THE WHITE HOUSE

WASHINGTON

Old Executive Office Building
Room 373
Washington, D.C. 20506

January 23, 1976

The Honorable John C. Stennis
United States Senate
205 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Stennis:

During the January 20, 1976 mark-up session on HJR 549, as amended, some members of the Sub-committee on General Legislation of the Senate Armed Services Committee, in addition to commenting on the national security aspects of the legislation, expressed their concerns on a number of non-military issues including (1) the U.S. Constitution and the Marianas Covenant, (2) the Covenant and the powers of the U.S. Congress, (3) the applicability of U.S. statutes to the Northern Marianas, (4) legal rights including trial by jury, (5) the exception to the one-man, one-vote principle, (6) eligibility for land ownership, (7) duties on imports, (8) taxation provisions, and (9) the costs of extending Federal programs and services to the Northern Marianas. The purpose of this letter is to address each of these issues with the hope that it may clear up any remaining misunderstandings on these important questions.

1. The U.S. Constitution and the Covenant.

a. The Supreme Court of the United States has established that the provisions of the Constitution which protect fundamental rights apply to all territories. In order to avoid all doubt, Section 501(a) of the Covenant enumerates those provisions of the Constitution which guarantee the basic rights of citizenship.1/ The Organic Acts of Guam and the Virgin Islands contain similar provisions.2/ Similarly all future constitutional amendments relating to fundamental rights will apply of their own force to

1/ See S.Rept. 94-433, pp. 73-74
2/ See 48 U.S.C. 1421 b(u) and 1561 (last two paras)

the Northern Mariana Islands. Only those amendments which do not relate to fundamental rights will not apply to the Northern Mariana Islands of their own force and only those will require the mutual consent of the United States and Northern Mariana Islands in order to be applicable to the Northern Mariana Islands.

b. The question has been raised whether the Covenant seeks to deny to Congress the power to legislate under Article IV, Section 3, Clause 2 of the Constitution. This is not the case. Under Section 105 of the Covenant the authority of the United States will be exercised through, among other provisions of the Constitution, Article IV, Section 3, Clause 2.3/ Section 105 of the Covenant does not mean that Article IV, Section 3, Clause 2 of the Constitution is inapplicable to the Commonwealth, but that the Congress in the exercise of its plenary powers over the territory agrees voluntarily not to exercise those powers in five specific areas which relate to (1) the fundamental nature of the political relationship between the United States and the Northern Marianas; (2) the right of self-government; (3) the right to U.S. citizenship; (4) the protection of the Bill of Rights; and (5) restrictions on land ownership. In these five areas, any change in the Covenant requires mutual consent.

2. Powers of Congress.

a. Once the Covenant has been adopted, Congress will have the power under Section 105 to legislate with respect to the Northern Mariana Islands. The only exceptions are those enumerated above under paragraph 1b. The Congress would have the power to modify all other provisions of the Covenant unilaterally. Some of those provisions, however, including Section 702 (U.S. Financial Assistance) are of a contractual nature and constitute a commitment and pledge of the full faith and credit of the United States. A unilateral modification of such provisions could constitute a dispute which could be adjudicated in court under Section 903 (Dispute Settlement).4/ It should be noted, however, that the commitment of U.S. financial assistance is for a period of seven years, after which Congress must take positive action if it wishes to alter or terminate such assistance.

3/ See S.Rept. 94-433, p.404
4/ See comment of the Drafting Committee on Section 702 and S.Rept. 94-433, p.406

b. The Congress would have the power to enact into law the recommendations of a Presidentially appointed Commission on Federal Laws, established to make recommendations to the Congress as to which laws of the United States are not applicable to the Northern Mariana Islands and should be made applicable and those which are applicable that should be made inapplicable. The Congress has the power to accept or reject any recommendations made by the Commission.5/

c. The future Constitution of the Commonwealth of the Northern Mariana Islands must be approved by the U.S. Government before it becomes effective. Thereafter, the Congress would not have the power to pass on amendments to the Constitution of the Northern Mariana Islands. It should be noted, that while Congress has the power to approve the original Constitution of States, and also approved the original Constitution of the Commonwealth of Puerto Rico, it cannot approve subsequent amendments in either case. Although Congress will not approve the amendments to the Constitution of the Northern Mariana Islands, the courts will have the power to determine whether such amendments are consistent with the Covenant, and the provisions of the U.S. Constitution, treaties and laws of the United States applicable to the Northern Mariana Islands.6/

3. Applicability of Federal Laws to the Northern Mariana Islands.

The federal laws applicable to Guam shall also apply to the Northern Mariana Islands with the exception of those which relate specifically to Guamanian problems.7/ Certain laws which are now inapplicable to the Trust Territory shall remain inapplicable to the Northern Mariana Islands for the duration of the Trusteeship, but Congress thereafter shall have the power to introduce them to the Northern Mariana Islands should it so desire.8/

Those laws are the Immigration and Naturalization laws which can become applicable to the Northern Mariana Islands only after the United States acquires sovereignty over them; the Coastwise shipping laws; and the minimum wage laws.

