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January 23, 1975

MEMORANDUM TO H. P. WILLENS

RE: Northern Marianas Plebiscite Eligibility Requirements

Under Section 1001, no person will be eligible to vote in the plebiscite who is not (1) domiciled in the Northern Mariana Islands and (2) eligible to vote in an election for the Northern Mariana Islands District Legislature if such elections were held on the day of the plebiscite. To satisfy the second requirement in all material respects, a person must be (a) a citizen of the Trust Territory, and (b) a resident of his Northern Mariana Islands electoral precinct for one year preceding the election, who (c) has registered to vote prior to the closing registration date as established by the Northern Mariana Islands Election Commission (Section 175(5)).*/ Section 1001's voter qualifications are designed to insure that only bona fide Northern Marianans participate in the electoral act of self-determination, or, conversely, to prevent other "peoples" who are not as directly involved or affected from contaminating or "raiding" the plebiscite. These provisions, in effect, exclude non-domiciliaries; non-citizens; persons including domiciliaries, citizens and residents who have only become residents of the

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*/ A special registration date will be established for the plebiscite.

Northern Mariana Islands District within a year preceding the plebiscite; and persons, again including domiciliaries, citizens, and residents, who have been residents of the District for the required year but who have moved their residence from one precinct to another within the District during the year.

I. Status of § 1001 Voting Eligibility Requirements Under U.S. Constitution

A. U.S. Constitutional Law

The exclusion of non-domiciliaries and non-citizens presents no constitutional problems. Dunn v. Blumstein, 405 U.S. 330, 337 n. 7, 342 n. 13, 343 (1972); Evans v. Cornman, 398 U.S. 419, 421 (1970); Kramer v. Union Free School District, 395 U.S. 621, 625 (1969) ("States have the power to impose reasonable citizenship . . . and residency requirements on the availability of the ballot"); Carrington v. Rash, 380 U.S. 89, 91 (1965); Pope v. Williams, 193 U.S. 621 (1904), as limited by Dunn, 405 U.S. at 337 n. 7. In Sola v. Sanchez Villela, 390 F.2d 160 (1st Cir. 1968), the court held that the Puerto Rico Legislature had full discretion to conclude that only residents could vote in its advisory plebiscite regarding its status. */

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*/ In Sola, the plaintiffs, citizens and residents of New Jersey and other states who had been born in Puerto Rico, sued to enjoin the plebiscite because the one-year residency requirement precluded them from voting. The court denied

[footnote continued]

However, the two exclusions which result from the durational residency requirements do raise constitutional equal protection and "right to travel" problems because they withhold the ballot from a class of persons, who may be bona fide citizens, domiciliaries, and residents, because they have recently moved into the District or within the District. In order to sustain this classification against equal protection attack, the cases generally, but not uniformly, impose a "strict scrutiny" test which requires us to meet the heavy burden of demonstrating that the durational residency requirement serves a compelling "state" interest, and that it is the least restrictive means of accomplishing that interest. Compare Dunn, 405 U.S. at 335, 343; and Kramer, 395 U.S. at 626-27, 632; with Rosario v. Rockefeller, 410 U.S. 752 (1973) (discussed infra). We can sufficiently demonstrate that the interests served by Section 1001 are compelling. However, the broad and arbitrary sweep of the one-year requirement poses serious problems under the "least restrictive means" aspect of the test.

[footnote continued from previous page]

injunctive relief and dismissed the suits. Although the case appears directly in point, its precedential value is diminished because (1) the court did not focus on the reasonableness of the durational aspect of the residency requirement, but only the reasonableness of requiring would-be voters to be residents; and (2) it antedates the development of residency requirement law as exemplified in Dunn, supra. However, as discussed below, it remains good authority on the issue of denial of injunctive relief in such circumstances.

Three lines of judicial authority support the argument that Section 1001 serves "compelling" state interests, particularly because the election is in the context of a "secession" from a larger body politic. First, as discussed above, the interest in imposing appropriate residence requirements on would-be voters is unquestioned. Dunn, supra; Kramer, supra; Pope, supra. But the test for determining residency must be sufficiently precise so that it either does not exclude bona fide residents or, if it incidentally does, it can be said that it is "necessary" to do so. Thus, the Supreme Court invalidated a state statute which permitted voter registration only for persons who had been residents in the state for one year and the county for three months, stressing that the scheme imposed durational requirements even on bona fide residents. Dunn, supra. The Court recognized the legitimacy of the state's interest in preserving the "purity of the ballot box" by excluding outsiders, but found the residency requirements unnecessary to achieve this goal because they excluded new residents as well as non-residents, and because other safeguards, such as the requirement that a would-be voter affirm his residency by oath, were available. Id. at 345-47. Dunn also rejected the contention that administrative convenience justified use of the durational requirement as a conclusory presumption of residence. Id. at 349-50. On the other hand, the Court has, since Dunn, upheld a 50-day

residence requirement which was coupled with a 50-day voter registration deadline, Marston v. Lewis, 410 U.S. 679 (1973) (per curiam), and a 50-day registration requirement, Burns v. Fortson, 410 U.S. 686 (1973) (per curiam) ("approaches the outer constitutional limits in this area"). In both cases the Court held, without explicit reference to "strict scrutiny" analysis, that these shorter requirements were justified by the states' interest in preparing adequate voting records and preventing fraud. Therefore, it would be prudent to set the special registration date at no more than 50 days prior to the plebiscite.

