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MEMORANDUM

Subject: Recommendations Concerning Disputed Portions of the Joint Drafting Committee Working Draft of the Northern Mariana Islands Status Agreement

There follows a summary of recommendations for the Commission to consider with respect to the issues raised by the Northern Mariana Islands Status Agreement which the Joint Drafting Committee was unable to resolve. Unless otherwise noted, references are as follows:

"CA" -- MPSC Commonwealth Agreement of May 1974

"Cov." -- U.S. Covenant of May 1974

"Committee Working Draft" -- Draft Status Agreement prepared by the Joint Drafting Committee, November 1974

"Explanatory Memorandum" -- Memorandum prepared by Wilmer, Cutler & Pickering concerning the Committee Working Draft, November 1974

Format (Explanatory Memorandum at 3-4). We continue to believe that a statement of general principles is unnecessary and undesirable. However, in view of the Ambassador's strong and personal interest in such a statement, we believe the Commissions interests would not significantly be harmed if it agreed to a carefully drafted statement.

Title (Explanatory Memorandum at 4). We recommend that the Commission agree to substitute the word "Covenant" for the word "Agreement" in the title. While we are unimpressed with the United States' argument, we do believe it is possible that the word "Covenant" might be interpreted to have substantive effect beneficial to the Marianas -- as it has been claimed that the word "Compact" used with respect to Puerto Rico has for that Commonwealth. In any event, we do not think the interests of the Commission can be harmed by the change.

United States Legislative Authority (Explanatory Memorandum at 10-11; Committee Working Draft § 105). The manner in which limits on U.S. legislative authority is to be phrased was the subject of extended discussion in the Joint Drafting Committee. We believe that this is an area in which a somewhat less precise articulation of the limitation may satisfy the interests of the Northern Mariana Islands and still be acceptable to the United States. We recommend that the Commission consider putting forward at an appropriate time during this session of negotiations the following substitute for Section 105 of the Committee Working Draft:

> "Consistent with the right of local self-government of the people of the Northern Mariana Islands, the United States may enact federal legislation applicable to the Northern Mariana Islands."

This formulation contains two implicit restrictions on the authority of the United States. First, it requires that legislation enacted by the United States applicable to the Northern Mariana Islands be "[c]onsistent with the right of local self-government of the people". While the right of local self-government is not clearly defined in the Agreement or elsewhere, the limitation does imply that the power of Congress is not plenary, and provides the basis for an argument to the Congress or, failing that, to a court, see Committee Working Draft Section 903, that a particular piece of legislation so interferes with local affairs as to be inconsistent with the right guaranteed by Section 103 of the Agreement. Second, the word "federal", modifying legislation, implies that the appropriate kind of legislation which the United States may make applicable to the Northern Mariana Islands is legislation which grows out of the United States role as the central government -- the role it plays with respect to the States -- and not its role under Article IV, Section 3, Clause 2 as the plenary authority with respect to the territories.

We have not discussed the substitute wording proposed here with the United States Delegation, so we cannot predict whether it will in fact be acceptable to them, even if acceptable to the Commission. The wording is, however, somewhat similar to a portion of Title V of the Cov., which read:

> "The legislative powers of the United States will be exercised with strict regard for the preservation of internal self-government in the Northern Mariana Islands."

Mutual Consent (Explanatory Memorandum at 12-14; Committee Working Draft §105). The United States has insisted that the mutual consent list not expand beyond its present state in the Committee Working Draft. We believe, on the other hand, that the additional provisions which we have recommended be included on the mutual consent list are of considerable substantive importance to the Northern Mariana Islands and should properly be included on the mutual consent list -- with the possible exception of Section 702. If the United States provides a memorandum from the Office of Legal Counsel of the Department of Justice demonstrating that Section 702 is in the nature of a contract with, and therefore enforceable in court against, the United States, regardless of whether it is on the mutual consent list or not, we recommend to the Commission that Section 702 be taken off of the list, for this protection is essentially the same as that provided by the mutual consent provision. We are informed that the Office of Legal Counsel is preparing such a memorandum.