5/ See Section 504 of the Covenant
6/ See Section 202 of Covenant and S.Rept. 94-433, p.68
7/ See S.Rept. 94-433, p.76
8/ See S.Rept. 94-433, pp.77-78

4. Indictment by Grand Jury and Trial by Jury. Section 501 (Applicability of Laws) would give the people of the Northern Mariana Islands the power to determine whether or not to have indictment by grand jury or trial by jury. This applies to local law and even under local law individuals would have the right to appeal to the federal courts. Trial under federal charges would be tried by jury. Similar provisions exist in Puerto Rico, the Virgin Islands,9/ and Guam.10/ They are based on the consideration that the U.S. Constitution does not require the imposition of the common law institutions of indictment by grand jury and trial by jury on U.S. territories which do not have the common law tradition.11/ Indeed, under existing Supreme Court decisions indictment by grand jury is not required in the States.

5. "One-Man, One-Vote" Principle. The Covenant contains an exception to the One-Man, One-Vote principle in that it provides for equal representation for each of the chartered municipalities of the Northern Mariana Islands in one house of a bicarmeral legislature. This provision was included at the insistence of the island municipalities of Rota and Tinian who stated that they would not consent to the Covenant unless they were protected from being out-voted by the far more populous municipality of Saipan. The Supreme Court has ruled that departures from the One-Man, One-Vote principle are permissible where otherwise a union or the accession to it could not have been achieved.12/

6. Limitation on Land Ownership. Section 805 limits the acquisition of permanent or long-term interests in land to persons of Northern Mariana Islands descent. This provision was inserted in the Covenant in consultation with the House Interior Committee, and with the full support of the Senate Committee on Interior and Insular Affairs. Its purpose is to protect the people of the Northern Mariana Islands from possible exploitation by agressive, more sophisticated and economically stronger outside individuals and groups. Without this protection there is likelihood that the peoples of the Northern Mariana Islands would soon become landless as have other island peoples. There is precedent for this legislation

9/ See 48 U.S.C. 1424(b)
10/ See 48 U.S.C. 1561
11/ See S.Rept. 94-433, p.74
12/ See Reynolds v. Sims, 377 U.S. 533, 574(1964) and S.Rept. 94-433, p.69

with respect to Indian lands, and to lands in Hawaii and on Guam.13/

7. Duties on Imports from the several States. Concern has been expressed that the Northern Mariana Islands would be able to impose import duties on products of the States. In fact, however, the Covenant limits the authority of the Northern Mariana Islands to levy duties on goods "imported into its territory from any area outside the customs territory of the United States".

8. Tax Problems. The tax provisions of the Covenant are analogous to those applicable to Puerto Rico, the Virgin Islands and Guam. While residents of the Northern Mariana Islands will be exempt from payment of the Federal income tax as such, with respect to income earned in the Northern Marianas, a local income tax identical with the Federal income tax will be levied. Taxes, customs duties and fees collected by the Federal Government will be rebated to the local government as is the case with the other territories.14/ Exemption from the payment of federal income taxes follows the principle of no taxation without representation. Since the Constitution precludes the territories from voting for the President and having voting representation in the Congress, it has been the view of the Congress that territories should not be subject to the federal income tax. On the other hand, subjection to a local tax identical with the Federal income tax prevents the territories from becoming tax havens.

9. Cost of Federal Programs and Services

The enactment of H.J. Res. 549 would make the Northern Marianas eligible for certain federal programs and services which have been extended by the Congress to all U.S. territories. It has not been possible to determine with precision to the last dollar what the total initial or succeeding annual cost of these federal assistance programs will be because of a number of variables and unknowns. It is however possible to come up with some realistic projections as to the cost. These are outlined below:

It should first be mentioned that the specific language of the Covenant does not provide for the expenditure of any Federal funds, but simply states that the Northern Marianas

13/ S.Rept. 94-433, pp.87-88 refers to some pertinent decisions of the Supreme Court

14/ See 48 U.S.C. 740, 1421(h), 1642 and S.Rept. 94-433, p.85

would be eligible for those programs which have been extended by the Congress to other U.S. territories. It would remain incumbent on the Government of the Northern Marianas to apply for federal program assistance and to meet the requirements of those programs as set forth by legislation. The Northern Marianas would also have to meet administrative requirements as set down by the relevant Federal agency, and would have to compete for funds with the States, other territories, and communities eligible for the program in question. Finally, and in the last analysis, the control over the actual extension of federal programs to the territories and the levels of available funds for such programs rests with the U.S. Congress.

