Mr. Almond

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21 January 1975

MEMORANDUM FOR CAPTAIN EDWARD C. WHELAN, JR.
EA&PR, ISA, OASD

SUBJECT: Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America - Outgrant of Land Acquired Under the Covenant

Mr. Harry H. Almond, Jr., Office of the Assistant General Counsel (International Affairs), has asked me to analyze possible legal impediments to the outgrant of lands to be acquired under the latest draft of the subject Covenant. The opinion that follows supplements Mr. Almond's written comments of 15 January 1975.

Article VIII of the proposed Covenant provides that upon the termination of the Trusteeship Agreement designated tracts of real property that have come under the authority of the Government of the Northern Mariana Islands will be leased to the United States Government. Section 803 specifies a lease term of 50 years with a renewal option for a like period. Subsection (c) states "The United States will lease back to the Government of the Northern Mariana Islands, at a nominal sum of $1 per acre per year, the following areas to be made available for purposes compatible with their intended military use: (1) On Tinian, approximately 6,400 acres; and (2) At Tanapag, 44 acres." I have been asked to verify the authority of the US Government to outlease lands in this manner.

Basic authority for the lease of DoD real property is found in 10 USC 2667:

> "(a) Whenever the Secretary of a military department considers it advantageous to the United States, he may lease to such lessee and upon such terms as he considers will promote the national defense or be in the public interest, real or personal property that is--
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> (1) under the control of that department;
> (2) not for the time needed for public use . . . ."

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The principal determinations that must be made are that the proposed outlease would be "advantageous to the United States" and that the land is "not for the time needed for public use." No doubt questions will be raised if the US needs the land enough to acquire it but, at the same time, US representatives are aware that, within the terms of this statute, this land will not be needed and thus may be outleased. This course of action is a matter of judgment to be exercised by the appropriate Secretary. I understand that some of the land designated for leaseback is needed for safety zones surrounding military airfields and other land will be used for occasional military maneuvers and training exercises. Thus there may be sufficient facts to rebut the possible allegation that the lease/leaseback arrangement is a device to bestow additional benefits on the people of the prospective commonwealth.

Another possible question concerns the nominal amount to be received by the Government in return for the outleases, substantially less than the acquisition cost. Since the statute permits the Secretary to specify the terms of the lease, his decision on the amount is a matter of judgment, not law. He is not prohibited from leasing for a nominal amount if this action would "promote the national defense or be in the public interest."

It is proposed that in some instances the land will be leased to designated individuals rather than to the Governmental body or by competitive procedures to the public at large. The DoD procedure for competitive selection of lessee is a matter of policy, not of law. It is within the discretion of the Secretary to waive the competitive procedures in appropriate circumstances.

Finally, it should be noted that DoD implementation will be preceded by several Congressional actions: the Covenant itself must be approved and authorization and appropriation legislation must be enacted. Thus, the application of the general procedures permitted under 10 USC 2667 will be validated in terms of the specific acquisitions and outgrants contemplated by the draft Covenant.

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David W. Ream
Office of the Assistant
General Counsel (Logistics)