Secondly, the Supreme Court has singled out "raiding," i.e., voting in an election in which one has no institutionally recognized interest in order to "spoil" the result, as a legitimate object for state voting regulations. Rosario, 410 U.S. at 760-62, and at 769 (Powell, J., dissenting); Kusper v. Pontikes, 414 U.S. 51 (1973). Thus, a requirement of party registration one month prior to a general election as a prerequisite to voter eligibility for that party's succeeding year's primary election was held, seemingly after "rational basis" rather than "strict scrutiny analysis" (see 410 U.S. at 767, Powell, J., dissenting), a "reasonable" and not unconstitutionally burdensome method to achieve the state's legitimate interest because the requirement did not deprive anyone of the vote, but merely imposed an admittedly lengthy

deadline on enrollment. Rosario, supra. However, a ban on voting in a party primary for persons who had voted in another party's primary during the preceding 23 months was later held to unconstitutionally burden First Amendment associational and Fourteenth Amendment equal protection rights because it rendered would-be voters powerless to make themselves eligible and was not the least restrictive method for preventing raiding. Kusper, 414 U.S. at 60. Rosario and Kusper (both written by Justice Stewart) are difficult to harmonize. Rosario edged away from the strict scrutiny test and leaves an opening to contend that Section 1001, as an anti-raiding measure, need only be "reasonable" to pass constitutional muster. However, Kusper appears to retrench to a position closer, if not identical to, strict scrutiny. At this point, Section 1001 could fail even under Rosario because it effects an irremediable bar to bona fide residents. Note that four Justices believe that the state's interest in preventing raiding justifies more burdensome voter qualifications where the would-be voters have previous antagonistic party affiliations, Rosario, 410 U.S. at 770 (Powell, J., dissenting), thereby suggesting that we could impose greater requirements on a class of would-be voters who had previous affiliations with other districts, e.g., those who voted in elections of another district.

Thirdly, it has been assumed, although not decided, that a state's interest in limiting the franchise to those

primarily affected by a particular election could be sufficiently compelling to justify denial of the suffrage "at least with regard to some elections," if those excluded are in fact substantially less interested or affected and the classification is narrowly tailored so that the resultant exclusion is necessary to achieve the goal. Evans, 398 U.S. at 422-23 (state cannot exclude residents of federal enclave from voting in state elections); Kramer, 395 U.S. at 632 (state cannot exclude non-parents and non-property taxpayers from voting in school board elections). An exclusion justified on this basis must survive "strict scrutiny" equal protection review, Kramer, 395 U.S. at 626-27; but a plebiscite concerning self-determination arguably presents the strongest case both for recognition of this goal as a "compelling interest" and for demonstrating the substantially decreased degree of interest of the excluded class.

The crux of the problem presented by Section 1001, however, is that we unquestionably cannot demonstrate that it is "necessary" to achieve these purposes, if it must survive strict scrutiny review, see Dunn, supra; Kramer, supra; cf. Kusper; and we probably could not demonstrate that it is "reasonable," if we must survive some modified form of "rational basis" review, see Rosario, supra; cf. Marston, supra; Burns, supra. No justification avails for excluding, as Section 1001 does, bona fide district residents who have

changed precincts within the year. Nor can it be very persuasively argued that it is reasonable to use the irrebuttable presumption created by a one-year durational requirement, which has the effect of excluding bona fide residents simply because they are new, in order to limit the plebiscite to bona fide residents. Dunn - Marston - Burns condemn irrebuttable presumptions where the residency requirement is as lengthy as a year. Cf. Vlandis v. Kline, 412 U.S. 441 (1973). Kusper condemns an irremediable lockout. Moreover, the availability of less arbitrary and less restrictive alternatives -- such as rebuttable presumptions based on length of residence or prior political affiliations, or the requirement of an oath -- undermines any reasonableness argument.

The argument that the plebiscite differs because it represents an act of self-determination can "cut both ways." It supports Section 1001 insofar as the importance of excluding "raiders" and even more benign outsiders is augmented in such an election. On the other hand, this augmented importance can also support the conclusion that Section 1001 should therefore exclude the fewest bona fide residents possible. An argument can be made that Section 1001's reasonableness should be measured not against regular state and federal elections, but against other cases of trusteeship termination. Arguably, if it was reasonable in the eyes of the United Nations not to have a plebiscite at all in six such cases, it would be reasonable to place strict eligibility

requirements where plebiscites are utilized. However, this argument proves too much: could Section 1001 restrict voter eligibility to Christians who met the durational residency requirement? Moreover, it runs afoul of the constitutional principle that once the vote is extended, it must be extended on an equal basis. Harper v. Virginia Bd. of Elections, 383 U.S. 663, 665 (1966); Kramer, 395 U.S. at 629. A narrower argument could be made based on the voter eligibility requirements in the other plebiscites (British Togoland, British Cameroons, and Western Samoa).*/ However, two answers to this argument are that: what is reasonable for other administering authorities is not necessarily reasonable nor constitutional for the United States; and, the precedential value of these other plebiscites is diminished because they all antedated Dunn.

Therefore I would conclude that Section 1001's durational residency requirement would be held violative of constitutional equal protection and travel rights, if these provisions are fully applicable to the Trust Territory in the context of this plebiscite.

B. Applicability of U.S. Constitution to Plebiscite in Trust Territory

1. Status of the Trust Territory. Whether a particular constitutional provision applies to the Trust Territory depends initially on the status of the Trust Territory, unless that provision governs governmental actions every-

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*/ We are currently researching what these eligibility requirements were in these plebiscites.

where. Downes v. Bidwell, 182 U.S. 244, 293 (1901) (White, J., concurring). But cf. Reid v. Covert, 356 U.S. 1 (1956). Unfortunately, the status of the Trust Territory eludes precise delineation.*/ Under the Trust Agreement, the United States acts as trustee, but not sovereign. Porter v. United States, 493 F.2d 583, 588 (Ct. Cl. 1974); Callas v. United States, 253 F.2d 838 (2nd Cir.), cert. denied, 357 U.S. 936 (1958); People of Enewetak v. Laird, 353 F. Supp. 811, 819 (D. Haw. 1973), quoting U.N. Security Council Off. Rec., 116th Meeting, March 7, 1947, p. 473 (remarks of U.S. Representative); Brunell v. United States, 77 F. Supp. 68, 70 (S.D.N.Y. 1948), quoting letter of December 16, 1947 to Attorney General Clark from State Department Legal Adviser. Since the United States is not sovereign, and there has been no cession of the Trust Territory to the United States, the Trust Territory is generally regarded as neither a U.S. "Territory" nor "possession." People of Saipan v. Department Interior, No. 73-1769 (9th Cir. July 16, 1974), Slip Op. at pp. 4-5; Callas, 253 F.2d at 839; Brunell, 77 F. Supp. at 70. It follows that the Trust Territory can therefore be neither an unincorporated nor, a fortiori, an incorporated territory. See Downes v. Bidwell, 182 U.S. 244 (1901) (White, J., concurring); Balzac v. Porto Rico, 258 U.S. 298 (1922).