If Section 702 is taken off of the list then the difference between the Commission and the United States revolves around only three portions of the Committee Working

Draft: Sections 503, 805 and 806, all of which involve issues of great sensitivity in the Northern Mariana Islands. However, of the three, the least important seems to be Section 503, for it has effect only between the approval of the Agreement and the termination of the Trusteeship Agreement. After termination the Congress may make the laws described in Section 503 (the immigration and naturalization laws, certain maritime laws, and the minimum wage provisions of the Fair Labor Standards Act) applicable in one manner or another to the Northern Mariana Islands.

It may be worth noting in this connection that during the initial deliberations of the Joint Drafting Committee the United States senior representative provided a list of those sections of the status agreement which the United States thought should be subject to mutual consent. This list included "provisions granting the local government authority to restrict land alienation" and "provisions placing safeguards against the exercise of the power of eminent domain" -- essentially, what are now Sections 805 and 806. The Commission may wish to make this point to the United States in its discussions.

With respect to Section 105(c) of the Committee Working Draft -- providing that consent to a change in a fundamental provision of the status agreement on behalf of the Northern Mariana Islands cannot be given before termination without a vote of the local legislature -- we recom-

mend that the Commission agree to the U.S. proposal to drop the Section with an appropriate addition to the negotiating history. In view of the blatant breach of good faith that would be involved if the United States attempted to change a fundamental provision of the status agreement by dealing with the Marianas Executive, we are persuaded that the United States would not attempt, and in any event could not succeed, in changing the status agreement in this manner.

One final technical point should be made concerning the mutual consent provision. Since there will have to be some re-wording of the competing versions of Section 105 of the Committee Working Draft anyway, we believe it might be desirable to separate the statement of the legislative authority of the United States from the mutual consent list, so that the presence of the list both looks less intrusive on U.S. power and is not taken to imply that that power is otherwise plenary. The mutual consent list might become a new Section 106, or might be inserted as a new Section 103, following existing Section 102 (which states that the status agreement will govern the relations between the Northern Mariana Islands and the United States). In either event, the provision could take the following straightforward and simple form:

> "Section . The fundamental provisions of this Agreement [including those in] Articles I, II and III and Sections 501, 503, 702, 805 and 806 may be modified

> only with the consent of the Government of the Northern Mariana Islands and the Government of the United States."

Approval of the Local Constitution by the United States (Explanatory Memorandum at 14 ; Committee Working Draft § 202, § 100[2]). We believe that the language put forward in brackets in Section 202 of the Committee Working Draft is a sensible compromise which provides the United States with the flexibility it needs but which assures the Northern Mariana Islands that the local Constitution will promptly be dealt with. If the concern of the United States is that it needs more time than sixty days, this concern could certainly be met by increasing the time provided by the bracketed material in Section 202 to 90, 120 or even 150 days.

Requirement of Grand Jury Indictment and Civil and Criminal Jury Trials (Explanatory Memorandum at 17-20; Committee Working Draft § 501). The Commission is in much the best position to gauge the impact of the requirement of grand jury indictments and jury trials in the Northern Mariana Islands. We are inclined to recommend that the Commission choose treatment like that of a State, rather than the more flexible treatment which the United States has offered. This recommendation is based in part on the fact that Guam now, by judicial interpretation, is so treated.

It is also based on the possibility discussed in the memorandum at Tab A -- a possibility which is admittedly remote at present -- that American citizens will be held to have a right to a grand jury indictment in federal criminal cases regardless of the geographic location of the proceeding. On the other hand, there is precedent for the more flexible treatment which the United States has stated it will agree to. If the flexible treatment alternative is chosen, we recommend, for reasons stated in the memorandum at Tab A, that the authority of the local legislature not extend so far as to permit it to eliminate jury trials in serious criminal cases.

