination between individual ports. Louisiana Public Service Comm. v. Texas & N.O.R. Co., 284 U.S. 125 (1931). Under the Commerce Clause, Congress does many things which benefit particular ports, and which may incidentally disadvantage others. It may, for example, set differential rates, establish ports of entry, erect and operate lighthouses, improve rivers and harbors, and provide structures for the covenient and economical handling of traffic, even if such activities in fact give an advantage to one port over another. Louisiana Public Service Comm., supra. The clause also does not prevent Congress from allocating to the states the power to supervise and to regulate pilots. Thompson v. Darden, 198 U.S. 315 (1905).

Article I, Section 9, Clause 8 -- No Title of Nobility shall be granted by the United States: And no Person handling any Office of Profit or Trust under them, shall, without the Consent of the Congress accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince or Foreign State.

This clause has apparently occasioned no litigation in the federal courts. From its language, and by analogy to the rest of Section 9, however, it would appear to be a prohibition directed solely against the Federal Government and against federal officers. It has not been specifically extended to Guam or to the Virgin Islands, but because it is an "express prohibition," which goes to the power of the Federal Government to take any action at all in this area, it may well apply to unincorporated territories without any specific extension. It is specifically mentioned in Downes v. Bidwell, 182 U.S. 244, 277 (1901), as an example of such an express prohibition. I suspect that the United States wants it to be made expressly applicable for the sake of clarity, and precisely because it is probably already applicable in any case. Since it operates only against the Federal Government, I can see no reason for the Marianas not to agree to its inclusion.

This provision has been interpreted only in a few opinions given by the United States Attorney General. In 1871, he ruled that a minister of the United States abroad may not accept a formal commission from any foreign power, because that creates an official relationship of

the type prohibited by this provision. 13 Ops. Atty. Gen. 538 (1871). The clause does not extend, however, to gifts or commissions bestowed on departments or institutions of the United States Government. Gifts from Foreign Prince -- Officer -- Constitutional Prohibition, 24 Ops. Atty. Gen. 117 (1902). The only recent incident ruled upon by the Attorney General involved a retired enlisted member of the Fleet Reserve, who accepted employment in a civilian position with an Australian state while continuing to draw retirement pay. The Attorney General ruled that this constituted acceptance of an emolument from a foreign state without the proper consent of Congress, and so, that an amount equal to the foreign salary received must be withheld from the amount of retirement pay to which the individual would otherwise have been entitled.

Article I, Section 10, Clause 1 -- No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts or grant any Title of Nobility.

This clause places limitations upon the States, or in this case, upon the Commonwealth, which fall into the following two categories: first, some are limitations upon the power of the States to deal with matters having a bearing on international relations, or second, some are absolute prohibitions against certain types of actions by the States, most of which are also forbidden to the Federal Government by other constitutional provisions. This provision has not been extended to Guam or to the Virgin Islands. There is no reason for the Marianas to object to the first type, because the Commonwealth specifically intends to grant to the United States full responsibility for and complete authority in all foreign relations. The second category is also acceptable, both because it works no particular disadvantage upon the Marianas, and because it is no more stringent than the requirements placed on the Federal Government.

There has been very little litigation concerning the prohibition against making treaties, and none concerning the granting of letters of marque and reprisal, or of coining money. They are all based on the concept of the unity of the United States, and on the explicit power of the Federal Government to conduct its foreign affairs.

These principles led the Supreme Court to hold that the Federal Government had paramount rights in and control over the three-mile marginal belt under the ocean along the California coastline, because the oil there might well become the subject of international dispute. United States v. California, 332 U.S. 19 (1947). However, in Skirotes v. Florida, 313 U.S. 69 (1941), the Court unanimously held that Florida could regulate the sponge fishing of its citizens outside its territorial waters. The Court said there that, "[w]hen its action does not conflict with federal legislation, the sovereign authority of the State over the conduct of its citizens upon the high seas is analogous to the sovereign authority of the United States over its citizens in like circumstances." (313 U.S. at 78-79) (Letters of marque and reprisal are defined as "commissions given to a private ship by a government to make reprisals on the ships of another state." Black's Law Dictionary, 4th ed., 1951.)