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*/ See Alig v. Trust Territory, 3 T.T.R. 64, 67 (1965):

> "The Trust Territory of the Pacific Islands is certainly a geographic area; other than that we think it merely a name under which the United States carries out its obligations as Administering Authority . . . . The Trust Territory, therefore, is not a real legal entity."

The Trust Territory is clearly not an incorporated territory because there has been no congressional act of incorporation. See Downes, 182 U.S. at 305-339 (White, J., concurring). Nor does the subjugation of the Trust Territory Government to the Interior Department necessarily make it an "agency" of the United States, although it may act as agent depending on the American role in a particular action. Porter, 496 F.2d at 587-89; People of Saipan, Slip Op. at 12; cf. Bell v. C.I.R., 278 F.2d 100 (4th Cir. 1960) (Samoa an "agency" of U.S. for income tax purposes because U.S. is sovereign and Samoan government is under authority of Interior Department.) */ The cases conflict as to whether the Trust Territory's relationship to the U.S. is so attenuated that in law it is a foreign country. Compare Callas, 253 F.2d at 840 (a "foreign country" as that term is used in the Federal Tort Claims Act); and Brunell, 77 F. Supp. at 82 (same holding); with People of Saipan, Slip Op. at 3-4 (not a foreign government immune from suit under NEPA); and People of Enewetak, 353 F. Supp. at 819 (part of the "nation" as that term is used in NEPA); and with DeLima v. Bidwell, 182 U.S. 1, 199 (1901) ("We are unable to acquiesce in this assumption that a territory may be at the same time both foreign and domestic . . ."; land ceded to and in possession of U.S. is not a foreign country). In sum, the Trust Territory's relationship to the United

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*/ But cf., Alig, 3 T.T.R. at 67 ("The Trust Territory . . . speaks, operates, and acts as a part of the executive department of the United States . . . .").

States, as defined by the Trusteeship Agreement, is somewhat more attenuated than that of an unincorporated territory and may even be that of a foreign country depending on the context.

2. Extraterritorial Application of U.S. Constitution. As trustee rather than sovereign, the United States' power to govern derives neither from its inherent constitutional power to acquire and govern territory, see Downes v. Bidwell, 182 U.S. at 290 (White, J., concurring), for it has not "acquired" the Trust Territory; nor from the Art. IV, § 3, ¶ 2 power to make rules "respecting the Territory or other Property belonging to the United States," for the Trust Territory does not "belong" to the United States. Rather, the United States' power to govern derives directly from the Trusteeship Agreement, which, as a treaty between the United States and the United Nations, becomes under the Supremacy Clause (Art. VI, ¶2) the law of the land. However the Trusteeship Agreement is not an extra-constitutional basis for power because the treaty-making power is itself constitutionally grounded, Art. II, § 2, ¶ 2; and because a treaty must comply with the Constitution, Reid v. Covert, 354 U.S. 1, 18 (1956); but cf. Missouri v. Holland, 252 U.S. 416 (1920).

Article 3 of the Trusteeship Agreement vests the United States with discretion to apply its laws, presumably

including constitutional provisions, to the Trust Territory, with such modifications as it deems appropriate to local conditions. (For effect of Trusteeship Agreement itself on plebiscite, see Section II, infra.) But because U.S. power to govern is ultimately derived from the Constitution, the non-mandatory language of Art. 3 does not finally resolve the question of the applicability of the equal protection - travel rights to the actions of the United States*/ in the Trust Territory.

Without recanvassing in detail the issue of the ex proprio vigore application of the Constitution abroad (see Kujovich memo of 8/6/73), the cases evince a movement away from the early position that only certain fundamental constitutional restrictions which transcend local conditions circumscribe American power under Art. IV, § 3, ¶ 2 to govern unincorporated territories, see, e.g., In re Ross, 140 U.S. 453 (1891); Downes, 182 U.S. at 290-91 (White, J., concurring); Pauling v. McElroy, 164 F. Supp. 390 (D.D.C. 1958), aff'd, 278 F.2d 252 (D.C. Cir.), cert. denied, 364 U.S. 835 (1960);

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*/ To the extent the constitutional restrictions on durational residency requirements are based on the Fourteenth Amendment Equal Protection Clause, they are applicable to the Federal Government through the Fifth Amendment Due Process Clause. See Bolling v. Sharpe, 347 U.S. 497 (1954). The so-called "right to travel" is directly applicable to the Federal Government. Shapiro v. Thompson, 394 U.S. 618 (1969). Note that this memorandum focuses on constitutional limitations placed on the U.S. Government. In light of the history of the creation of the Political Status Commission, the same limitations apply to it. Cf. People of Saipan, Slip Op. at 11.

and toward the position that the Constitution restricts governmental action throughout the world, see Reid v. Covert, 354 U.S. at 14; United States v. Toscanino, 42 U.S.L.W. 2637 (2d Cir. 1974). The holding in Reid, that the right to a jury trial applies to American civilians tried in capital cases abroad by the United States, is, of course, restricted to the applicability of the Constitution to American citizens. But the tone and reasoning, particularly that of Justice Black for four Justices (there was no opinion of the Court), limits the Insular Cases and grounds the decision on broader foundations:

> "The 'Insular Cases' can be distinguished . . . in that they involved the power of Congress to provide rules and regulations to govern temporarily territories with wholly dissimilar traditions and institutions . . . it is our judgment that neither the cases nor their reasoning should be given any further expansion. The concept that the Bill of Rights and other constitutional provisions against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our Government. If our foreign commitments become of such nature that the Government can no longer satisfactorily operate within the bounds laid down by the Constitution, that instrument can be amended . . . . But we have no authority, or inclination, to read exceptions into it which are not there." 354 U.S. at 14 (footnotes omitted).