Automatic Effectiveness of the Final Recommendations of the Commission on Federal Laws (Explanatory Memorandum at 20-21; Committee Working Draft § 504). In view of the general Executive Branch policy and the wide-ranging effect that the recommendations of the Commission on Federal Laws might have -- and considering that less than a majority of the members of that Commission will be from the Northern Mariana Islands -- we are inclined to believe this should be a low priority item for the Commission. This view is reinforced by the fact that the Marianas will have a considerably greater degree of protection against the misapplication or non-application of federal laws than did other territories joining the American political family. This is so because Section 502

of the Committee Working Draft contains a formula which, with certain exceptions, makes applicable to the Marianas the bulk of federal laws which are applicable to Guam. On the other hand, we see no reason that the United States should refuse to pay the costs of the Federal Laws Commissions's work. At most, it seems to us, the Marianas should bear the salary costs of the Marianas members, but even this seems unnecessary.

Naturalization (Explanatory Memorandum at 22-23; Committee Working Draft § 506). There is some force in the U.S. argument that it is inappropriate to attempt to determine now for all time the naturalization provisions which will be applicable to the Northern Mariana Islands; and there is some force to its argument concerning the sensitivity of this issue among representatives of the territories. Moreover, as the Commission is aware, the naturalization provisions in the CA (and now in bracketed Section 506 of the Committee Working Draft) might discourage persons with desirable talents and abilities from coming to the Marianas.

If the Commission does decide to reconsider its position in this area, we believe that the United States proposal reflected in its version of Section 506 of the Committee Working Draft does provide certain benefits. If there is no such provision, then close relatives of persons who are citizens of the United States and who reside in the

Northern Mariana Islands would not have an opportunity to come to the Marianas and become United States citizens after termination of the Trusteeship, unless Congress had acted to make the naturalization laws applicable. Thus the "gap" which the United States foresees as being created by Section 503(a)(1) of the status agreement is a real one. Their proposal to close that gap in part by their version of Section 506, while not fully responsive to the Commission's concerns, cannot harm the Commission's interests. As a practical matter, the existence of such a provision in the status agreement, even though Congress would have the authority to alter it after termination, might deter Congress from acting until the effect of the provision could be assessed. Further, placing such a provision in the status agreement would avoid the Marianas being placed in the position of having to ask Congress to make the naturalization laws applicable after termination so that close relatives of persons in the Marianas could establish residency and eventually become United States citizens.

We have not had an opportunity to do a thorough technical review of the United States version of Section 506. We do wish to bring to the Commission's attention, however, that the definition of close relatives in the Immigration and Naturalization Act does not include brothers and sisters. The Commission had previously expressed concern about this definition of close relatives.

Local and Federal Income Tax (Explanatory Memorandum at 23-26; Committee Working Draft §§ 601, 602). After considerable analysis we have concluded that if the original system agreed to by the principals is to be abandoned, the Guam system is probably a satisfactory alternative. In addition to the arguments put forward by the United States, we have been influenced by the following points. First, there would be no objection in Congress to the status agreement insofar as the tax system was concerned if that system was the same as Guam's. Second, if, as seems most likely, the Northern Mariana Islands does not have a non-voting delegate in the Congress for at least some period of time, accepting the Guam system assures an institutional structure which will facilitate the resolution of any difficulties raised by that system, for the same difficulties would presumably be arising in Guam (and perhaps the Virgin Islands), and the non-voting delegate would have a political incentive to resolve them. Third, the interference of the Guam system with local self-government can be viewed as fairly minimal. The federal tax system applies, to be sure, but this is true in a State as well. And, unlike a State, the Northern Mariana Islands would have administrative control of the federal tax system and would receive all of the funds raised by it. The Northern Mariana Islands would be free to impose its own tax system -- income taxes, property taxes, and sales or other taxes --

and to modify the effect of the federal tax system through rebates, as is done in Guam.