The prohibition against Bills of Credit applies to any paper medium of exchange, intended to circulate between individuals, and between the government and individuals, for the ordinary purposes of society. Poindexter v. Greenhow, 114 U.S. 284 (1885). The States are allowed, however, to issue coupons receivable for

taxes, or to execute instruments binding themselves to pay money at some future date for services rendered or money borrowed. See, e.g., Poindexter, supra, and Houston and Texas Central Rd. v. Texas, 177 U.S. 66 (1900). This prohibition and the one following, concerning legal tender, were clearly intended "to provide a fixed and uniform standard of value throughout the United States, by which the commerce and other dealings between the citizens thereof, or between them and foreigners, . . . should be regulated," Ogden v. Saunders, 25 U.S. 213 (1827).

The prohibition against making anything but gold or silver into legal tender clearly a-plies only to the States. Juilliard v. Greenman, 110 U.S. 421 (1884). It does not prevent a bank depositor from agreeing to receive an exchange draft in payment on his check, if the state law so provides. Farmers and Merchants Bank v. Fed. Reserve Bank, 262 U.S. 649 (1923).

The prohibition against passage by the states of ex post facto laws and bills of attainder parallels that against the Federal Government in Article I, Section 9, Clause 3. The prohibition against bills of attainder applies to both civil and criminal laws, and has been used

to invalidate statutes such as those that were passed after the Civil War, which required persons who wished to enter certain professions to swear that they had never given aid to the Confederacy. See, e.g., Klinger v. Missouri, 13 Wall. (80 U.S.) 257 (1972). The prohibition against bills of attainder is intended to prevent all legislative acts which inflict punishment on individuals without judicial trial. Cummings v. Missouri, 71 U.S. 277 (1867). The prohibition against ex post facto laws applies only to criminal legislation, Calder v. Bull, 3 Dall (3 U.S.) 386 (1798). It can be violated by changes in punishment, or occassionally in procedure as well as by legislation which makes a certain act a crime, which when it was carried out was not criminal. See., e.g., Graham v. West Virginia, 224 U.S. 616 (1912), Thompson v. Utah, 170 U.S. 343 (1898).

The prohibition against passage by the states of laws impairing the obligation of contracts is intended to preserve the absolute inviolability of contracts against all state legislative interference. There is no parallel prohibition placed on the Federal Government, and the Court has held that it may act to impair contracts, but apparently only in pursuance of an express power.

Continental Illinois Nat. Bank and Trust Co. v. Chicago, R.I. & P. Ry. Co., 294 U.S. 648 (1935). The provision applies only against statutes, and not against judicial decisions, except in a few unusual circumstances. Tidal Oil Co., v. Flannagan, 263 U.S. 444 (1924). Although this clause has proved to be of relatively little importance in recent times, it still provides a basis for judicial review of the factual justifications offered by a state legislature for its exercise of the police power. Chastleton Corp. v. Sinclair, 264 U.S. 543 (1924). This provision still protects the remedial rights of creditors against unreasonable legislative erosion. See, e.g., W. B. Worten Co. v. Thomas, 292 U.S. 426 (1934), but see, Home Building and Loan Assn. v. Blaisdell, 290 U.S. 398 (1934).

No cases have arisen under the provision which forbids the states to grant any titles of nobility. Its meaning is quite clear, and, like the rest of this clause, should cause no particular difficulties in the Marianas.

Article I, Section 10, Clause 2 -- No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts laid by any State on Imports or Exports shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

The applicability of this Section will have to be carefully examined by both parties in light of the provisions of the Status Agreement relating to customs duties and excise taxes. My initial opinion, however, is that the Marianas should not agree to the applicability of this provision of the Constitution, because it is in direct conflict with the proposed agreement on custom duties. Under that agreement, the Marianas will not be included in the customs territory of the United States, and will retain the authority to extablish a "duty-free" port, to enact local customs laws relating to imports from foreign countries, and to impose taxes on exports from the Commonwealth. It is entirely contradictory, therefore, to expect the Marianas to agree here not to pass any such laws without their being subject to the revision and control of Congress. It is irrelevant that Marianas exports will be allowed to enter the United States without paying any import duties both because that is a separate agreement, and because

this arrangement also exists with Guam, to which this constitutional provision has never been extended. I can only assume that the United States proposed the inclusion of this provision through some oversight or error.