Recently, the Second Circuit carried Justice Black's logic to its conclusion, holding that Fifth Amendment due process and the Fourth Amendment apply to aliens who are victims of unconstitutional actions by the United States in foreign

countries. Although Toscanino's grotesque facts (alien wiretapped in foreign country and then kidnapped to the U.S. for trial) could serve to limit it, its apparent application of Fourth Amendment rights to an alien in a foreign country arguably applies a fortiori to our case. Toscanino, 42 U.S.L.W. at 2637-38. This precedential evolution is not sufficiently advanced to conclude that the constitutional equal protection and travel rights necessarily restrict the U.S.'s discretion under the treaty-making power, as exercised in the Trusteeship Agreement, to provide voter eligibility rules for the plebiscite. But it indicates the possibility and basis for a court to so hold.

A court need not go as far as Toscanino to invalidate Section 1001. It need rely only on the narrower proposition that, in light of Reid's gloss on the Insular Cases, at least fundamental constitutional restrictions limit U.S. action in the Trust Territory, as they do in unincorporated territories under the Insular Cases. First, the language in Downes which indicates that suffrage is not a fundamental right, 182 U.S. at 283, has been superseded by numerous subsequent judicial pronouncements that the right to vote is fundamental, because it is "preservative of all rights." Reynolds v. Sims, 377 U.S. 533, 562 (1964); Dunn, 405 U.S. at 336. Therefore, it could be argued, the United States is prohibited from transgressing constitutional restrictions which equal protection and the right to travel impose on regulating this "fundamental right."

Secondly, without reference to the nature of the underlying right to vote, the right to equal protection vel non may be a "fundamental right." Fifth Amendment due process subsumes certain notions of equal protection, at least to the extent of prohibiting unjustifiable discriminations. Bolling v. Sharpe, 347 U.S. 497 (1954); see Shapiro v. Thompson, 394 U.S. 618, 641-42 (1969); United States v. Davis, 115 F. Supp. 392 (D.V.I. 1953), rev'd on other grounds, 212 F.2d 681 (3d Cir. 1954); Dyer v. Kazuhisha Abe, 138 F. Supp. 220, 224-25 (D. Haw. 1956), rev'd as moot, 256 F.2d 728 (9th Cir. 1958) (reapportionment of Territory of Hawaii). The Fifth Amendment Due Process Clause has been held to restrict U.S. action in the Trust Territory. Porter, 496 F.2d at 591; see Flemming v. United States, 352 F.2d 533 (Ct. Cl. 1965) (assumed sub silentio); cf. Davis, supra; Dyer, supra. */

Thirdly, even if the constitutional prohibitions involved are not "fundamental," they may nevertheless

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*/ The analysis is more difficult for the "right to travel" leg of the durational residence requirement cases because of the absence of a textual reference for the right. It has been suggested that it derives from three sources: the Due Process Clause, the Privileges and Immunities Clause, and the Commerce Clause. Shapiro v. Thompson, 394 U.S. at 630 n. 8. As discussed, the Due Process Clause has been applied ex proprio vigore to the Trust Territory. However, the courts have denied application to unincorporated territories of the Privileges and Immunities Clause, Duehay v. Acacia Mutual Life Ins. Co., 105 F.2d 768, 775 (D.C. Cir. 1939); see Haavik v. Alaska Packers Ass'n, 263 U.S. 510 (1929); and the Commerce Clause, Sayre & Co. v. Riddell, 395 F.2d 407 (9th Cir. 1968); Cases v. United States, 131 F.2d 916 (1st Cir. 1942), cert. denied, 319 U.S. 770 (1943).

circumscribe U.S. action in the Marianas because, to the extent the Insular Cases relied on the impracticality of transplanting American constitutional values to dissimilar cultures to support the extension of only selected constitutional provisions, they are distinguishable. The U.S. decision to terminate the trusteeship is some evidence that the people of the Marianas have adopted themselves to American norms of self-government. These developments embarass reliance on the implicit "untutored savage" justification for the Insular Cases, see Reid, 354 U.S. at 74-75 (Harlan, J., concurring); and could render the Insular Cases inapplicable.

In sum, a series of arguments are available which support the conclusion that the constitutional law governing durational residency requirements for voting apply ex proprio vigore to U.S. action in promulgating the voter eligibility rules for the plebiscite in the Marianas. The risk that a court would so conclude is not insubstantial.

II. Status of § 1001 Voting Eligibility Requirements Under Trusteeship Agreement and Trust Territory Code

A. Trusteeship Agreement

The Trusteeship Agreement obligates the United States to administer the Trust Territory in accordance with its provisions. (Art. 3: "The administering authority shall have full powers of administration, legislation, and jurisdiction over the territory subject to the provisions of this

agreement . . ."; Art. 4: "The administering authority, in discharging the obligation of trusteeship in the trust territory, shall act in accordance with the . . . provisions of this agreement . . ."). Therefore, the United States is bound to comply with Article 7 of the Trusteeship Agreement which provides in pertinent part:

> "In discharging its obligations under Article 76(c), of the Charter, the administering authority shall guarantee to the inhabitants of the trust territory . . . freedom of migration and movement."*/

Although this right to "freedom of migration and movement" has not been meaningfully construed,**/ it is presumably at least akin to the U.S. constitutional "right to travel."***/ Cf. Ichiro v. Bismark, 1 T.T.R. 57, 60 (1953) (Due Process Clause in Trust Territory Code presumed to have same meaning as same clause in U.S. Constitution).

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*/ Article 76(c) of the U.N. Charter provides that it is a basic objective of the trusteeship system

> "to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of interdependence of the peoples of the world . . . ."

**/ Ngirasmengesong v. Trust Territory, 1 T.T.R. 345 (1958), the only reported case construing this aspect of Art. 7, held that a curfew was a reasonable exercise of the police power which under the circumstances did not transgress the right to freedom of migration and movement. See Yang v. Yang, 5 T.T.R. 427 (1971) (two-year residency requirement for divorce jurisdiction held violation of Trust Territory Code Equal Protection Clause) (discussed at Section II, B, infra).