For these reasons, we recommend that the Commission seriously consider a compromise along the following lines. The federal income tax system which is now applicable in Guam will also apply in the Northern Mariana Islands. But the authority of the Northern Mariana Islands to impose its own tax system, and to provide for rebates from the funds received under the Guamanian system, would be explicitly recognized. The net effect of this system would be that the Marianas would be treated much like a State of the Union, except that it would collect the federal tax and would be able to use those funds for its own purposes. The language proposed by the United States in Section 602 does not satisfactorily implement this suggestion, so new language will have to be developed if the Commission agrees to this proposal

Goals of Financial Assistance (Explanatory Memorandum at 26-27; Committee Working Draft § 701). We consider the U.S. opposition to the bracketed language in Section 701 of the Committee Working Draft to be wholly unwarranted, and we recommend that the Commission continue to insist on its position. Section 701 of the Committee Working Draft, after all, simply states goals; and it does provide that the Government of the United States will undertake together with the Government of the Northern Mariana Islands measures

which will assist the achievement of those goals. We do not think it too much to ask the United States to assist in reaching this goal, since the people of the Northern Mariana Islands will be American citizens.

Multi-Year Financial Commitment (Explanatory Memorandum at 27-28; Committee Working Draft § 702). If the Commission is unable to persuade the United States to word Section 702 so that the approval of the Agreement is explicitly an authorization and an appropriation, we recommend that alternative wording be proposed which will make the Section a guarantee by the United States that the funds will be provided. This wording will have two advantages. First, it will reinforce the notion that the United States does not have discretion to decline to provide the funds. Second, it may discourage extensive hearings concerning the use of the funds by the Northern Mariana Islands because the Congress will be committed to provide such funds in any event.

Land Issues in General (Explanatory Memorandum at 28-33 ; Committee Working Draft §§ 801-804. All of the issues raised by Sections 801 to 804 of the Committee Working Draft will require the attention of the Commission at this session of negotiations. Section 801, as proposed in the Committee Working Draft, seems to us to protect the basic interests of the Commission in assuring that the real property in the Northern Mariana Islands which is now owned

or held by the Trust Territory Government becomes the property of the local government no later than termination. Of course, it is expected that the bulk of the property will promptly be transferred to the local government, perhaps even before separate administration, under the United States Land Policy Statement. Section 801, then, serves as a guarantee that the Marianas will gain control of public land within its borders no later than termination. The disposition of the personal property of the Trust Territory is a difficult matter with which the Marianas Government and the Trust Territory Government, as well as the United States, will have to deal -- primarily at the time of separate administration. The Committee Working Draft version of Section 801 assures that the Marianas will be treated equitably in this regard.

Section 802 raises one of the most fundamental issues remaining to be resolved. The Commission's version of this Section provides that the land use arrangement between the United States and the Northern Mariana Islands will take the form of a lease rather than a sale. As the Commission well knows, the United States has insisted on being able to purchase the land upon termination of the Trusteeship.

Section 803 of the Committee Working Draft deals with the terms of the land use arrangement. With respect to the United States proposal of a technical agreement, we

recommend that the Commission proceed with caution. The terms of the lease or other land use arrangement are of fundamental importance; they will be reviewed with care by the District Legislature and the people of the Northern Mariana Islands. We feel that at the very least the status agreement should contain a narrative describing the most important aspects of the lease, even if this is done in less detail than is presently found in the Commission's version of Section 803(b) of the Committee Working Draft. We also question the wisdom of the United States version of Section 803 of the Committee Working Draft in requiring that the District Legislature approve the technical agreement separately from the status agreement. We think it wiser to incorporate the technical agreement by reference into the status agreement so that approval of the status agreement by the District Legislature, the people in a plebiscite, and the United States Congress will also constitute approval of the technical agreement, if there is one.

Section 804 deals with military retention land. The United States has agreed, by concurring in Section 804(a), to cancel all Use and Occupancy Agreements relating to military retention land upon the establishment of the new Government of the Northern Mariana Islands, other than those relating to land which is needed for federal civilian governmental purposes. We believe it entirely appropriate for the Commission to insist that the land needed for civilian governmental purposes -- which essentially means the Post Office and

the Coast Guard land -- and the joint use agreement for Isely Field be renegotiated prior to termination, when they would in any event expire, as is done by the proposed Section 804(b). However, we also believe that the precise terms of the arrangements for that land ought to be left to be determined at another time, outside the context of political status negotiations.

