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July 18, 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 17, 1974 in the offices of Wilmer, Cutler & Pickering. Attending for the United States were Herman Marcuse, Adrian DeGraffenreid and Andre Surena. Attending for the Marianas Political Status Commission were Howard Willens, Steven Lawrence, Erica Ward and Michael Helfer.

In accordance with the previous agreement a discussion was held concerning Agenda Item 5(a), dealing with the applicability of the United States Constitution to the Commonwealth. Mr. Marcuse first noted that the United States had proposed making applicable to the Marianas portions of the U. S. Constitution not applicable to Guam and the Virgin Islands. The reason for this, he said, was that the Mink amendment, which extended certain portions of the U. S. Constitution to the other two territories, was designed only to protect individual rights of American citizenship. The status agreement, on the other hand, is designed to govern the entire relationship between the United States and the Marianas. Therefore it ought to include provisions of the U. S. Constitution which will govern the relations between the two political entities in addition to provisions protecting individual rights.

The discussion turned to Article I, § 10 which imposes certain restrictions on states. Mr. Marcuse stated that these restrictions had not been extended to Guam and the Virgin Islands since Congress had reserved the power to repeal the local laws of those territories, and generally could treat them as agencies of the federal government, and consequently had control of their actions. This would not be so in the Marianas, he noted. The Commonwealth Agreement, Mr. Marcuse pointed out, specifically provided that the Marianas would not be an agency or instrumentality of the federal government. Accordingly, he argued that the prohibitions found in Article I, § 10 should apply to the Marianas as if it were a state.

After discussion, it was agreed that Article I, § 10, Clause 2 should not be made applicable because the status agreement itself will deal with the power of the Marianas to tax exports. With respect to Article I, § 10, Clauses 1 and 3, Mr. Willens stated that his concern was that these sections might be read to prohibit the Marianas from participating in regional economic and cultural organizations (after approval by the Secretary of State), as the United States had previously agreed the Marianas would be empowered to do. Mr. Willens noted that the May draft of the Covenant did not grant the Marianas this power, although the December draft of the Covenant and the Joint Communiques reflected an agreement that the Marianas could join in such regional organizations. Mr. Marcuse said that he would have to defer to Mr. Wilson with respect to the United States position on this matter. So far as the effect of Article I, § 10, Clauses 1 and 3 on this issue was concerned, Mr. Marcuse said that in his view Clause 1 would have no applicability because the Marianas would not be entering into a treaty, alliance or confederation; and with respect to Clause 3, the approval of the status agreement by Congress would grant Congress' consent in advance to such an agreement. Mr. Willens stated that he would reserve decision on whether to include Article I, § 10 Clauses 1 and 3 until the issue concerning the ability of the Marianas to participate in regional economic and cultural organizations was resolved.

The discussion turned to Article I, § 9. It was agreed that Clauses 1, 4, and 7 need have no applicability with respect to the Marianas. The parties had previously agreed that Clauses 2 and 3 would specifically be made applicable. Mr. Marcuse asked whether the Marianas wanted to have Clause 5, prohibiting the federal government from imposing a tax or duty on articles exported from any state, apply to the Marianas as if it were a state. Mr. Willens noted that CA § 610 dealt with this issue, but that he saw no immediate reason that Article I, § 9, Clause 5 should not also be made applicable. He tentatively agreed to Mr. Marcuse's suggestion, subject to further study. With respect to Clause 6, prohibiting preferences in ports, Mr. Helfer noted that to make this clause applicable would prohibit Congress from giving any benefits to the ports of the Marianas not given to the states; on the other hand, of course, it would also prevent discrimination against the Marianas. This clause does not apply with respect to Guam; therefore there would be no prohibition against Congress favoring the ports of Guam as compared to the ports of the Marianas. Mr. Willens asked what were the interests of the United States in making this clause applicable. Mr. Marcuse said that the United States was prepared to make it applicable,

but would leave the decision entirely to the Commission. That decision was postponed. It was then agreed that Clause 8 would be made applicable.