***/ See, e.g., Shapiro v. Thompson, 394 U.S. 618 (1969); United States v. Guest, 383 U.S. 745 (1966).

Dunn invalidated a one-year durational residency requirement for voter eligibility because, inter alia, it impinged, without a compelling state interest, on the right to travel of bona fide residents who had recently exercised that right. 405 U.S. at 338. (See discussion, section I, A, supra.) Therefore, if American constitutional norms are the reference point for Article 7's Freedom of Migration and Movement Clause, we would, as discussed above, be confronted with the difficult burden of contending that the one-year residency requirement was "necessary" or "reasonable" -- in the sense that more finely tailored eligibility requirements would not work -- to achieve what will probably be accepted as compelling interests.

B. Trust Territory Code

Section 1001's durational residency requirement is arguably inconsistent with two provisions of the Trust Territory Code. Section 7 provides in part that "equal protection of the laws [shall not] be denied." Section 8, which is similar to Article 3 of the Trusteeship Agreement, provides that, "Subject only to the requirements of public order and security, the inhabitants of the Trust Territory shall be accorded freedom of migration and movement within the Trust Territory."

1. Equal Protection Clause. The Trust Territory Code Equal Protection Clause has been construed by

the Trial Division of the High Court to prohibit classifications based on recent travel. Yang v. Yang, 5 T.T.R. 428 (1971). In Yang, the court, relying, inter alia, on Shapiro v. Thompson, supra, invalidated the section of the Trust Territory Code which required two years' residency as a jurisdictional prerequisite for divorce. In Sosna v. Iowa, No. 73-762 (Jan. 14, 1975), the Supreme Court recently held that a one-year state residency requirement for divorce jurisdiction did not violate either the Equal Protection or the Due Process Clause. Although Sosna probably overrules the result in Yang, it does not undermine the precedential validity of Yang's reasoning as it would apply to voter residency requirements. Therefore, with Dunn - Marston - Burns as reference points and following the reasoning of Yang, the Trust Territory Code Equal Protection Clause in all probability would be construed to invalidate Section 1001's durational residency requirement.

2. Freedom of Migration and Movement Clause. No cases construe the Freedom of Migration and Movement Clause in any material respect. The analysis follows that under the similar Trusteeship Agreement article.

III. Enforceability

Assuming that Section 1001's durational residency requirement infringes rights derived from the U.S. Constitution, the Trusteeship Agreement, and/or the Trust Territory

Code, two further issues remain: first, whether citizens of the Trust Territory could enforce these rights in a court; and, secondly, if a court has jurisdiction and rules as a matter of law with the plaintiffs, whether it would as a matter of its equity discretion enjoin the election. This memorandum will touch only briefly on these points.

A. Enforceability

If the alleged right is derived from the Constitution and is held to apply for the benefit of Trust Territory citizens, then they may attempt to enforce that right in court. See Porter, 496 F.2d at 591 (assumes sub silentio that Trust Territory citizens can litigate alleged violations of the Due Process Clause); see also Putty v. United States, 220 F.2d 473 (9th Cir. 1955), cert. denied, 350 U.S. 821, (1955); Mora v. Mejias, 206 F.2d 377 (1st Cir. 1953); Davis, 115 F. Supp. 392 (D.V.I. 1953), rev'd on other grounds, 212 F.2d 681 (3d Cir. 1954). If the alleged right is derived from the Trusteeship Agreement, it is also judicially enforceable by Trust Territory citizens. People of Saipan, supra, Slip Op. at 6-9 (good discussion); see Diggs v. Shultz, 470 F.2d 461 (D.C. Cir. 1972), cert. denied, 411 U.S. 931 (1973); but see Pauling v. McElroy, 164 F. Supp. at 393; and compare Alig, 3 T.T.R. at 67, with In re Ngiralois, 3 T.T.R. 303, 313 (1967). Finally, alleged violations of the Trust Territory Code are judicially enforceable initially in the Trust Territory courts.

B. Equity Issue

In Reynolds v. Sims, 377 U.S. 533, 585 (1964), the Supreme Court set forth general guidelines for the exercise of equitable power with respect to upcoming elections:

> "It is enough to say now that, once a State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan. However, under certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid. In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles. With respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree. As stated by Mr. Justice Douglas, concurring in Baker v. Carr, 'any relief accorded can be fashioned in the light of well-known principles of equity.'" (Footnote omitted.)

The imminence and disruption factors which the Court apparently considered the most persuasive reasons to abstain from enjoining a tainted election probably do not carry the same weight with respect to the plebiscite. The plebiscite is a "one-shot" election; unlike the recurring elections for candidates, the harm flowing from an unconstitutionally truncated electorate cannot be erased by subsequent elections. Moreover, since the plebiscite is not tied in with other

simultaneous elections, time is arguably less of the essence. Finally, and most importantly, since the plebiscite involves the issue of self-determination, there is a stronger argument that it should be conducted correctly the first time. Courts have issued less disruptive decrees in analogous cases, e.g., an injunction only against the use of the residency requirement. See Marston, 410 U.S. at 679-80; Evans, 398 U.S. at 420; Garcia Marrero v. Sanchez Villela, 390 F.2d 158, 159 (1st Cir. 1968). In addition, it is an accepted remedy to order a new election where the prior election has been tainted by some unconstitutional defect. Hadnott v. Amos, 394 U.S. 358 (1969) (racial discrimination against potential candidates); Smith v. Cherry, 489 F.2d 1098, 1103 (7th Cir. 1973), cert. denied, 42 U.S.L.W. 3652 (1974); Tong v. White, 488 F.2d 310 (5th Cir. 1973) (racial discrimination); Taylor v. Monroe County Board of Supervisors, 421 F.2d 1038, 1042 (5th Cir. 1970) (malapportionment).

IV. Conclusions

The durational residency requirement of Section 1001 violates constitutional equal protection and travel rights, under present standards which approximate strict scrutiny. The Supreme Court's "waffling" on the strict scrutiny test leaves an opening for arguing that Section 1001 need only be "reasonable," but precedents strongly suggest we could not satisfy that test even in these special circumstances.

