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October 2, 1974

MEMORANDUM FOR MARIANAS POLITICAL STATUS COMMISSION FILE

SUBJECT: Applicability of U.S. Constitution--5th, 6th and 7th Amendments.

The United States representatives on the Joint Drafting Committee have raised the question how the grand jury provisions of the 5th Amendment, the criminal jury trial provisions of the 6th Amendment and the civil jury trial provisions of the 7th Amendment should apply in the Marianas under the new status agreement. This memorandum reviews the manner in which these provisions apply in the States, in Guam and in the Virgin Islands, and then proposes two alternative positions the Commission might take.

Grand Jury

A. States. The grand jury requirement of the 5th Amendment applies only to the federal government and does not apply to the States through the 14th Amendment, Hurtado v. California, 110 U.S. 516 (1884); Gosa v. Mayden, 413 U.S. 665 668 n.l. (1973).

B. Guam. By an amendment to the Guam Organic Act in 1954, 48 U.S.C.A. § 1424(b) (Supp. 1974), Congress provided that

"No provisions of [the Federal Criminal and Civil Rules of Procedure] which authorize or require trial by jury or the prosecution of offenses by indictment by a grand jury instead of by information shall be applicable to the District Court of Guam unless and until made so applicable by laws enacted by the Legislature of Guam."

See also Fed. R. Crim. P. 54(a) ("all offenses shall continue to be prosecuted in the District Court of Guam . . . by information as heretofore except such as may be required by local law to be prosecuted by indictment by grand jury"). Under this provision a grand jury indictment was not required either for federal crimes or local crimes. In 1968 Congress passed the Mink Amendment extending the 5th Amendment to Guam with "the same force and effect there as in the United States or in any State of the United States," 48 U.S.C.A. § 1421b(u) (Supp. 1974). The potential conflict between these two provisions was resolved in Guam v. Inglett, 417 F.2d 123 (9th Cir. 1969). In that case the court held that the

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5th Amendment would apply in Guam as it does in a State, so that a grand jury indictment was not required where a local crime was being prosecuted in the District Court of Guam. However, the court did state that a grand jury indictment would be required if a federal crime were being prosecuted, although a local crime was the only one involved in Inglett.

C. Virgin Islands. The Mink Amendment also extended the 5th Amendment to the Virgin Islands. 48 U.S.C.A. § 1561 (Supp. 1974). The Mink Amendment specifically provides "[t]hat all offenses shall continue to be prosecuted in the district court [of the Virgin Islands] by information as heretofore, except such as may be required by local law to be prosecuted by indictment by grand jury." Id. See also Fed. R. Crim. P. 54(a). Thus in the Virgin Islands neither local crimes nor federal crimes need be prosecuted by indictment.

Trials in Criminal Cases

A. States. The Constitution requires that a State provide a criminal defendant with a trial by jury, although the jury need not consist of twelve persons and, at least in non-capital cases, may return a guilty verdict with less than a unanimous vote. Williams v. Florida, 399 U.S. 78 (1970); Apodaca v. Oregon, 406 U.S. 404 (1972).

B. Guam. Prior to the Mink Amendment, there was no right to a jury trial in a criminal case--local or federal--in the District Court of Guam. e.g., Hatchett v. Guam, 212 F.2d 767 (9th Cir.) cert. dismissed, 348 U.S. 801 (1954). See 48 U.S.C.A. § 1424(b) (Supp. 1974). But cf. Reid v. Covert, 354 U.S. 1 (1957) (discussed below). The Mink Amendment extended to Guam both the 6th Amendment and the 2nd sentence of Section 1 of the 14th Amendment. Thus a jury trial is now certainly required when federal crimes are being prosecuted, although by analogy to Inglett there may be more flexibility in the kind of jury trial which must be provided when local crimes are involved.

C. Virgin Islands. As in other unincorporated territories, the 6th Amendment does not apply to the Virgin Islands unless specifically extended. Virgin Islands v. Bodle, 427 F.2d 532 (3rd Cir. 1970). But since 1954 the Virgin Islands Organic Act has specifically provided for jury trials in criminal cases, 48 U.S.C.A. § 1616 (Supp. 1974) ("[a]ll criminal cases originating in the district court shall be tried by jury upon demand by the defendant or by the Government"; the local legislature may provide a jury of six persons in misdemeanor cases). And the Mink Amendment extended the 6th and relevant portions of the 14th Amendment to the Virgin Islands. Thus,

since the District Court of the Virgin Islands has jurisdiction over all serious crimes, whether local or federal, a jury trial is available on demand for important crimes in the Virgin Islands. Virgin Islands v. Parrott, 476 F.2d 1058 3rd Cir. 1973).