Both sides agreed that Article 4, § 1, concerning full faith and credit, should be made applicable with respect to the Marianas, and that that provision of the Commonwealth Agreement which requires the states to grant full faith and credit with respect to the Marianas was also acceptable. Mr. Marcuse noted that in view of the federal statutes requiring full faith and credit among the states and territories, it was probably not strictly necessary to make Article 4, § 1 applicable. It was further agreed that Article 4, § 2 would be made applicable, and that that provision of the Commonwealth Agreement which requires the states to protect the privileges and immunities of citizens of the Marianas was also acceptable. Finally, it was agreed that Article 4, § 2, dealing with extradition, would be made applicable to the Marianas as if it were a state.

A discussion was held concerning Article 6, Clause 2, the Supremacy Clause. It was agreed that it was preferable to include a Supremacy Clause within the status agreement -- a clause which would refer specifically to the status agreement, and to the applicable portions of the Constitution and land of the United States. This is the approach taken by the Commonwealth Agreement.

Both sides having agreed that the first four amendments of the Constitution should apply within the Marianas, the discussion turned to the Fifth Amendment. Mr. Marcuse asked whether the Marianas wanted to have the requirement of the grand jury apply in the federal courts in the Marianas. He said that 48 U.S.C. § 1424(b) had been interpreted to permit the federal courts in Guam to try felony cases without an indictment, notwithstanding the Mink amendment. Mr. Marcuse suggested that the status agreement could be written so as to leave up to the local government the question whether an indictment would be required in the federal courts, or in the local courts, or neither or both. He suggested that the local government could have this same kind of control with respect to the jury trial requirements of the Sixth and Seventh Amendments. Mr. Willens said that his initial reaction was that the federal government should act in the Marianas in the same way that it acts in the state, and that this would raise the fewest questions in Congress and would result in the fewest exceptions for the Marianas. However, he said that he wanted to review Mr. Marcuse's latest suggestion of local control with respect to certain portions of the Fifth, Sixth and Seventh Amendments.

It had previously been agreed that the Eighth, Ninth and Thirteenth Amendments would apply within the Marianas. Mr. Marcuse suggested that the first sentence of § 1 of the Fourteenth Amendment also be made applicable. Mr. Willens saw no objection. The second sentence of § 1 of the Fourteenth Amendment had previously been agreed to be applicable and accordingly, all of § 1 of the Fourteenth Amendment will apply in the Marianas.

Mr. Helfer asked why the United States wanted to make § 5 of the Fourteenth Amendment specifically applicable within the Marianas. He pointed out that the powers of Congress under Article I, § 8 had not been made specifically applicable, and thought it would lead to confusion if § 5 of the Fourteenth Amendment was made applicable, since it simply gave Congress the power to enforce the Fourteenth Amendment. This was the power which Congress would have with respect to the Marianas under either draft of the status agreement. Mr. Marcuse noted that the same problem existed with respect to the Thirteenth, Fifteenth and Nineteenth Amendments. Mr. Helfer replied that perhaps it would be simplest to eliminate all reference to the portions of those amendments which granted Congress the power to enforce them by appropriate legislation. Mr. Marcuse stated that in his view it was largely a cosmetic matter, and of no substantive importance, and that he wanted to discuss it with Mr. Wilson.

Mr. Marcuse stated that the United States had no objection to the suggestion of the Marianas that the Twenty-Sixth Amendment, concerning the 18-year-old vote, be made applicable within the Marianas.

Mr. Marcuse asked how future amendments to the Constitution should be dealt with. Neither the Covenant nor the Commonwealth Agreement appear to make future amendments applicable automatically. However, Mr. Marcuse noted, if subsequent amendments have sections granting Congress the power to enforce them, as is the case with the pending Equal Rights Amendment, then Congress would be able to enforce the amendment in the Marianas under its general legislative authority, even though the amendment was not applicable there. This could lead to considerable confusion. It was agreed that this matter required further consideration.