There are other important outstanding issues in the land area as well. One concerns the method of payment; another, the amount of payment for the land to be made available to the United States for military purposes. As the Commission is aware, the United States has offered to make a lump sum payment of approximately $11.7 million for title to these lands. The counter-offer which we have prepared for the Commission's consideration would permit the United States to obtain a lease for 50 years together with an option to renew for another 50 years; it would require that the United States pay $32.9 million for the first 50 years, and make a second payment reflecting just compensation for the rights which it obtained upon exercise of its option. Presumably the United States will agree to an initial lump sum payment; but it will oppose making a second payment upon exercise of the option, and it will want to pay far less than $32.9 million in any event.

The Commission cannot and should not settle for a payment for land below that which it considers fair and which

can defend before the District Legislature and the people. The Commission should keep in mind at the same time that there are many ways within the package of issues raised by Sections 801 through 804 of the Committee Working Draft to secure economic benefits for the people of the Northern Mariana Islands besides the large influx of money upon the grant to the United States of land use rights. For example, those provisions of Section 803 which require the United States to reimburse the Northern Mariana Islands for the costs incurred in obtaining title and clearing encumbrances from the land to be made available to the United States may provide important savings to the Northern Mariana Islands. The same may be said for the provisions requiring a second payment upon the exercise of the option for the second fifty years; requiring reversion of the land without payment by the Northern Mariana Islands if the United States does not make use of the land for the purposes for which it was leased; requiring leasebacks to the Government of the Northern Mariana Islands on a nominal fee -- as opposed to a fair market value -- basis; and requiring maximum use of the resources and services of the people of the Northern Mariana Islands in construction and supply activities relating to the property. These provisions provide concrete financial benefits to the people of the Northern Mariana Islands. They also, of course, impose costs on the United States. The United States commitment to use the bulk of the land at Tanapag

Harbor for a memorial park containing recreational facilities for the people of the Marianas is in the same category.

It does not seem to us inappropriate for the Commission to consider the value of such benefits to the people of the Northern Mariana Islands and the cost to the United States in determining the total amount which it is willing to accept in return for the interest in land to be granted to the United States. Accordingly, we suggest that the Commission analyze the provisions of Sections 801 through 804 of the Committee Working Draft with the goal in mind of determining those which are most important to it, both financially and otherwise. The Commission might then formulate a single proposal dealing with all of the outstanding issues between the parties relating to the transfer of land to the United States Government in a manner which is acceptable to the Commission and which it feels will be acceptable to the District Legislature and to the people. If a single proposal can be worked up, there might be tactical advantages for the Commission if, at an appropriate time in the negotiations -- after the United States has formally presented its views on these issues, perhaps -- the Commission put forward the entire package.

Restraints on Alienation (Explanatory Memorandum at 34-35; Committee Working Draft § 805). Since the members of the Commission generally favor the imposition of

land alienation restraints, a possible resolution of the difference between the principals would be for the Commission to agree in the statement of the negotiators' intent that it will recommend to the Constitutional Convention that land alienation restrictions be imposed. The status agreement itself would then be worded in the manner suggested by the Commission. A similar compromise might be put forward with respect to the U.S. proposal that limits on public land holdings be required. The Commission would undertake to support such limitations -- in connection with the establishment of a legal entity to receive and hold public land in trust for the people, or in the Constitutional Convention or the first legislature of the new Government of the Northern Mariana Islands -- and, Section 805 would be worded in the manner suggested by the Commission.