This provision serves as a restriction on the states only in regard to articles imported from or exported to a foreign country, or "a place over which the Constitution has not extended its commands with respect to imports and their taxation." Hooven and Allison Co. v. Evatt, 324 U.S. 652 (1945). In Brown v. Maryland, 12 Wheat. (25 U.S.) 419, 441-442 (1827), the Supreme Court enunciated the "original package doctrine," to determine how long imported goods remain under the strictures of this clause. The test is whether the thing imported has become so "incorporated and mixed up with the mass of property in the country" that it has "lost its distinctive character as an import"; if this is not the case, then it remains within the prohibition of this clause, and cannot be taxed by the states. The clause also forbids such indirect taxes on imports as importers licenses. Brown, supra, at 447. The Supreme Court has sustained many state inspection laws, however, as an exercise of the state's police power. See, e.g., Turner v. Maryland, 107 U.S. 38 (1833).

Article I, Section 10, Clause 3 -- No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or

Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War unless actually invaded, or in such imminent Danger as will not admit of delay.

This provision is intended to insure the unity of the National Union, and to guarantee absolute power in foreign affairs and defense to the Federal Government. It is a restriction only against the states, and has not been extended to the Virgin Islands or to Guam. With the possible exception of the restriction on the laying of duties of tonnage, there is no reason for the Marianas to reject to the inclusion of this provision, since it is the intention of the Commonwealth that the United States will exercise complete power and authority over its foreign relations and defense. Although the prohibition against tonnage duties without the consent of Congress will prevent the Marianas from levying any charges for the privilege of entering, trading in, or lying in their ports, it should probably also be accepted. This restriction is one which applies to all other United States ports as well, and since the United States will be instrumental in constructing any ports in the Marianas, it is only reasonable that this standard restriction on interstate commerce should be enforced.

The prohibition against laying tonnage duties without the consent of Congress is intended to forbid all taxes which are actually charges solely for the privilege of entering, trading in

or lying in a port, whether these charges are measured by the tonnage of the vessel or not. Clyde Mallory Lines v. Alabama, 296 U.S. 261 (1935). The section does not forbid charges by the states for services rendered to a vessel, such as pilotage, towage, wharfage, or storage, even if the rates for these services are determined by tonnage. Packet Co. v. Catlettsburg, 105 U.S. 559 (1882).

The restrictions on keeping troops or ships of war in time of peace, and on engaging in war, do not forbid the organization and maintenance of an active state militia. Presser v. Illinois, 116 U.S. 252 (1886). Except on this point, there has apparently been no litigation in the Federal Courts under these clauses.

The clause forbidding interstate compacts and agreements with foreign powers without the consent of Congress is not intended to strip the states, or the Commonwealth, of the power to make such agreements. It merely makes the consent of Congress necessary to the establishment of such a compact. See, e.g., Hinderlider v. La Plata Co., 304 U.S. 92 (1938), Bootery Inc. v. Washington Metropolitan Transit Authority, 326 F. Supp 794 (D.D.C. 1970). This restriction on "agreements or compacts" was intended to compliment the prohibition against "any treaty, alliance, or confederation," in Article I, Section 10, Clause 1, and to make the prohibition against agreements with foreign powers more comprehensive. Holmes v. Jennison, 14 Pet. (39 U.S.) 540 (1840). The Congress has approved many compacts between

states, relating both to boundary disputes and to affirmative programs for solving common problems. See, e.g., Act of June 6, 1934, 48 Stat. 909 (1934), which consented in advance to agreements for the control of crime. Such Congressional consent may be given either before or after the agreement is reached, and need not be express or specific. Green v. Biddle, 8 Wheat. (21 U.S.) 1 (1823).

Article IV, Section 2, Clause 2 -- A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

This clause binds all of the States to an extradition agreement with all of the other states. It has never been extended to Guam or to the Virgin Islands, and it would impose certain obligations on the Commonwealth government. These obligations do not seem unreasonable, however, expecially since the duty to surrender the accused is not absolute and unqualified. I can see no serious objections to the Marianas agreeing to accept the express applicability of this provision.

