March 20, 1974

MEMORANDUM FOR MS. KRAMER

Subject: Marianas Status Agreement -- Section 302(c)

Section 302(c) of the January 19th draft of the status agreement provides:

> "No statutory law of the United States enacted after the effective date of this section shall have any force or effect in the Commonwealth of the Mariana Islands unless specifically made applicable by reference to the 'Commonwealth of the Mariana Islands.'"

This provision is based on section 25(b) of the Organic Act of Guam, 48 U.S.C.A. § 1421c(b) (1952), which provided:

> "Except as otherwise provided in this chapter, no law of the United States hereafter enacted shall have any force or effect within Guam unless specifically made applicable by act of the Congress either by reference to Guam by name or by reference to Guam by name or by reference to 'possession.'"

I am concerned about the effect of Section 302(c) for several reasons.

First, Section 25(b) of the Organic Act of Guam was repealed by Section 7 of the Guam Elective Governor Act, P. L. 90-497, see 48 U.S.C.A. § 1421c(b) (Supp. 1973). According to H. R. Rep. No. 1521, 90th Cong., 2d. Sess., reprinted in 1968 U. S. Code Cong. 3564, 3568, this section was repealed because it "is an unusual provision and is inconsistent with standard references in federal laws to the territories." The recent repeal of this portion of the Guam Organic Act indicates that Congress may not be receptive to Section 302(c) of the draft Status Agreement. This is particularly true in view of the fact that Section 302(c) provides that the statutory laws of the United States enacted after the effective date shall have no effect in the Marianas unless specifically made applicable there by reference to the Commonwealth of the Mariana Islands. Section 25(b) of the

Organic Act of Guam, on the other hand, permitted Congress simply to use the term "possessions" to make a law applicable in Guam.

Second, and more fundamentally, a provision like Section 302(c) of the draft Status Agreement or Section 25(b) of the Organic Act of Guam may create more trouble than it is worth. The section is of little practical importance with respect to major bills which create new federal programs or significantly alter existing federal programs. These bills generally carry with them a definition of the word "state," which includes the territories and possessions. E.g. federal Water Pollution Control Act of 1973, 33 U.S.C.A. § 1362(3) (Supp. 1973) (state defined to include D.C., P.R., V.I., Guam, American Samoa, and TTPI). On the other hand, a serious problem can arise with respect to amendments to existing legislation or more ordinary bills. The risk exists that the Commonwealth will not be mentioned in these amendments or bills, and therefore that the bills or amendments might not apply in the Commonwealth even when it is desirable they do so. This problem is especially grave if the present wording of Section 302(c) is retained, and the Marianas does not get a non-voting delegate. An example from the Guamanian experience makes this point clear. 46 U.S.C. § 251 used to provide that only certain vessels "shall be deemed vessels of the United States entitled to the privileges of vessels employed in the coasting trade or fisheries." The effect of this law, which dated back to 1793, was to prevent foreign fishing vessels from landing their catches of fish at American ports unless permitted to do so under international agreements. Under the Bureau of Customs' regulations designed to enforce this law, however, "a device [was] possible whereby foreign fishing vessels without rights under international agreements [were] able, after making their catches, to obtain documentation as cargo vessels in their home or other foreign ports and, as such cargo vessels, . . . proceed to American ports and market their fish." H. R. Rep. No. 2934, 81st Cong., 1st Sess., reprinted in 1950 U. S. Code Cong. 3539, 3540. Congress accordingly amended Section 251 "by adding further specifications which will, in the future, make impossible the employment of the afore-described device." Id. The amendment, enacted on September 2, 1950, made no mention of Guam. Accordingly in 1953 the Bureau of Customs ruled that the amendment "has no force or effect within Guam because the Act is not specifically made applicable, either by reference to Guam by name or by reference to 'possessions'." Bureau of Customs Marine Circular No. 124 (June 12, 1953)

It is possible that in this instance the effect of Section 25(b) of the Organic Act of Guam may well have been favorable to that territory, for foreign flag ships are permitted to land their catches of fish there, and perhaps the legislation's failure to mention Guam was purposeful, though the Report makes no such comment. It is easy to imagine, however, circumstances in which the Guamanians would prefer to have this particular law applicable in Guam. And it is equally easy to imagine a situation in which, though the Marianas wanted a particular law or an amendment to a law to be applicable in the Commonwealth, Congress might neglect to comply with Section 302(c).

If these are legitimate concerns, how do we handle them? One partial solution would be to alter Section 302(c) so it reads:

> "No law of the United States enacted after the effective date of this section shall have any force or effect in the Commonwealth of the Mariana Islands unless it is a law which amends an existing statute which is applicable in the Commonwealth of the Mariana Islands at the time the law is enacted, or unless it is a law which is expressly made applicable by reference to the 'Commonwealth of the Mariana Islands.'"

This takes care of the amendment problem, though not of the ordinary bill problem or of potential congressional reaction as indicated by repeal of Section 25(b) of the Organic Act of Guam. Whether this is more desirable than the present section depends on what you think the likelihood of the Marianas benefitting from the applicability of ordinary legislation is, and the chances of the Commonwealth being overlooked.

Another potential solution is to seek an arrangement whereby the Commonwealth has greater control over the applicability of federal laws than any existing territory. For example, the Commonwealth Agreement could allow the Commonwealth to prevent a federal law from becoming applicable (subject perhaps to a congressional override), or cause a federal law to become applicable (again subject to an override). These possibilities seem highly unrealistic.

Finally, we could drop Section 302(c) entirely. The question whether any given federal law applies in the Commonwealth, then, would turn -- in the absence of specific

language -- on congressional intent and on the limits of federal power in the Marianas. This plainly adds a good deal of uncertainty which could be avoided by Section 302(c) in one version or another. It is, of course, the same uncertainty with which Guam and the Virgin Islands live now, though they have non-voting delegates who can help assure that where the matter is important to the territory a law's coverage is clarified before enactment.

*/ I am inclined now to recommend dropping Section 302(c) though I could easily be talked into a version which at least takes care of the amendment problem. I would appreciate your views (and Bob Kelley's) either as to the substance of the problem or as to how we should proceed to come up with a recommendation for HPW and the client.

Michael S. Helfer

xc: Robert Kelley

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*/ If we drop Section 302(c) then we should re-word Section 302(a)(3) to make clear that it refers to laws passed by Congress between the signing of the agreement and the approval of the agreement by all parties (or the coming into effect of the Commonwealth Government, if that is preferable). In this interim (transition) period, a section like 302(a)(3) is desirable, for otherwise virtually all federal laws might become applicable (there being no limitation on federal power), or no laws might become applicable (the Marianas not being part of the U. S.), or those laws made applicable in the TTPI might become applicable (and this might be undesirable).