Future United States Land Acquisition (Explanatory Memorandum at 35-39; Committee Working Draft §§ 806-807). As noted in the Explanatory Memorandum, the U.S. proposals with respect to eminent domain represent no compromise on its part at all. We believe that the proposal put forward by the Commission's representative and reflected in Section 806(c) of the Committee Working Draft is entirely reasonable. The protection provided by this Section, of course, is not as great as that which would have been provided by the Commission's original proposal in the CA. But the Section does

assure that before land is taken by eminent domain for any significant period the Northern Mariana Islands will have an opportunity to present its objections to the Congress of the United States, through the Resident Commissioner in Washington or a non-voting delegate or otherwise. This should be a deterrent to the hasty or unnecessary exercise of the power of eminent domain by an executive agency.

One alteration of the position reflected in Section 806(c) which the Commission might consider would be to require specific congressional approval of the exercise of the power of eminent domain to be obtained only if the Northern Mariana Islands Government did not approve of the involuntary taking. This would mean that the United States Executive Branch would not, necessarily have to seek congressional approval in each instance. It would, on the other hand, require the Commonwealth Government to accept and to exercise the political responsibility of approving or opposing particular land acquisitions by the United States; but this may be a political responsibility which the new Government should be prepared to confront.

Washington Representation (Explanatory Memorandum at 39-40; Committee Working Draft § 901). One possible compromise position with respect to this issue would be to provide for a single non-voting delegate from the Western Pacific Islands to be selected by the people of Guam and the

Northern Mariana Islands. The United States Delegation has indicated that it would be receptive to this proposal, but the Commission has previously rejected it.

If the Commission does decide to agree to the United States version of Section 901 of the Committee Working Draft, we recommend that the Commission insist first, that the official be called a Resident Commissioner, not a Resident Agent; second, that the United States bear the cost of the Resident Commissioner; and third, that the United States Executive Branch agree to propose to and vigorously support in Congress a proposal that the Resident Commissioner be granted non-voting delegate status by the House, as was done for the Resident Commissioner from Puerto Rico shortly after his selection in the early, 1900's.

Marianas Participation in International Affairs (Explanatory Memorandum at 40-41; Committee Working Draft § 904(c)). We are unable to understand the reasons for the United States' refusal to maintain the position it had previously taken with regard to the substance of this Section, in view of the degree of control the United States would retain under the Section's terms. If this is a matter of importance to the Commission, the Commission might well insist on its position, notwithstanding the as-yet-incomplete policy review of the area by the United States.

Participation in the Plebiscite (Explanatory Memorandum at p. 41; Committee Working Draft § 1001(a)). The Commission is in much the best position to assess the need for restrictions in the status agreement beyond those in Trust Territory law to assure that only persons truly interested in and affected by the change in political status vote in the plebiscite. The United States version has some emotional appeal but may not be the best way to implement the policy objective because it establishes a classification which may raise objections in the Marianas, the United States or the United Nations. The alternative put forward by the Commission's representative -- to add the requirement of domicile to the requirements of Trust Territory law for purposes of determining eligibility to vote in the plebiscite -- may be preferable. Since a person can have only one domicile, only those whose future is tied to the Marianas would be able to vote.

Efforts to Terminate the Trusteeship (Explanatory Memorandum at 42; Committee Working Draft § 100[3]). While prompt termination would bring a quick end to the power of the United States as administering authority and would result in U.S. citizenship in the immediate future, there are arguments on the other side. Under the Committee Working Draft of the status agreement the bulk of federal laws, and many

of the beneficial provisions of the status agreement will become effective prior to termination. And under Section 503 certain laws of the United States, including the immigration and naturalization laws, cannot be made applicable to the Northern Mariana Islands prior to termination. Thus it may be in the interest of the Commission to withdraw from the position it has previously taken and which is reflected in the bracketed sentence in Section 100[3] of the Committee Working Draft.

Separate Administration (Explanatory Memorandum at 42; Committee Working Draft § 100[7]). Since the matter of separate administration is one which has been dealt with by the Mariana Islands District Legislature by a resolution adopted at its last session, and since the basic point the United States makes appears to be correct -- i.e., by the time the status agreement is approved, separate administration should be a reality -- we do not believe that the Commission need insist on the inclusion of this Section in the status agreement.