In terms of the projected annual cost of the federal programs which might be extended to the Northern Mariana Islands, the most accurate comparative data is that of the Guam experience. It is estimated that on the basis of this comparison that the cost of federal programs and services under the Marianas Covenant would be between $3.9 million and $5.4 million.

These figures were arrived at by totalling all of the programs now operating in Guam together with their dollar value and subtracting those programs which, under their own terms, would not apply to the Northern Marianas. The remaining dollar amount was then multiplied by the ratio of the Marianas population (14,335) to the population of Guam (105,000) and the lower estimate results. The higher estimate is adjusted further to account for FY 1975 data on some programs on Guam and for the effects of inflation. The differential between average Guam and Marianas family incomes is not considered to be significant for the purposes of these calculations. We feel that the most accurate estimate of Federal program costs ranges therefore between $3.9 million and $5.4 million.

In FY 1975, there were 116 Federal programs operating in Guam. This constitutes only 11% of the U.S. Federal program total of 1010. Thus, in number terms, close to 90% of all federal programs and services would not extend to the Northern Marianas for a variety of statutory, budgetary and administrative reasons (under present law).

Some federal agencies have submitted to the Senate Armed Services Subcommittee on General Legislation some preliminary and unrefined projections regarding the addi-

tional costs of federal programs and services if H.J. Res. 549 were to be enacted. These initial projections indicate that, by their own terms, they are estimates only and that they were not based on a detailed examination of the economic infrastructure, population and resource characteristics of the Northern Marianas nor an assessment as to critical eligibility factors. Finally these rough estimates, and one time costs projections, were not submitted to the Office of Management and Budget for review and therefore are in no way a part of the President's budgetary program for any fiscal year.

The Northern Marianas Commonwealth Covenant is in essence a federal relations act governing the relationship between a prospective territory of the United States and the federal government. In drafting the Covenant, established U.S. Congressional policies applying now to U.S. territories were used as precedents. In most important respects the Covenant conforms to legislation already enacted for territories with respect to such matters as the applicability of the U.S. Constitution and federal laws, taxation, and the eligibility of territories for federal programs and services. What is clear in the Covenant is the principle of federal supremacy and the power of the U.S. Congress to legislate for the Northern Marianas. The Congress, for example, retains the power to control what federal programs and services are to be extended to the territories and it could at will review and revise U.S. Congressional legislation dealing with territorial taxation policies for the Northern Marianas, if the Covenant were to be approved, or for any other or all of the territories.

In view of the above and the legislative responsibilities of the Interior Committees of the House and Senate for territories, the Covenant was not signed until it had been reviewed by key members of these two Committees. Since its signature in February a year ago, it has been approved by (1) the Marianas District Legislature; (2) the people of the Northern Marianas by an overwhelming 78.8 percent majority; (3) the House Interior Committee; (4) the full House; (5) the Senate Interior Committee and (6) by the Senate Foreign Relations Committee which last Tuesday, January 20, joined in approving the Covenant with statements calling for early favorable action by the full Senate.

Support for the Marianas Covenant and the early passage of H.J. Res. 549, as amended, also comes from many other quarters; from the Congress of Micronesia (testimony before the Senate Foreign Relations Committee last fall on H.J. Res. 549, as amended); the Guam Legislature (by unanimous resolution) and from all of the Departments of the Executive Branch of the U.S. Government which participated in the negotiations (State, Defense, Justice and Interior) and finally and most importantly from the people of the Northern Marianas who are anxiously awaiting the outcome of the vote hoping that the Senate will join the House in approving the Covenant.

By so doing the Senate will be strengthening and adding flexibility to the U.S. defense posture in the Western Pacific without incurring any new international commitments. As a Pacific nation with two of the 50 American States and the U.S. Territory of Guam extending deep into the Pacific it is in our national interest to be capable of maintaining a stable balance among the United States, the Soviet Union, Japan and the Peoples Republic of China in the Pacific, as well as to be able to uphold our commitment to our smaller allies in the area. To do so requires a credible military presence to demonstrate our resolve, to add substance to our foreign policy endeavors and to deter major conflict. Our ability to continue to deny the islands lying north of Guam to the military of other nations coupled with the right to operate and base U.S. forces in these islands as may be required by future contingencies is of great importance to such a posture and our status as a Pacific power.