Evolving principles provide several legal bases for applying these constitutional restraints to U.S. action in the Northern Marianas. There is a substnatial risk that a court would so hold, although the precedents compel neither result. Regardless of the applicability of constitutional equal protection and travel rights, both the Trusteeship Agreement and the Trust Territory Code provide bases for invalidating the durational residency requirement. Rights created by any of these three bases are judicially enforceable, and precedent would support, though not compel, equitable relief ranging from an injunction against utilization of the residency requirement to an injunction against holding the election.

These risks can be eliminated by substitution of other eligibility requirements which precedents suggest are constitutional. Specifically, the covenant could impose any combination of the following: a 50-day durational residency requirement; a requirement that would-be voters affirm their residence under oath; a rebuttable presumption against residence of would-be voters who had participated in elections of other districts within a reasonable time period, or own land or pay taxes in other districts; a rebuttable presumption against residency for would-be voters who have been residents of the district for more than 50 days but less than one year; and a 50-day registration deadline. Other tests for voter eligibility could be added as long as they do not arbitrarily exclude bona fide residents, i.e., as long as they are narrowly tailored.

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R.M.Witten

(CONGRESS 11TH DAY)

SAIPAN, JAN. 23 (MNS)--- MOST OF THE WORK OF THE CONGRESS OF MICRONESIA CONTINUES TO BE DONE BY THE VARIOUS COMMITTEES DURING THIS FIRST REGULAR SESSION. THE HOUSE AND SENATE BOTH MET ONLY BRIEFLY ON THE ELEVENTH DAY OF THE SESSION. THE CONGRESSMEN HEARD SHORT REMARKS FROM SOME OF THEIR COLLEAGUES ON ISSUES OFHTHE DAY AND RECEIVED MORE BILLS AND RESOLUTIONS FOR CONSIDERATION.

IN THE HOUSEMOF REPRESENTATIVE S TEN NEW BILLS WERE INTRODUCED, FIVE OF THEM APPROPRIATION MEASURES OF : $500,000 FORHTHE IMPROVEMENT AND OPERATION OF THE PALAU BOATBUILDERS ASSOCIATION, (HB 6-53); $100,00 AS GRANT -IN-AID TO THE MICRONESIAN BOATBUILDING AND DRYDOCKING CORPORATION IN PALAU DISTRICT, (HB 6-54); $50,000 FOR THE CONSTRUCTION OF TWO MULTI-PURPOSE COMMUNITY CENTERS, ONE AT GARAPAN VILLAGE AND ONE AT SAN JOSE VILLAGE ON SAIPAN, (HB 6-55); $60,00 TO PROVIDE FUNDS TO EXPAND THE EDUCATIONAL OPPORTUNITIES FOR MICRONESIAN ADULTS, (HB 6-56); $75,000 FOR CHANNEL BLASTING PROJECTS IN THE MARSHALL ISLANDS, (HB 6-57). OTHER BILLS INCLUDED: A MEASURE TO IMPOSE WHARFAGE AND DOCKING FEES ON VESSELS USING PORTS IN THE TRUST TERRITORY, (HB 6-52); A BILL RELATING TO ILLEGAL EXPENDITURE OF PUBLIC FUNDS AND PRESCRIBING THE PENALTIES THERFORE, (HB 5-58): ADDING A SECTION IN THE TT CODE TO REQUIRE VESSELS CARRYING PASSENGERS FOR HIRE TO PROVIDE COMPENSATION OR FOOD AND ODGING TO PASSENGERS WHO MUST MAKE UNSCHEDULED DESARKATIONS, (HB 6-59); TO AMEND CERTAIN SECTIONS OF THE TRUST TERRITORY CODE TO INCREASE THE OFFICIAL EXPENSES OF MEMBERS OF THE CONGRESS OF MICRONESIA TO $3,500, (HB 6-60); AND A MEASURE TO AMEND CERTAIN SECTIONS OF THE TT CODE RELATING TO THE DISTRIBUTION OF REVENUES AND PROVIDING FOR AN EFFECTIVE DATE, (HB 6-61).

THE HOUSE JOINT RESOLUTION IS REQUESTING THE TT DEPARTMENT OF EDUCATION TO CONDUCT A STUDY INTO THE CURRICULUM MOST APPROPRIATE FOR PUBLIC SCHOOLS THROUGHOUT MICRONESIA AND REPORT ITS FINDINGS TO THE FIRST REGULAR SESSION OF THE SIXTH CONGRESS, (HJR 6-7).

THE SENATE MEETING WAS SHORT THURSDAY MORNING (JAN.23) WITH ONLY ONE BILL AND ONE JOINT RESOLUTION OFFERED. THE BILL WOULD ESTABLISH A TRUST TERRITORY AERONAUTICS COMMISSION AND PRESCRIBE ITS POWERS AND DUTIES, (SB 6-55).

THE JOINT RESOLUTION REQUESTS THE U.S. POSTMASTER GENERAL AND THE TT HIGH COMMISSIONER FOR AN ASEQUATE MAIL SERVICE SYSTEM TO THE OUTER ISLANDS OF MICRONESIA, (SJR 6-6).

BOTH HOUSES WILL CONVENE AT 10:00 A.M. FRIDAY MORNING (JAN . 24).

(MICRONESIAN UNIVERSITY PROFESSOR)

SAIPAN, JAN. 23 (MNS)---MICRONESIA'S FIRST UNIVERSITY PROFESSOR RECENTLY LEFT THE TRUST TERRITORY TO BEGIN A SIX-MONTHS RESIDENCE AT THE UNIVERSITY OF HAWAII.

MARCELLINO UMWECH, LANGUAGE PROGRAMS COORDINATOR FOR THE DEPARTMENT OF EDUCATION, WAS HONORED BY THE UNIVERSITY OF HAWAII WITH HIS APPOINTMENT AS VISITING ASSISTANT PROFESSOR IN THE DEPARTMENTOF LINGUISTICS. THE 33 YEAR OLD UMWECH, ORIGINALLLY FROM THE MORTLOCKS, HAS SERVED AS COORDINATOR FOR ALL LANGUAGEPROGRAMS IN THE TRUST TERRITORY SINCE OCTOBER 1970.