Mr. Helfer asked Mr. Marcuse whether the United States had any difficulties with the introductory portions of § 208(a), and specifically whether the United States had any difficulties with making clear in the introductory portion of this section

that there were two separate governmental entities involved, the Commonwealth and the United States. Mr. Marcuse said he had no problem with the later concept, though he did not think it necessary to make the point any clearer than Cov. § 401 does. He noted that Cov. § 401 was less wordy and urged that § 208(a) be revised and shortened.

The discussion then turned to the question of exceptions to the applicability of the United States Constitution. Mr. Marcuse agreed that it was preferable to state the exceptions as exceptions to the applicability of the entire Constitution, as is done in the Commonwealth Agreement, rather than tie them to individual sections of the Constitution as is done in the Covenant. Mr. Willens asked what the United States position was with respect to land alienation. Mr. Marcuse stated that the question whether the provisions of the agreement relating to land alienation restrictions would be mandatory or permissive was one which would have to be taken up with Mr. Wilson in view of the congressional interest in mandatory restrictions. With respect to the requirement found in the Covenant that the Commonwealth limit the extent of landholdings of individuals, Mr. Surena noted that the United States had modified its position and wanted to require only that limits be imposed on holdings of public land. In that case, Mr. Helfer asked, is an exception from the Constitution needed. Mr. Marcuse stated that it seemed likely that no such exception was needed. It was then agreed that the requirement that the Marianas impose limits on the extent of individual holdings of public lands does not belong in this portion of the status agreement. Mr. Willens noted that the Commission did not agree that such a provision belonged any place in the status agreement, since this was a matter for the local government and should be left entirely up to the people of the Marianas to decide. No such restrictions is found in the U. S. Policy Paper Regarding Transfer of Public Land. He noted, as a practical matter, that restrictions on the extent of individual land holdings would probably be imposed through the anticipated Marianas Public Land Corporation.

A discussion was then had concerning the CA § 208(b)(2) exempting the Commonwealth legislature from the reappportionment decisions. Mr. Marcuse noted that there would be congressional objections to such a provision and that as a matter of policy such provision was undesirable. Mr. Willens said that the Commission thought it necessary to leave it open to the Marianas Constitutional Convention to draft a constitution in which one house of a bicameral legislature consisted of an equal or almost equal number of representatives from each of the major islands;

or to structure a unicameral legislature in a way which recognized the different interests of the various islands. Mr. DeGraffenreid said that there was considerable sympathy for the Marianas position among the U. S. Delegation, but that a final discussion of this matter would have to await Mr. Wilson. Mr. Willens again noted the political problems to which this portion of the status agreement was addressed, and the necessity to protect the interests of Rota and Tinian. Mr. Surena suggested that the exception might be made more specific by indicating the basis on which members of the legislative branch would be selected; the Commonwealth Agreement now simply permits the legislature to be selected without regard to population, but does not state the alternative basis. Mr. DeGraffenreid suggested it might be preferable to deal with this problem in conjunction with the provisions of the status agreement providing for a Marianas legislature.

It was agreed that the next meeting of the Joint Drafting Committee would take up the interim applicability of laws formula. Mr. DeGraffenreid noted that this Agenda Item was related to problems of separate administration and to the timing of the effectiveness of the Commonwealth Agreement generally. It was noted that Mr. Wilson should be present for a discussion of these timing matters. A brief discussion was held on the problems anticipated by the State Department if certain provisions of the Commonwealth Agreement came into effect before termination of the Trusteeship by their own force, rather than through the actions of the United States as the Administering Authority. Mr. Willens stated that this was a problem the State Department would have to work out with the United Nations.

It was agreed that the next meeting will be held at 10 a.m. on July 25, 1974, in Mr. Wilson's office.

Michael S. Helfer

cc: Howard P. Willens