Bringing these strategic islands which lie astride important lines of air and sea communications under U.S. sovereignty will also contribute to the defense of nearby Guam (40 miles away), the site of many vital U.S. military installations and activities. The right to use land in the Northern Marianas for military purposes as agreed to in the Covenant would provide added insurance against unforeseen military needs and possible future emergencies. If needed, this reserved land will give the United States the option of supporting forward deployed forces from U.S. soil without the political involvement and constraints stemming from bases on foreign soil.

Cost-wise the total acreage which the United States has an option to lease for 100 years for defense purposes would cost but little more than one Air Force F-15 fighter plane--

a small price to pay for the present use of Tinian for joint-service amphibious training exercises and the use of Farallon de Medinilla for aerial and ship to shore bombing and gunnery practice--and the ready availability of this land to meet unforeseen future needs. The fact that the Department of Defense has set aside plans for base construction on Tinian in no way diminishes the importance of the Northern Mariana Islands to the defense of Guam; and to long term strategic planning in the Western Pacific.

In summary, we believe that prompt approval of H.J. Res. 549, as reported by the Senate Interior Committee is highly desirable for the following reasons:

- It would constitute an important step in bringing the Trusteeship to an honorable end in accordance with the U.N. Charter and Trusteeship Agreement.

- It would enable the Northern Marianas to move ahead, in cooperation with the Congress of Micronesia with a smooth and orderly transition.

- It would clear the way for the appropriation of funds for self-government in the Northern Marianas which the Senate has already authorized pending approval of the Covenant.

- It would strengthen the chances of reaching a mutually satisfactory agreement with the other islands of the Trust Territory by resolving the uncertainty of the future status of the Northern Marianas.

Finally, early approval of the Covenant by the Senate would be seen as a fulfillment of a trust and would increase the confidence and credibility of the United States in the Northern Marianas and throughout the Trust Territory and the Pacific.

On the other hand, a defeat or deferral of final approval of the Covenant would be a great psychological let down for the people of the Northern Marianas. While they entered into the negotiations with the full knowledge that Congressional approval would be required, they have nevertheless been encouraged over the years by the strong expressions of support from members of the Congress and from visiting Congressional delegations for their aspirations to become a territory of the United States.

Defeat or postponing final approval of the Covenant would also undermine and seriously weaken pro-American political leadership in the Northern Marianas which has joined together in a common cause for Commonwealth. It would at the same time encourage and strengthen the very small but highly vocal and critical anti-American minority which strongly opposes union with the United States despite the overwhelming vote of the people for Commonwealth.

Deferral of approval or a defeat of the Covenant in the Senate would also greatly complicate and lessen the chances for a satisfactory conclusion of the negotiations with the remainder of the Trust Territory. Delaying the approval of the Covenant will not change the fundamental political fact that the political aspirations of the Marianas and the Carolines and Marshalls are growing further apart as indicated by the recently signed Micronesian Constitution. To force the Northern Marianas to continue to participate in the political processes, including the status negotiations, of the Trust Territory as a whole, despite this divergence and the vote of nearly 80% of the people, would be awkward, disruptive and detrimental to the interests of all parties concerned.

Additionally, a defeat or an indefinite postponement of final approval of the Covenant would have a negative impact on Guam. The Guamanians would begin to question more seriously our basic political objectives in the Western Pacific, and our long-term commitment to Guam and its defense. Certainly the current reassessment of the Guam-United States Federal relationship would be affected adversely especially if defeat or delay in approving the Covenant were taken as a lessening of U.S. interest and resolve to remain a Pacific power. Guam would not like to see its immediate neighboring islands, which are important to its defense, forced to become a part of a weak and unstable Micronesian entity against the will of the people of these islands or to become affiliated with another power because of rejection by the United States.

In conclusion, I hope the members of the Armed Services Committee will join their colleagues on the Senate Foreign Relations and Interior Committees in supporting the President's request of last July for early favorable action on

the Marianas Commonwealth Covenant. We have done our best to respond to the questions which have been posed by the Senate. We will continue to stand by to provide whatever further assistance may be requested.

Sincerely yours,

F. Haydn Williams

Ambassador F. Haydn Williams
The President's Personal Representative
for Micronesian Status Negotiations

FHW:kkc