

Working File -
Joint Budget
Committee

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TO: HOWARD WILLENS, MICHAEL HELFER
FROM: ERICA WARD
RE: MARIANAS

SOVEREIGN IMMUNITY

The cases involving the sovereign immunity of United States territories uniformly invoke the "general rule exempting a government sovereign in its attributes from being used without its consent." Puerto Rico v. Rosaly, 227 US 270, 273 (1913). This doctrine is based not on "any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." In holding that the Territory of Hawaii could claim the protection of sovereign immunity, Mr. Justice Holmes explained that "the doctrine is not confined to powers that are sovereign in the full sense of juridical theory, but naturally is extended to those that in actual administration originate and change at their will the law of contract and property, from which persons within the jurisdiction derive their rights." Kawananakoa v. Polyblank, 205 U.S. 349, 353-354 (1907).

The organic acts of the various territories make clear that although the Congress may intervene in some

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situations and may limit the powers of the territories, the legal rights that exist there ordinarily flow from the government of the particular territory. The courts have therefore consistently found that the territories are governments sufficiently sovereign in their attributes to be immune from suit in their own and in all other courts. See, e.g., Puerto Rico v. Rosaly, supra; Kawananakoa v. Polyblank, supra (Territory of Hawaii); In re Hooper's Estate, 359 F.2d 569, 578 (3d Cir. 1966), cert. denied, 385 U.S. 903 (Virgin Islands) ("While not sovereign, in the true sense of that term, the Revised Organic Act has conferred upon [the Territory of the Virgin Islands] attributes of autonomy similar to those of a sovereign government or a state."); Crain v. Government of Guam, 97 F. Supp. 433, 434 (D. Guam 1951). Since the Commonwealth of the Northern Marianas will possess at least as many of the attributes of sovereignty as these other territories, it appears that it will also automatically possess an inherent immunity from all suits to which it does not consent.

Despite the apparent clarity of the law in this area, the Organic Acts of the two most recently organized territories, Guam and the Virgin Islands, include specific provisions on the immunity of the territorial government from suit. See 48 U.S.C.A. § 1421(a) (as amended, Sept. 21,

1959), and 48 U.S.C.A. § 1541(b). Such an explicit statement in the Marianan Status Agreement, although not necessary to preserve or to establish this right, might aid the courts by definitely establishing the intent of the parties to the agreement.

We considered and rejected the possibility of making the Eleventh Amendment expressly applicable to the Marianas. It provides that, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." While this provision would prevent suits in the federal court in the Marianas against the Marianas, the states, and the federal government, it would not forbid suits in any other federal court against the Marianas. This lack of reciprocity makes the express application of the Eleventh Amendment inadequate as a means of reinforcing the immunity from suit of the Marianas government.

We suggest that the following section, patterned after the Guamanian Organic Act provision, should be added to the Political Relationship section of the Status Agreement:

The Commonwealth of the Northern Marianas
may not be sued upon any claim arising out
of the exercise of its lawful powers except

with the consent of the legislature as
evidenced by an enacted law.

ORGANIC ACT PROVISIONS ON SOVEREIGN IMMUNITY

VIRGIN ISLANDS:

(b) The government of the Virgin Islands shall have the powers set forth in this chapter, sections 104 and 111 of title 21, and section 3350 (c) of Title 26 and shall have the right to sue by such name and in cases arising out of contract, to be sued: Provided, that no tort action shall be brought against the government of the Virgin Islands or against any officer or employee thereof in his official capacity without the consent of the legislature constituted by this chapter and said section...

48 U.S.C. § 1541(b)

GUAM:

The government of Guam shall have the powers set forth in this chapter, shall have power to sue by such name, and, with the consent of the legislature evidenced by enacted law, may be sued upon any contract entered into with respect to, or any tort committed incident to, the exercise by the government of Guam of any of its lawful powers...

48 U.S.C. § 1421(a)

PUERTO RICO:

All inhabitants continuing to reside in Puerto Rico who were Spanish subjects on the 11th day of April 1899, and then resided in Puerto Rico, and their children born subsequent thereto, shall be deemed and held to be citizens of Puerto Rico, and as such entitled to the protection of the United States, except such as shall have elected to preserve their allegiance to the Crown of Spain on or before the 11th day of April 1900, in accordance with the provisions of the treaty

of peace between the United States and Spain entered into on the 11th day of April 1899; and they, together with such citizens of the United States as may reside in Puerto Rico, shall constitute a body politic under the name of the people of Puerto Rico, with government powers as hereinafter in this chapter conferred, and with power to sue and be sued as such.

48 U.S.C. § 733

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