Jury Trials in Civil Cases

A. States. The requirement of a jury trial in civil actions where the value of the matter in controversy exceeds twenty dollars contained in the 7th Amendment is not applicable to the States through the 14th Amendment, Minneapolis and St. Louis R.R. v. Bombolis, 241 U.S. 211 (1916).

B. Guam. Prior to the Mink Amendment, there was no right to a jury trial in civil cases in Guam, e.g., American Pac. Dairy Prod. Inc. v. Siciliano, 235 F.2d 74 (9th Cir. 1956). See 48 U.S.C.A. § 1424(b) (Supp. 1974). But the Mink Amendment extended the 7th and relevant portions of the 14th Amendments to Guam. A jury trial in a civil case is therefore required at least where there is a federal jurisdiction (either diversity or federal question), as opposed to local, jurisdiction. By analogy to Inglett, the 7th Amendment requirement should not apply where there is solely local jurisdiction, though no case on this point has been found.

C. Virgin Islands. The Mink Amendment also extends the 7th and relevant portions of the 14th Amendment to the Virgin Islands. The treatment of the Virgin Islands should be the same as the treatment of Guam.

Alternative Positions

Treatment as a State. One alternative--indeed, the position we have up to now taken in the Joint Drafting Committee--would be to have the Marianas treated as a State is treated for purposes of the 5th, 6th and 7th Amendments. As can be seen, this would mean that federal crimes of sufficient severity would have to be prosecuted by indictment in the District Court for the Mariana Islands, that a jury of twelve persons (required to return a unanimous verdict) would be required in federal criminal cases, and that civil juries would be provided in appropriate cases under federal jurisdiction. On the other hand, local crimes of any severity could be prosecuted with or without indictment depending on local law, local crimes could be tried to juries of less than twelve or with less than a unanimous verdict, and there would be no requirement of juries in civil cases arising under local laws and outside federal jurisdiction. Provison could be made in the status agreement to assure that the District Court

of the Marianas would be considered a local court for purposes of the provisions of the Constitution when it sat with solely local jurisdiction. This approach has the advantage of being well known in our federal system and of providing the Marianas with the same kinds of protection for local preferences as is provided to the States,

There is some concern, however, that it would be undesirable to require grand jury indictments and trials by juries in view of the small number of people in the Marianas and the possibility that the interrelationships of the population would make it too difficult to secure convictions.

Flexible Treatment. Another alternative would be to permit the local legislature to determine the extent to which indictments would be required, or juries in criminal and civil cases provided--in both local and federal causes of action. This would give the Marianas a degree of control over the prosecution of federal causes of action with the States do not have, but which the Virgin Islands (at least with respect to indictments) has, and which Guam (apparently with respect to indictments and civil and criminal juries) once had. I am very concerned, however, about not requiring a jury trial in criminal cases. Jury trials in federal and local criminal cases are now required in the States and in the Virgin Islands and in Guam. In addition, Reid v. Covert, 354 U.S. 1 (1957) and Kinsella v. United States, 361 U.S. 234 (1960), indicate that American citizens have a right to a trial by jury and to an indictment when the federal government acts against them in a foreign country, although since these cases fell short of overruling the Insular Cases, e.g., Downes v. Bidwell, 182 U.S. 244 (1901), their applicability to the territories is not clear. Moreover, while the Covenant proposed by the United States provided an exception for the Marianas from the indictment requirement and from the civil jury trial requirement, it did not provide an exception from the jury trial in criminal cases requirement. Accordingly, if we are to provide any flexibility, I think it should extend only to the 5th and 7th Amendments, and not to the 6th.

One method of providing flexibility would be to insert a provision into the status agreement (probably Title V) like the following:

"Nothing in this Agreement or in the provisions of the United States Constitution or federal laws applicable within or with respect to the Northern Marianas Islands shall provide a right to an indictment by grand jury or a right to trial by jury in non-criminal cases unless and until provided for by laws enacted by the legislature of the Northern Marianas Islands."

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*/ The contention that Reid and Kinsella require a grand jury indictment for the prosecution of a felony in the name of the United States in the Virgin Islands was rejected in Virgin Islands v. Rojas, 255 F. Supp. 126, 129 (D.C.I., 1968).

The legislative history of this provision should make it clear that it applies to the District Court for the Northern Marianas Islands, whether it sits with federal or local jurisdiction, as well as to the local courts established by the Northern Marianas Islands. Other provisions of the status agreement, such as Section 402(b) in the current working draft, should make clear that the 6th Amendment requirement of a jury trial in a criminal case applies within the Northern Marianas Islands as it does within a State--that is, with the full force of the 6th Amendment with respect to a federal crime, but only through the 14th Amendment with respect to a local crime, either in the District Court or in a local court.

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