A GRADUATE OF THE UNIVERSITY OF GUAM AND MORE RECENTLY ASSISTANT RESEARCHER WITH THE PACIFIC AND ASIAN LINGUISTICS INSTITUTE OF THE UNIVERSITY OF HAWAII, UMWECH WILL SERVE IN SEVERAL CAPACITIES DURING HIS PROFESSORSHIP. IN ADDITON TO INSTRUCTIONAL RESPONSIBILITIES IN THE DEPARTMENT OF

LINGUISTICS, HE WILL ACT AS ADVISOR TO THE BILINGUAL EDUCATION TEACHING TRAINING PROJECT FOR MICRONESIA.

HE WILL ALSO ASSIST IN THE COMPLETION OF THE TRUKESE DICTIONARY BEING PRODUCED BY THE UNIVERSITY.

UMWECH WILL BE ENGAGED IN GRADUATE STUDY AT THE UNIVERSITY.

DURING HIS ABSENCE, MASA-AKI EMESIOCHL WILL SERVE AS ACTING LANGUAGE PROGRAMS COORDINATOR. EMESIOCHL, A RECENT HONORS GRADUATE OF THE UNIVERSITY OF HAWAII, HOLDS AN M.A. IN LINGUISTICS. WHILE AT THE UNIVERSITY HE WORKED WITH DR. LEWIS JOSEPHS ON THE PALAUAN ORTHOGRAPHY, GRAMMAR, AND LEXICON.

(HICOM INVITES BANKERS TO SERVE AS EDLF BOARD MEMBERS)

SAIPAN, JANUARY 23 (MNS) --- HIGH COMMISSIONER EDWARD E. JOHNSTON HAS EXTENDED AN INVITATION TO THE SAIPAN BRANCH MANAGERS OF BANK OF AMERICA, BANK OF HAWAII, AND CITICORP TO SERVE AS MEMBERS OF THE HEADQUARTERS ECONOMIC DEVELOPMENT LOAN FUND (EDLF) NOARD.

AS THE EDLF BOARD CONCENTRATES IT S LENDING ACTIVITIES MORE IN THE AREAS OF TOURISM, MARINE RESOURCES, AND AGRICULTURE, IT IS EXPECTED THAT THE BANKER-MEMBERS WILL MAKE SIGNIFICANT CONTRIBUTIONS TO THE EFFICIENCY OF THE BOARD'S LENDING POLICIES. IT IS EXPECTED THAT THE BANKERS WILL ALTERNATE AMONG THEMSELVES WHEN OCCUPYING THEIR EDLF BOARD POSITION, SINCE ONLY ONE BANKER CAN SERVE AT ANY TIME. IN THE PAST THE EDLF HAS HAD A VERY CLOSE WORKING RELATIONSHIP WITH THE BANKING COMMUNITY IN THE AREA OF LOAN GUARANTY AND THE SHARING OF CREDIT INFORMATION.

THIS CHANGE IN MEMBERSHIP OF THE BOARD COMPOSITION IS EXPECTED TO BRING THE EDLF AND THE COMMERCIAL BANKERS EVEN CLOSER IN THEIR COOPERATION IN PROVIDING FINANCING TO MICRONESIA'S DEVELOPING PRIVATE SECTOR. THE BANKERS SERVE ON THE BOARD WITHOU COMPENSATION.

(MICRONESIANS ATTEND BETT PROJECT)

SAIPAN, JAN.23 (MNS)--- TRUST TERRITORY DIRECTOR OF EDUCATION, DAVID RAMARUI, ANNOUNCED THAT AT THE END OF JANUARY, THIRTY MICRONESIAN EDUCATORS WILL ENROLL IN THE BILINGUAL EDUCATION TEACHER TRAINING PROJECT (BETT) AT THE UNIVERSITY OF HAWAII. THEY ONE YEAR DEGREE PROGRAM FOR ADVANCING PROFESSIONAL COMPETENCY OF MICRONESIAN BILINGUAL EDUCATION STAFF AND TEACHERS, IS BEING CONDUCTED FOR THE TRUST TERRITORY BY THE UNIVERSITY OF HAWAII'S SOCIAL SCIENCES AND LINGUISTICS INSTITUTE.

CHOSEN BY THEIR DISTRICTS TO PARTICIPATE IN THE NEW PROGRAM, THE THIRTY EDUCATORS ARE RECIPIENTS OF STUDY GRANTS WHICH INCLUDE TUITION, STIPEND AND TRANSPORTATION. IN THEIR STUDIES AT THE UNIVERSITY THEY WILL STRENGTHEN THEIR PROFESSIONAL COMPETENCY IN THE AREAS OF LINGUISTICS, BILINGUAL EDUCATION THEORY AND PRACTICE, AND LANGUAGE ARTS INSTRUCTION. PARTICIPANTS MAY APPLY CREDITS EARNED TOWARD EITHER THE B.A. O OR M.A. DEGREES. UPON THEIR RETURN TO POSITIONS IN EDUCATION, IT IS ANTICIPATED THAT A SECOND GROUP OF EDUCATORS WILL BE ENROLLED IN THE BETT PROJECT.

THE GRANT RECIPIENTS ARE AS FOLLOWS: FROM PALAU: CELESTINE YANGILMAU, MAHENSIA TABELUAL, ROMANA ANASTACIO, TOYOKO RULUKED, RUMMY TELEMANG, AND ISAIAS NGIRAILEMESANG; FROM THE MARSHALLS: ALFRED CAPELLE, SAITO AINE, NIDEL LORAK (LUJUAN), DANIEL JOHN, TONY ZACHERIAS; FROM TRUK: KASPAR SOUMWEI, MISAEL SETILE, TATASY TERRY, WAN SMITH , ANCHERES RECHING, RIOCHY JOHNNY, AND PETER SOUMWEI; FROM THE MARIANAS: CONSOLACION T. KAUFER, TERESA I. TAITANO, DOLORES MARCIANO,

AND RITA M. INOS; FROM PONAPE: WELDIS WELLY, EWALT JOSEPH, MASAKI THOMPSON, GIDEON DAVID, AND CASIANO SHONIBER; AND FROM YAP: ISAAC LANGAL, RAPHAEL DEFEG, AND ANTHONY TAWERLIMANG.