As noted above, the duty to surrender an accused is not absolute; if the laws of the state to which the fugitive has fled have already been put into force against him, and he is imprisoned there, then the demands of those laws may be

satisfied first, before the obligation to extradite is fulfilled. Taylor v. Taintor, 16 Wall. (83 U.S.) 366 (1873). The governor of a state can only demand the return of a fugitive after the individual has been actually charged with a crime. Strassheim v. Daily, 221 U.S. 280 (1911). Once the request is made, however, the surrender of the fugitive is required by the Constitution, and can not be interfered with upon grounds which properly go to the eventual result of a criminal trial. Drew v. Thaw, 235 U.S. 432(1942).

Article VI, Clause 2 -- This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

If this section is read absolutely literally, it states that all of the Constitution and all of the federal laws made in pursuance of the Constitution shall be the supreme law of the land. Further, it reemphasizes this meaning by saying that this rule applies no matter what the constitution or laws of any state might say. The United States might reasonably argue from the language that whatever laws it passed based on Constitutional powers would be supreme in the Commonwealth, notwithstanding the limitations on United States authority outlined in the Status

Agreement. Therefore, the Marianas definitely should not agree to the express applicability of this provision. A properly worded supremacy clause might be helpful, however, and so the Marianas should press for acceptance of their proposed draft Section 205(b). This provides that the Commonwealth Agreement, the applicable portions of the United States Constitution, applicable federal laws, and federal treaties shall be the supreme law of the Commonwealth.

The Supremacy Clause of the United States Constitution, as interpreted by the Supreme Court, states an absolute rule: when Congress legislates pursuant to its delegated powers, conflicting state law and policy must yield. Gibbons v. Ogden, 9 Wheat, (22 U.S.) 1 (1824). The primary task for the Court is to ascertain whether a challenged state law is compatible with the policy of the federal statute. State courts are of course also bound to give effect to federal law when it is applicable, and to disregard state law when there is a conflict. Cooper v. Aaron, 358 U.S. 1 (1958). The uniformity which results in at least some areas, particularly commerce, is vitally important to the preservation of a strong national Union. This clause also supports the doctrine of federal exemption from taxation by the states, Osborn v. United States Bank, 9 Wheat. (22 U.S.) 738 (1824), which remains in force today at least as to activities of the Federal Government itself, and as to that which is explicitly created by statute. See, e.g., Mayo v. United States, 319 U.S. 441 (1943).

Fourteenth Amendment, Section 5 -- The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The initial problem with making this section expressly applicable to the Marianas is that it refers to enforcement of the entire Fourteenth Amendment, while only the first section is being applied to the Marianas. Further, the Marianas is reserving certain rights and powers, particularly concerning apportionment rules, which might normally be forbidden by that first section. Therefore, although some enforcement clause would be acceptable, this section is too broad. I would suggest that if the United States really desires an enforcement clause, this section be incorporated, with the provision that it refers only to those sections of the Fourteenth Amendment which have been made specifically applicable to the Marianas, and not to any parts of those sections under which particular rights have been specially preserved. It should be noted, however, that this section has not been extended to either Guam or the Virgin Islands, although in view of the broad powers of the United States under 4-3-2 in those territories, there is hardly any reason to do so.

Congress has the discretion under this section to adopt remedial measures, such as placing jurisdiction over certain types of cases in the federal courts, and to provide criminal or civil liability for state officials or agents who violate protected rights. These statutory measures designed to eliminate discrimination under color of law have been consistently upheld by the Court.

See, e.g., Ex parte Virginia, 100 U.S. 339 (1880). In a series of cases concerning Reconstruction laws, however, the Court found that statutes prohibiting private racial discrimination were beyond the Congress' power to enforce the Fourteenth Amendment. See, e.g., United States v. Cruikshant, 92 U.S. 542 (1875), Civil Rights Cases, 109 U.S. 3(1883). Cruikshant did state, however, that Congress could protect against the private deprivation of those rights which derive particularly from an individual's status as a United States citizen. This principle was used to protect the right to vote in federal elections, Ex parte Yarbrough, 110 U.S. 651 (1884), and the right to interstate travel, United States v. Guest, 338 U.S. 745 (1966), for example. At least some Justices now believe that Section 5 does authorize Congress to make whatever laws are necessary to protect a right created by this Amendment. Guest, supra, 383 U.S. at 774 (J. Brennan, joined by Warren, C. J., and Douglas, J.). It is not clear at this point whether this expansion will be pursued.