(EDLF BOARD APPROVES LOAN FUNDS TO MARIANAS FISHING COOPS)

SAIPAN, JANUARY 23 (MNS) ---THE ECONOMIC DEVELOPMENT LOAN FUND (EDLF) BOARD, IN A RECENT MEETING, VOTED TO APPROVE LOANS FOR THE PURCHASE OF FISHING VESSELS FOR FISHING COPERATIVES ON TINIAN AND ROTA. THESE LOANS ARE IN KEEPING WITH THE BOARD'S INTENTION TO PROVIDE DEVELOPMENT FINANCING FOR THE EXPLOITATION OF THE OCEAN'S RESOURCES.

IT IS HOPED THAT THESE PROJECTS, WHEN UNDERWAY, WILL CONTRIBUTE TO LOWERING THE IMPORTATION OF FROZEN FISH PRODUCTS INTO THE MARIANAS AND ELSEWHERE.

(NOTE TO EDITORS AND NEWS DIRECTORS: THE FOLLOWING IS PART OF A SERIES OF INTERVIEWS ON ALL MEMBERS OF THE CONGRESS OF MICRONESIA PREPARED BY THE MICRONESIAN NEW SERVICE).

(KALISTO REFONOPEI)

SAIPAN, JAN.23 (MNS) ---KALISTO REFONOPEI IS TRUK'S ONLY SEATED FRESHMAN CONGRESSMAN IN THE SIXTH CONGRESS OF MICRONESIA'S FIRST REGULAR SESSION.

REP. REFONOPEI IS ALSO THE ONLY CONGRESSMAN TO USE AN INTERPRETER. NOT THAT HE DOESN'T SPEAK ENGLISH - HE DOES. "I'M A LITTLE NERVOUS THE FIRST FEW DAYS," CLAIMED REP. REFONOPEI, "AND THAT'S WHY I BROUGHT AN INTERPRETER WHO ALSO HAS HAD SOME EXPERIENCE WITH CONGRESS TO HELP ME UNDERSTAND THE OPERATIONS AND PROCEDURES HERE. NEXT SESSION I'LL COME ALONE."

ALTHOUGH HE IS MODEST ABOUT HIS LANGUAGE ABILITY, THE 28-YEAR OLD GONGRESSMAN IS CONFIDENT THAT HE CAN HELP THE PEOPLE OF THE FAICHUK AREA IN THE WESTERN PART OF THE TRUK LAGOON, FROM WHERE HE WAS ELECTED.

HE DEPLORES THE LACK OF CAPITAL IMPROVEMENT AND DEVELOPMENT PROJECTS DURING THE LAST 28 YEARS OF THE TRUSEESHIP AGREEMENT AND DURING THE 10 YEARS SINCE CONGRESS WAS ORGANIZED. "THINGS HAVE LOOKED THE SAME FOR THE LAST 100 YEARS THERE," HE ASSERTS.

"I'D LIKE TO FIND WAYS FOR MONEY TO BE MADE AVAILABLE TO THESE ISLANDS," REP. REFONOPEI COMMENTED.

SINCE HIS ON THE HOUSE APPROPRIATIONS COMMITTEE, "IT'LL HELP IN MY PURSUIT OF IMPROVING THE FAICHUK AREA BECAUSE, WHEN I INTRODUCE AN APPROPRIATION BILL, I'LL BE ABLE TO FOLLOW IT THROUGH," HE STATED.

REP. REFONOPEI HAS OTHER INTERESTS TO ACT ON DURING HIS TERM. HE COMMENTED THAT HE'D LIKE TO WORK WITH THE REST OF THE TRUK DELEGATION FOR SUCH PROJECTS AS BETTER HEALTH SERVICE IN TRUK, BETTER ROADS AND TRANSPORTATION, AND MORE ECONOMIC DEVELOPMENT. ONE SPECIAL PROGRAMME HE HAS IN MIND IS TRAINING FOR TRIAL ASSISTANTS IN TRUK. "THE MAIN PROBLEM," REP. REFONOPEI STATED, "IS WITH THE CIVIL CASES IN TRUK. THE NUMBER OF LAND DISPUTE CASES IS INCREASING CREATING A BURDEN ON THOSE INVOLVED WITH THE CIVIL ACTION WHO CANNOT AFFORD TO PAY LAWYER."

A FORMER TRUK DISTRICT LEGISLATOR (1970-72) THE FRESHMAN CONGRESSMAN SAID HE SEES MANY SIMILARITIES BETWEEN THE TWO LAW-MAKING BODIES: "MY FIRST IMPRESSION, THOUGH, IS THAT THERE'S MUCH MORE POLITICAL MANEUVERING IN THE CONGRESS."

REP. REFONOPEI RESIGNED HIS POSITION AS LEGISLATOR TO JOIN THE POLICE FORCE IN TRUK. FIRST HE WORKED WITH THE DETECTIVE DIVISION THEN TRANSFERRED TO PATROLMAN . HE HAS COMPLETED TWO POLICE TRAINING ACADEMY COURSE IN TRUK BESIDES TWO YEARS OF HIGH SCHOOL ON TOL IN THE FAICHUK AREA.

IN 1969, REP. REFONOPEI LEFT HIGH SCHOOL TO PARTICIPATE IN THE MICRONESIAN OLYMPIC GAMES HELD ON SAIPAN. HE THREW THE JAVELIN AND SHOT PUT, AS WELL AS PITCHED FOR THE TRUK BASEBALL TEAM WHICH PLACED SECOND IN THE GAMES.

HE AND HIS WIFE EMILIA HAVE THREE CHILDREN.